

Department of Veterans Affairs (VA)

# Federal Service Impasses Panel Training

Course Development and Presentation by  
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# What Does the Federal Service Impasses Panel Do?

- The Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations arising under the Federal Service Labor-Management Relations Statute and the Federal Employees Flexible and Compressed Work Schedules Act.
- If bargaining between the parties, followed by mediation assistance, does not result in a voluntary agreement, then either party or the parties jointly may request the Panel's assistance.

# How is the Panel Selected

- All Panel members are appointed by the President for fixed terms however they serve at the pleasure of the President.
- The Panel members are not subject to Senate Confirmation.
- The Panel positions are all part time.
- Panel members can be removed without cause.
- Panel members historically have resigned when a new President from the other party is elected, if they do not resign, they are removed by the President.

# Who Are the Panel Members

- Martin H. Malin – Chairman
- Wynter Patrice Allen, Member
- Jeanne Charles, Member
- Howard Friedman, Member
- Edward F. Hartfield, Member
- Marvin E. Johnson, Member
- Mark Gaston Pearce, Member
- Pamela R. Schwartz, Member
- Joseph E. Slater, Member
- Tamiko N.W. Watkins, Member

# Who Are the Panel Staff

- Kimberly Moseley Executive Director
- Dan Duran Attorney-Advisor
- Vicky Gillen Attorney-Advisor
- Yvonne P. Waller Staff Assistant

# The Foreign Service Impasse Disputes Panel

- Created under the Foreign Service Act of 1980, 22 U.S.C. §§ 4101-4118, the Foreign Service Impasse Disputes Panel assists in resolving impasses arising in the course of collective bargaining under the Act over conditions of employment affecting Foreign Service employees working for the U.S. Department of State, the U.S. Agency for Global Media (formerly the Broadcasting Board of Governors (BBG)), the U.S. Agency for International Development (USAID), the U.S. Department of Agriculture (USDA), and the U.S. Department of Commerce.
- The Act provides that the Chairperson of the Foreign Service Labor Relations Board – who concurrently serves as the FLRA Chairman – appoints the five Foreign Service Impasse Disputes Panel members, and requires that it be composed of two members of the Foreign Service (who are not management officials, confidential employees, or labor organization officials); one member of the Federal Service Impasses Panel; one individual employed by the U.S. Department of Labor; and one public member who does not hold any other office or position in the government.
- The Panel Staff provide services to the Foreign Service Impasse Disputes Panel.

# Panel Processes

- The Federal Service Impasses Panel (Panel) has broad statutory authority to resolve negotiation impasses over conditions of employment in the federal sector.
- Once it determines to assert jurisdiction in a dispute, the Panel may recommend or direct the use of procedures for resolving an impasse through any method it deems appropriate.
- If the procedure selected does not result in a settlement, the Panel may then take whatever final action is necessary to resolve the dispute, including the issuance of a Decision and Order.
- The Order is binding during the term of the parties' collective-bargaining agreement, unless the parties agree otherwise.

# Panel Processes

- In conjunction with any procedure, the Panel may, on occasion, introduce variations as well.
- After consulting with the parties, for example, the Panel may determine that time and efficiency require conducting the selected procedure by telephone conference or video teleconference.
- When presented with special circumstances or a novel issue, as a second step, the Panel may issue a Report and Recommendations for Settlement.



# Panel Processes

- This additional procedural step gives the parties an opportunity to consider and comment on a recommended settlement before a final decision is issued.
- In some cases, the Panel may use "final-offer selection," which limits the decision-maker to selecting between the parties' final offers on an issue-by-issue, article-by-article, or package basis, insofar as they otherwise appear to be legal.
- Final-offer selection is intended to provide the parties with an incentive for making their proposals as reasonable as possible. If it is used in connection with any procedure, the parties will always be notified in advance.

# Jurisdictional Questions

- In the course of investigating a request for assistance, a party may claim that a matter is outside its duty to bargain.
- When that claim is meritorious, the Panel may decide to decline jurisdiction over a request for assistance.
- But if subsequent research reveals that the claim appears to be frivolous, the Panel will not permit it to block the processing of an impasse.
- In certain circumstances, such as a multi-issue impasse where the claim raises a serious question, the Panel may nevertheless determine to assert jurisdiction in an attempt to work around the matter, with the goal of assisting the parties in resolving the entire dispute.
- The Panel may assert jurisdiction on some issues but not others.

# The Parties' Responsibilities

- The Panel's unique role as the federal sector substitute for the strike and the lock-out requires it to bring finality to those disputes where jurisdiction is asserted.
- The parties bear the ultimate responsibility for ensuring that the Panel is fully informed when it deliberates over the merits of their case.
- During any procedure under the Panel's auspices, therefore, each party must be ready to explain how its proposal works, and to support its adoption by providing clear and complete statements of position, either orally or in writing.

# Criteria for Assessing Merits of Proposals

- The most common criteria the Panel applies in assessing the merits of proposals are **demonstrated need** and **comparability**.
- **Demonstrated Need** - When one party proposes to change the status quo, that party is obligated to demonstrate the need for the change.
- **Comparability** - When other workplaces in the private, public, or federal sector are currently governed by a practice that a party would like to see adopted, the existence of the practice should be documented, and evidence should be produced to substantiate that the employees who would be affected are similarly situated.
- In sum, whenever a party participates in a procedure under the Panel's auspices, there is no substitute for thorough preparation and collection of data in advance to be used in persuading the Panel that its proposal should be imposed to resolve the dispute.

# Panel Procedures

- The following is a description of some of the procedures that the Panel uses after it asserts jurisdiction in a case.
- If a more thorough understanding of the procedures is necessary, you may contact Panel representatives directly at (202) 218-7790 for additional information.
- The Panel representative initially assigned to investigate a case will provide a detailed explanation of various procedures when soliciting the parties' preferences.
- While such preferences are given serious consideration, the Panel ultimately selects the procedure that, in its view, is best designed to address the particular circumstances presented.

## § 2471.6 Investigation of request; Panel procedures; approval of binding arbitration.

- (a) Upon receipt of a request for consideration of an impasse, the Panel or its designee will promptly conduct an investigation, consulting when necessary with the parties and with any mediation service utilized.
- After due consideration, the Panel shall either:
  - (1) Decline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction, in whole or in part, and so advise the parties in writing, stating its reasons; or

## § 2471.6 Investigation of request; Panel procedures; approval of binding arbitration.

- (2) Assert jurisdiction and
  - (i) Recommend to the parties procedures for the resolution of the impasse; and/or
  - (ii) Assist the parties in resolving the impasse through whatever methods and procedures the Panel considers appropriate.

## § 2471.6 Investigation of request; Panel procedures; approval of binding arbitration.

- The procedures utilized by the Panel may include, but are not limited to:
  - informal conferences with a Panel designee;
  - factfinding (by a Panel designee or a private factfinder);
  - written submissions;
  - show cause orders; oral presentations to the Panel; and
  - arbitration or mediation-arbitration (by a Panel designee or a private arbitrator).
- Following procedures used by the Panel, it may issue a report to the parties containing recommendations for settlement prior to taking final action to resolve the impasse.



## § 2471.6 Investigation of request; Panel procedures; approval of binding arbitration.

- (b) Upon receipt of a request for approval of a binding arbitration procedure, the Panel or its designee will promptly conduct an investigation, consulting when necessary, with the parties and with any mediation service utilized.
- After due consideration, the Panel shall promptly approve or disapprove the request, normally within five (5) workdays.

# 1. Resumption of Negotiations on a Concentrated Schedule

- When the Panel believes that further bargaining may resolve a dispute, or at least serve to narrow the issues, it may send the parties back to the bargaining table on a specified, concentrated schedule, normally over a 15-, 30-, or 45-day period.
- In one variation of this procedure, during the resumed bargaining, the parties may secure assistance from the Federal Mediation and Conciliation Service (FMCS) when they believe that it is necessary.
- The Panel will ask the parties to submit a status report at the conclusion of the concentrated effort.

# 1. Resumption of Negotiations on a Concentrated Schedule

If they do not reach a complete settlement, the Panel may then direct another procedure, which often results in the Panel will ask the parties to submit a status report at the conclusion of the concentrated effort.

If they do not reach a complete settlement, the Panel may then direct another procedure, which often results in issuance of a binding decision. In another variation of the procedure, the Panel itself may arrange in advance a schedule of resumed negotiations with the FMCS mediator who was previously involved in the case

# 1. Resumption of Negotiations on a Concentrated Schedule

- The Panel also sometimes informs the parties in the letter directing them back to the table that if a complete settlement does not occur during the specified period of negotiations, the Panel will be restricted to selecting from between the parties' final offers on either an issue-by-issue, article-by-article, or package basis.
- This usually occurs in only the most difficult impasses where the Panel believes that maximum pressure should be brought to bear on the parties to assist the mediator in his or her efforts at voluntary settlement.

## 2. Informal Conference

- To maximize the parties' opportunity to reach a voluntary resolution of the dispute, a Panel-appointed representative (usually a Panel Member or staff member) explores settlement possibilities with the parties in a face-to-face setting.
- Discussions between the parties and the representative, who is well-versed in how the Panel has decided previous cases involving similar issues, take place across the bargaining table and in caucus sessions.
- Often these explorations result in a voluntary settlement of some or all of the disputed issues.

## 2. Informal Conference

- Should settlement efforts prove unsuccessful, the procedure permits the Panel representative to gain a full understanding of the parties' justifications, demonstrated needs, and other evidence presented on the merits.
- The representative then reports to the full Panel at a subsequent Panel meeting;

The report includes the parties' final offers, any statements of position the parties are required to submit by the representative, and his or her recommendations for settlement.

The Panel then takes final action on the matter, which could include issuing a Decision and Order.

## 2. Informal Conference

- The informal conference historically has been the Panel's most misunderstood procedure.
- It has permitted numerous parties to craft the resolution to their own dispute in an interest-based, non-litigious setting.
- The interchange of ideas, with the guidance of a Panel representative, increases the possibility for a more satisfactory resolution than a decision imposed by the Panel.
- Where a voluntary settlement does not occur, the procedure preserves the Panel's discretion to resolve issues that it believes should be decided by the full Panel in plenary session.

### 3. Mediation-Arbitration ("Med-Arb")

- With a Panel Representative
  - To provide the parties with a final opportunity to resolve the dispute themselves at this late stage of the negotiation process, a Panel-appointed mediator-arbitrator begins by exploring possible areas of agreement.
  - Often, the procedure leads to a settlement because the arbitrator's suggestions during mediation are not apt to be taken lightly.
  - The procedure is normally less formal than grievance arbitration but may vary depending upon the Panel representative involved and the nature of the issues.



### 3. Mediation-Arbitration ("Med-Arb")

- With a Panel Representative
  - If a voluntary agreement does not occur during the mediation phase, an arbitration hearing then immediately follows.
  - At his or her discretion, the arbitrator may swear witnesses, receive exhibits into evidence, or require the submission of pre- or post-hearing briefs.

### 3. Mediation-Arbitration ("Med-Arb")

- With a Panel Representative
  - Regardless of the nature of the hearing, however, the arbitrator ultimately has the authority to render a binding arbitration decision on those issues not resolved during the mediation portion of the procedure.
  - There is no charge for the arbitrator's services.

## With a Private Arbitrator (Private "Med-Arb")

- The Federal Service Labor-Management Relations Statute authorizes the parties to voluntarily submit their dispute to a private mediator-arbitrator after the Panel has approved a joint request from the parties to use the procedure.
- These joint requests are investigated on an expedited basis, and generally approved, unless they involve matters that the Panel reserves to itself, such as issues of first impression for the federal-sector labor-relations community.

## With a Private Arbitrator (Private "Med-Arb")

- In other cases, not involving joint requests, the Panel may recommend and/or direct the use of private med-arb or arbitration as well.
- Under either scenario, the parties select the arbitrator who will handle the case and share the arbitrator's fees and other associated expenses.
- In other respects, the procedure is similar to med-arb with a Panel representative.

# With a Private Arbitrator (Private "Med-Arb")

- The Panel's regulations outline the information that the parties should submit in a joint request for Panel approval of private med-arb.
- As part of their joint request, the parties are required to submit statements regarding:
  - (1) whether any of the proposals to be presented to the arbitrator contain questions concerning the duty to bargain, and
  - (2) the arbitration procedure to be used or, in the alternative, those provisions of the parties' collective-bargaining agreement that contain this information.
- Although the Panel does not recommend particular arbitrators, it will, upon request, direct the parties to the Federal Mediation and Conciliation Service for a list of arbitrators.

# Expedited Arbitration with a Panel Representative

- When a quick resolution is a crucial factor in the circumstances of a case, and the issues are neither too numerous nor overly complex, the Panel may direct an expedited arbitration procedure.
- A Panel-appointed arbitrator meets with the parties to hear both sides of the dispute and, if a settlement is not reached, will issue a binding decision within 2 workdays of the close of the hearing.
- Given the short time-frame, the parties are not permitted to file post-hearing briefs, although they may be given permission to submit statements and documentary evidence in advance.
- These and other details of the proceeding are left to the discretion of the arbitrator.
- In other respects, the procedure is similar to med-arb with a Panel-appointed arbitrator.

# Arbitration with a Panel Representative or Private Arbitrator

- This procedure gives the parties the opportunity to present the justifications and demonstrated needs, including documentary evidence, for their positions on the merits directly to the decision-maker.
- The parties, at the arbitrator's discretion, may have an opportunity to file statements, either before or after the proceeding.

# Arbitration with a Panel Representative or Private Arbitrator

- As opposed to the other varieties of arbitration listed in this guide, traditional arbitration is normally recommended or directed where the Panel's initial investigation demonstrates that the parties are so entrenched in their positions that additional mediation is highly unlikely to produce any movement.
- The parties should not be surprised if the arbitrator spends some time exploring settlement possibilities with them.



## 4. Written Submissions

- Single Written Submissions/Initial Statements of Position and Rebuttals
  - On a schedule established by the Panel, the parties present the merits of their positions in writing, normally within specified page limitations.
  - They also may submit supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes.
  - The parties are to serve these materials on each other and on the Panel (two copies). In addition to the initial filing, if so directed, they may submit rebuttal statements

## 4. Written Submissions

- Following consideration of the parties' submissions, the Panel will take final action, which could include issuing a Decision and Order.
- Since the parties do not engage in a dialogue with a Panel representative, there is less opportunity for a voluntary settlement.
- Because there also is no opportunity for the Panel's representative to ask questions, it is essential that the parties explain their proposals and persuasive evidence clearly and completely.
- When the record requires clarification, Panel staff may conduct a telephone conference call to resolve any uncertainties.

## 4. Written Submissions

- Order To Show Cause
  - When the issues presented are substantively similar to those addressed in a previous Panel decision, the Panel may issue an Order to Show Cause.
  - Under this procedure, the parties are asked to show cause why specific wording or other solutions previously imposed by the Panel should not be applied to resolve the dispute in the case at hand.

## 4. Written Submissions

- Order To Show Cause
  - Once it has considered the parties' submissions, which may include supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes, and the parties' final offers, the Panel will take final action, normally the issuance of a Decision and Order, to resolve the impasse.
  - This procedure is intended to focus the parties' attention on distinguishing the circumstances of their case from those that the Panel has considered in the past.

## § 2471.7 Preliminary factfinding procedures.

- When the Panel determines that a factfinding hearing is necessary under § 2471.6, and it appoints one or more of its designees to conduct such hearing, it will issue and serve upon each of the parties a notice of hearing and a notice of prehearing conference, if any. The notice will state:
  - (a) The names of the parties to the dispute;
  - (b) The date, time, place, type, and purpose of the hearing;
  - (c) The date, time, place, and purpose of the prehearing conference, if any;
  - (d) The name of the designated representatives appointed by the Panel;
  - (e) The issues to be resolved; and
  - (f) The method, if any, by which the hearing shall be recorded.

## § 2471.8 Conduct of factfinding and other hearings; prehearing conferences.

- (a) A designated representative of the Panel, when so appointed to conduct a hearing, shall have the authority on behalf of the Panel to:
  - (1) Administer oaths, take the testimony or deposition of any person under oath, receive other evidence, and issue subpoenas;
  - (2) Conduct the hearing in open, or in closed session at the discretion of the designated representative for good cause shown;
  - (3) Rule on motions and requests for appearance of witnesses and the production of records;
  - (4) Designate the date on which post hearing briefs, if any, shall be submitted.
  - (5) Determine all procedural matters concerning the hearing, including the length of sessions, conduct of persons in attendance, recesses, continuances, and adjournments; and take any other appropriate procedural action which, in the judgment of the designated representative, will promote the purpose and objectives of the hearing.

## § 2471.8 Conduct of factfinding and other hearings; prehearing conferences

- (b) A prehearing conference may be conducted by the designated representative of the Panel in order to:
  - (1) Inform the parties of the purpose of the hearing and the procedures under which it will take place;
  - (2) Explore the possibilities of obtaining stipulations of fact;
  - (3) Clarify the positions of the parties with respect to the issues to be heard; and
  - (4) Discuss any other relevant matters which will assist the parties in the resolution of the

## 5. Factfinding

- By a Panel Representative With Recommendations for Settlement
  - In important disputes involving issues of first impression, heightened public interest, or of a highly technical nature, a factfinding hearing creates a complete record of documentary evidence and expert witness testimony on which to base a decision.
  - It is the most formal of the Panel's procedures.
  - A pre-hearing conference is conducted to facilitate preparations for the hearing and to explore settlement possibilities.
  - To expedite the process, the Panel asks parties to stipulate through joint exhibits to any facts that are not in dispute.



## 5. Factfinding

- By a Panel Representative With Recommendations for Settlement
  - During the factfinding hearing, the Panel representative (factfinder) in charge of the proceeding has the authority to issue subpoenas, and to allow the parties to call witnesses who are under oath.
  - The parties may question the witnesses through direct and cross examination; the factfinder may also question the witnesses and the parties' representatives as necessary to ensure creation of a complete record.
  - An official transcript of the proceeding is made; the parties make arrangements to purchase copies from the court reporting service for their own use.

## 5. Factfinding

- By a Panel Representative With Recommendations for Settlement
  - After the hearing, the parties are normally permitted to submit post-hearing briefs.
  - The factfinder issues a report summarizing the evidence and arguments presented, the parties' final offers and positions, and his or her recommendations for settlement.

## § 2471.9 Report and recommendations.

- (a) When a report is issued after a factfinding hearing is conducted pursuant to § 2471.7 and 2471.8, it normally shall be in writing and, when authorized by the Panel, shall contain recommendations.
- (b) A report of the designated representative containing recommendations shall be submitted to the parties, with two (2) copies to the Executive Director, within a period normally not to exceed thirty (30) calendar days after receipt of the transcript or briefs, if any.
- (c) A report of the designated representative not containing recommendations shall be submitted to the Panel with a copy to each party within a period normally not to exceed thirty (30) calendar days after receipt of the transcript or briefs, if any.
- The Panel shall then take whatever action it may consider appropriate or necessary to resolve the impasse.

## § 2471.10 Duties of each party following receipt of recommendations.

- (a) Within thirty (30) calendar days after receipt of a report containing recommendations of the Panel or its designated representative, each party shall, after conferring with the other, either:
  - (1) Accept the recommendations and so notify the Executive Director; or
  - (2) Reach a settlement of all unresolved issues and submit a written settlement statement to the Executive Director; or
  - (3) Submit a written statement to the Executive Director setting forth the reasons for not accepting the recommendations and for not reaching a settlement of all unresolved issues.
- (b) A reasonable extension of time may be authorized by the Executive Director for good cause shown when requested in writing by either party prior to the expiration of the time limits.

## 5. Factfinding

- By a Panel Representative With Recommendations for Settlement
  - Copies of the report are sent to the parties, who have 30 days in which to reach an agreement or present their reasons, in writing, as to why the factfinder's recommendations should or should not be adopted.
  - If the issues are not resolved as a result of the factfinder's recommendations, after considering the entire record, the Panel subsequently takes final action on the matter, usually by issuing a Decision and Order.

## 5. Factfinding

- By a Panel Representative Without Recommendations for Settlement
  - This procedure is identical to factfinding with recommendations, except that the factfinder is not given the authority to provide the parties with his or her recommendations for resolving the dispute.
  - In such cases, the factfinder's responsibility is complete upon the issuance of a factfinder's report, within a period normally not to exceed 30 calendar days after the receipt of the transcript or post-hearing briefs, if any.
  - The factfinder's report summarizes the evidence and arguments presented, and the parties' final offers and positions.
  - The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a Decision and Order.

## 5. Factfinding

- Private Factfinding (With or Without Recommendations for Settlement)
  - In certain circumstances, often, but not always with their concurrence, the Panel may direct the parties to hire a mutually acceptable private individual to conduct a factfinding hearing.
  - The parties share all of the expenses of the private factfinder that they select to conduct the proceeding.
  - Although the private factfinder is without authority to issue a binding decision to resolve the parties' impasse, he or she normally has latitude in determining scheduling and the manner in which the proceeding is conducted.

## 5. Factfinding

- Private Factfinding (With or Without Recommendations for Settlement)
  - As in those cases where one of its own representatives is designated to conduct a factfinding hearing, the Panel requires that an official transcript of the proceeding be submitted to it along with the private factfinder's report.
  - In those instances where the private factfinder is granted the authority to make recommendations to the parties and the Panel for settlement of the dispute, the parties have 30 days in which to reach an agreement or present their reasons, in writing, as to why the private factfinder's recommendations should or should not be adopted.



## 5. Factfinding

- Private Factfinding (With or Without Recommendations for Settlement)
  - If the issues are not resolved as a result of the private factfinder's recommendations, after considering the entire record, the Panel subsequently takes final action on the matter, usually by issuing a Decision and Order.
  - If the private factfinder has not been given the authority to make recommendations for settlement, his or her responsibility is complete upon the issuance of the private factfinder's report summarizing the evidence and arguments presented, and the parties' final offers and positions.
  - The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a Decision and Order.

## § 2471.11 Final action by the Panel.

- (a) If the parties do not arrive at a settlement as a result of or during actions taken under §§ 2471.6(a)(2), 2471.7, 2471.8, 2471.9, and 2471.10, the Panel may take whatever action is necessary and not inconsistent with 5 U.S.C. chapter 71 to resolve the impasse, including but not limited to, methods and procedures which the Panel considers appropriate, such as directing the parties to accept a factfinder's recommendations, ordering binding arbitration conducted according to whatever procedure the Panel deems suitable, and rendering a binding decision.
- (b) In preparation for taking such final action, the Panel may hold hearings, administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in 5 U.S.C. 7132, or it may appoint or designate one or more individuals pursuant to 5 U.S.C. 7119(c)(4) to exercise such authority on its behalf.
- (c) When the exercise of authority under this section requires the holding of a hearing, the procedure contained in § 2471.8 shall apply. (d) Notice of any final action of the Panel shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless they agree otherwise.

# The Steps in the Panel Process

- Request for Panel Assistance must use Panel Form or meet the requirements of the Panel Regulations.
- The Panel Staff investigates request and reports back to the Panel.
- The Panel decides jurisdictional issues.
- The Panel seeks input on parties' preference for which process to use.
- The Panel Decides which process is appropriate for the case.
- The Panel will disallow late submissions.
- Panel or Arbitrator depending on process used, will issue decision on dispute

# Biggest Mistakes when Appearing Before the Panel

- Making late submissions required by Panel or Arbitrator
- Not supporting jurisdictional claims
- Choosing wrong Panel Process as your preference
- Making assertions before the Panel without proof to support them
- Not supporting your proposal with facts

# Panel Exercise

- You are assigned six Panel Decisions to read and analyze
- For each case you are to determine the following:
  - Where there any jurisdictional issues and if any, how were they resolved
  - What Panel Processes were used
  - Where there any issues concerning late submissions
  - What was the basis of the Panel's decision on all issues taken by the Panel – what was the deciding factor or factors for each issue - Provide a summary

# The Panel Decisions for You to Review

Go to <https://www.flra.gov/decisions/fsip-decisions> to find the following decisions

1. 2020 FSIP 086 January 18, 2021, U.S. DEPARTMENT OF VETERANS AFFAIRS AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
2. 2021 FSIP 040 May 24, 2022, U.S. DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES COUNCIL 169
3. 2021 FSIP 013 November 10, 2021, UNITED STATES DEPARTMENT OF DEFENSE, US ARMY DENTAL ACTIVITY, FORT SAM HOUSTON, HOUSTON, TX AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1004
4. 2016 FSIP 052 January 25, 2017, Department of Defense, DOD Education Domestic Elementary, and Secondary Schools (DDESS), Fort Buchanan and Ramey Annex, Puerto Rico and Antilles Consolidated Education Association

# The Panel Decisions for You to Review

5. 2021 FSIP 019 February 22, 2022, US ARMY CORPS OF ENGINEERS LOGISTICS  
ACTIVITY CENTER MILLINGTON, TN And INTERNATIONAL FEDERATION OF  
PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 259
6. 2018 FSIP 073 December 14, 2018, Department of Defense Education Activity Domestic Dependent  
Elementary & Secondary Schools and National Education Association Stateside  
Region
7. 2022 FSIP 026 May 13, 2022, NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO  
And OFFICE OF MARINE AND AVIATION OPERATIONS, NATIONAL OCEANIC  
& ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
8. 2020 FSIP 073 November 13, 2020, U.S. ARMY MEDICAL COMMAND, BROOKE ARMY MEDICAL  
CENTER AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
LOCAL 1004

# REFUSAL TO COOPERATE IN IMPASSE PROCEDURES

## -- 7116(a)(1) and (6)

- How does an agency violate section 7116(a)(6) of the Statute?
- A violation occurs if the FSIP directs the agency to maintain the status quo and the agency implements changes in conditions of employment anyway, or if the agency's implementation violates a FSIP procedure. INS, 55 FLRA at 78.
- The FSIP may direct the union and the agency to include certain language in their
- agreement.
- This order is binding during the term of the agreement unless the
- parties agree to something else. Western Area Power Admin., 25 FLRA 1090
- (1987) (FSIP's Order that the parties' future impasses, if any, be resolved
- through binding arbitration)



# Refusal to Comply with Panel Order

A party acts at its peril by refusing to comply with a Panel decision. Dept. of Energy, 51 FLRA 124, 126 (1995); Interpretation and Guidance, 15 FLRA 564, 568 (1984); NASA, 12 FLRA 480, 500-01 (1983).

If on review, the provision is found lawful, the agency's disapproval or failure to comply with the Panel's decision violates section 7116(a)(1), (5), and (6). NTE, 64 FLRA 443 (2010); HQ, Nat'l Guard Bureau, Wash. D.C., 54 FLRA 316 (1998)

# What happens if the FSIP orders parties to include provisions in their agreements that conflict with other laws, rules, or regulations?

- An agency head can review the provisions:
  - Under section 7114(c) of the Statute, an agency head can review provisions of a collective bargaining agreement that the Panel has directed the parties to adopt.
  - The agency head can disapprove provisions that conflict with the Statute and other applicable laws, rules and regulations. Interpretation & Guidance, 15 FLRA 564 at 568.
  - The agency head level disapproval of an agreement under Section 7114(c) goes to the whole agreement, not just the specific provision being reviewed. Dept. of the Interior, National Park Serv., Yorktown, Va., 20 FLRA 537 (1985).

# What happens if the FSIP orders parties to include provisions in their agreements that conflict with other laws, rules, or regulations?

- Challenge to agency head review:
  - If a union disagrees with an agency head's review, it can challenge it. The union does this through filing a negotiability appeal or an unfair labor practice charge.
  - If the agency's disapproval was incorrect, the agency has committed an unfair labor practice. U.S. Army Headquarters, 17 FLRA 84 (1985), aff'd in relevant part sub nom. NFFE v. FLRA, 789 F. 2d 944 (D. C. Cir. 1986) and Dept. of Treasury, IRS, 22 FLRA 821 (1986) (violation by agency level where the disapproval occurred, not the activity level where the impasse originated).

# Department of Veterans Affairs (VA)

## Exceptions to Arbitration Awards Training

Course Development and Presentation by  
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# FLRA 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 Authority under § 7122 of the Statute.
- This is unlike the private sector, where arbitration awards are subject to direct judicial review.

# 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.
- The Authority's Regulations define "party" to include any person who
- participated as a party in a matter where an arbitration award was issued.
- This means that, generally, only the agency and the union are entitled to file exceptions because they are the only parties to the arbitration proceeding.
- Thus, a grievant cannot file exceptions to an arbitration award unless the union authorizes him or her to do so.

# 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 the day after service of the award.
- The 30-day filing period is significant; the Authority may not waive or extend it, and must dismiss untimely filed exceptions.
- However, the Authority has determined that the 30-day filing period is not jurisdictional; therefore, the Authority may equitably toll the filing date for exceptions for some extraordinary circumstances.

# Date of Service of Award

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.

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.



## Consider the following principles in determining the award's date of service

If the arbitrator serves the award by regular U.S. mail, then the date of service is the postmark date or, if there is no legible postmark, then the date of the award.

If the arbitrator serves the award by commercial delivery – such as FedEx or UPS – then the date of service is the date on which the arbitrator deposited the award with the commercial-delivery service, or, if that date is not indicated, the date of the award.

If the arbitrator serves the award by e-mail or fax, then the date of service is the date of transmission.

If the arbitrator serves the award by personal delivery, then the date of service is the date of personal delivery.

If the arbitrator serves the award by more than one method, then – with an exception discussed below – the first method is controlling.

## 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 after, not the day of, the date of service.

For example, if the award is served on May 1, then May 2 is counted as day 1, and May 31 is day 30. If day 30 is not a Saturday, Sunday, or federal legal holiday, then the exceptions are due at 5 p.m. Eastern Time (E.T.) – or midnight E.T., for exceptions that are eFiled – on that day.

# Content of Exceptions

- Exceptions must be dated (unless eFiled), self-contained documents that set forth in full:

A statement of the grounds on which review is requested;

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 U.S. Code and the Code of Federal Regulations);

A statement regarding whether you are requesting an expedited, abbreviated decision under § 2425.7 (which is described further below), and, if so, arguments in support of such request;

A legible copy of the arbitrator's 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

# Failure to Raise Issues Before Arbitrator

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.

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.

Merely submitting evidence as part of the record at arbitration, without any explanation, is insufficient to raise an argument before the arbitrator. In addition, an excepting party may not make an argument that is inconsistent with that party's arguments before the arbitrator.

# Opposition to Exceptions

- Any party to arbitration may file an opposition to exceptions within 30 days after the date on which the excepting party serves its exceptions on the opposing party.
- 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 inform the Authority of 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 or are documents that are readily accessible to the Authority (such as Authority decisions, decisions of federal courts, and current provisions of the U.S. Code and the Code of Federal Regulations)

# 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 [f]ederal 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.

# Exceptions to Arbitration Awards

- Section 2425 of the Rules and Regulations of the Federal Labor Relations Authority
- Grounds for Exceptions:
  - Bias on the part of the arbitrator
  - Arbitrator exceeded his authority
  - Arbitrator failed to provide a fair hearing
  - Award is deficient as contrary to law or regulation
  - Award fails to draw its essence from the parties' collective bargaining agreement
  - Award is based on a non-fact

# Bias By Arbitrator

- To prove bias you must establish:
  - Award was procured by improper means
  - There was partiality or corruption on part of arbitrator
  - Arbitrator engaged in misconduct that prejudiced rights of the party
- See U.S. Department of Veterans Affairs, Medical Center, North Chicago, IL, 52 FLRA 387, 398



# Consider: Is this bias?

- Arbitrator does not properly resolve credibility dispute
- Arbitrator has lunch with one party and not the other
- Arbitrator addresses one party by her first name
- Arbitrator was member of a union in a former job

# Arbitrators Exceed Authority

- Arbitrators exceed their authority when:
  - They fail to resolve an issue submitted to arbitration
  - Resolve an issue not submitted to arbitration
  - Disregard specific limitations on their authority
  - Award relief for those not encompassed within the grievance
- See U.S. Department of Defense, Army and Air Force Exchange Service, 51 FLRA 1371, 1378

# Issues Submitted to Arbitration

- Arbitrators interpretation of submitted issues due same consideration as interpretation of CBA
- In absence of stipulation of submitted issues arbitrators formulation of issue to be decided accorded substantial deference
- See SSA, Boston Region, 57 FLRA No. 55

# Consider: Did Arbitrator Exceed Authority?

- In absence of submission agreement, arbitrator determined the issues
- Arbitrator provided relief to individuals not included in the grievance
- Arbitrator retained jurisdiction after submission of award
- Arbitrator provided a remedy for an issue not submitted

# Failure to Conduct Fair Hearing

- To prove this exception you must establish:
  - The arbitrator refused to hear or consider pertinent or material evidence
  - Actions in conducting the proceedings so prejudiced a party as to affect fairness of the proceedings as a whole
- See AFGE Local 1668, 50 FLRA 124

# Award Contrary to Law

- An award will be found deficient if it conflicts with a law, rule or regulation
- The Authority reviews questions of law raised by an award and a party's exceptions de novo
- The Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law
- See NTEU Chapter 24, 50 FLRA 330, 332 and NFFE, Local 1437, 53 FLRA 1703

# Award Contrary to Agency Regulation

- Review consistency with agency regulation de novo
- An award is deficient if it is inconsistent with a “governing” agency regulation
- CBA not agency wide regulations govern disposition of matters to which they both apply
- See U.S. Department of Air Force, Seymour Johnson Air Force Base, N.C., 55 FLRA 163

# Award Based on Non-Fact

- In order to establish an award is based on non-fact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous but for which the arbitrator would have reached a different result.
- See U.S. Department of the Air Force, Lowry Air Force Base, Denver, Colorado, 48 FLRA 589 (1993)



# What Is a Non-Fact?

- Arbitrator improperly fails to believe your witness
- Arbitrator does not find a fact you put in evidence
- Arbitrator creates a fact not put in to evidence which he/she relies on to make a finding

# Award Essence Not from Collective Bargaining Agreement

- Award is deficient when appealing party establishes that the award:
  - Cannot in any rational way be derived from the agreement
  - Is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator
  - Does not represent a plausible interpretation of the agreement
  - Evidences a manifest disregard for the agreement
- See U.S. Department of Labor (OSHA), 34 FLRA 573

# Arbitrability Disputes

- Determinations of Procedural Arbitrability are subject to challenge only on ground other than those that directly challenge the procedural arbitrability determination
- Disputing timeliness determination of arbitrator - directly challenges arbitrability determination
- See USDA, Rural Development Centralized Servicing Center, St. Louis, MO, 57 FLRA No. 41

# Arbitration Remedies

- BEP Test – 2 pronged:
  1. Does award provide remedy for violation of either:
    - Applicable law? OR
    - § 7106(b) contract provision
  2. Does remedy constitute reconstruction of what management would have done had violation not occurred?
- Excessive Interference Test – appropriate arrangement exception

BEP, 53 FLRA 151

# Arbitration Remedies Example (continued)

## Arbitrator's Finding

- Any decision to vacate posts for administrative convenience, whether it is tied to overtime specifically, needs created by training requirements, medical escort trips, sick leave, and to vacations ... or to the amorphous balancing of considerations such as safety, security, budget and organizational objectives violates the pledge of Article 27 to lower inherent hazards to the lowest possible level.

# Arbitration Remedies Example (continued)

## Award

- The arbitrator ordered the Agency to cease and desist the practice of vacating posts to avoid the payment of overtime or for any other reason of administrative convenience, and directed the parties to submit arguments concerning additional remedies.

# Position of Agency

- Arbitrator's order to is contrary to law because it interferes with management's right to assign work, to assign employees and determine internal security practices.
- The agency also asserted Article 27 does not constitute an arrangement under section 7106(b)(3) and that the award both excessively interferes and abrogates enumerated management rights.

# Resolving Exceptions

Framework for resolving exceptions that an award violates management rights under §7106:

Does award affect a management right?

BEP Test (53 FLRA at 151-154):

- Prong I: Does award provide a remedy for violation of either applicable law within meaning of §7106(a)(2) or contract provision negotiable pursuant to §7106(b)?
- Prong II: Does award reflect reconstruction of what management would have done if management had not violated law or contractual provision?



# Prong I - Applicable Law or Contract Violation

- Agency asserts Article 27 is not enforceable as an arrangement within meaning of 7106(b)(3)
- Authority reviews award using Excessive Interference Test - Under this test CBA provision enforced by arbitrators if it:
  - Constitutes an arrangement for employees under 7106(b)(3)
  - Does not excessively interfere with the exercise of a management right
- See U.S. Dept. of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma (2002) 53 FLRA No. 21

# Award Affects Management Rights

- Limitations on an agency's authority to leave posts vacant affected the right to determine whether and when work will be performed and as such affected management's right to assign work
- Restrictions on the agency's authority to staff its facility with fewer correctional officer's than it had scheduled limited the agency's authority to determine the degree of staffing necessary to maintain the security of its facility

# Arrangements

- Requiring an agency to exercise its rights fairly and equitably — Dept. of Navy, J6 FLRA of 340
- Requiring performance standards be provided in a fair and equitable manner — AFGE, Local 2369, 45 FLRA 124
- Conduct reductions in force “in a fair and equitable manner” NTEU, 25 FLRA 1041
- Qualifications of selection panel members, 53 FLRA 539
- Union representatives on selection panels — FAA, Washington, D.C., 55 FLRA 1233

# Excessive Interference

- Authority changed standard from abrogation to excessive interference
- Abrogation required Authority to find whether enforcement of award precluded management from exercising its management rights under 7106
- Excessive interference requires the Authority to find whether the award excessively interferes with the exercise of management rights
- Excessive interference is lower threshold for finding an award is not appropriate

Did Award excessively interfere  
with Management Rights?

# Prong II - Reconstruction

- Requiring reconstruction ensures that an agencies' 7106(a) rights are limited only to extent parties bargained for in contract
- Constraints placed on exercise of managements rights agreed to under 7106(b)
- Reconstruction does not place greater constraints on management rights than parties agree to
- Award must entail reconstruction based on requirements of contract articles
- See SSA, Boston Region, 57 FLRA No. 55

# Challenges to Arbitrability Findings

Parties often challenge arbitrators' determinations concerning the "arbitrability" of a grievance – in other words, whether a grievance may properly be taken to arbitration.

There are two categories of arbitrability: procedural and substantive.

Procedural-arbitrability issues pertain to the procedural conditions to resolving a dispute on the merits. Timeliness is a common procedural-arbitrability issue.

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, such as an essence or a nonfact challenge.

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.

Additionally, a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law. In order for a procedural-arbitrability ruling to be

# Challenges to Arbitrability Findings

Substantive arbitrability involves questions as to whether the subject matter of the dispute is arbitrable.

When an arbitrator bases his or her substantive-arbitrability determination on law or governing regulations, the Authority reviews that determination “de novo” – without deference to the arbitrator.

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



# Compliance with Arbitration Award

Parties must comply with a final and binding arbitration award.

A party's failure to do so is a ULP under § 7116(a)(8) (for agencies) and § 7116(b)(8) (for unions) of the Statute.

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.<sup>386</sup>
- The issue of compliance with an arbitration award arises in various types of cases.

# 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 [a ULP].”

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.”

# Tips on Exceptions

- Cite the specific exception you are relying on in your brief to the Authority.
- The most important exception to make deals with the remedy.
- When presenting your case to the arbitrator know what potential exceptions may be filed later to support your case if you lose.

# QUESTIONS?

Department of Veterans Affairs (VA)

# Federal Service Impasses Panel Training



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