

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



(Updated October 8, 2010)

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FOREWORD

This Guide has been prepared by the Federal Labor Relations Authority (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, 5 U.S.C. §§ 7701-7135 (the Statute), for unions representing Federal employees, Federal employees, and their employing agencies.

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. 5 U.S.C. § 7101.

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 resolving more grievances without appeal to the Authority 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 not 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.

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.

Section 7121 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. 5 U.S.C. § 7121(a)(1).
- 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, 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. 5 U.S.C. § 7121(b)(1)(C)(ii) & (iii).
- The NGP must be fair and simple and provide for expeditious processing. 5 U.S.C. § 7121(b)(1)(A).

Coverage of the Grievance Procedure

Sections 7121 and 7103(a)(9) of the Statute establish the coverage and scope of an NGP. Section 7103(a)(9) 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 include matters in an NGP, in the Federal sector, subjects are covered by the NGP unless parties negotiate to exclude them. These negotiated exclusions are in addition to those matters that are excluded by law from a NGP. Specific matters that are excluded by law from the NGP include:

- prohibited political activities;
- retirement, life insurance, or health insurance;
- a suspension or removal for national security reasons under 5 U.S.C. § 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. 5 U.S.C. § 7122. On exceptions, the Authority will consider whether the arbitrator properly considered and applied applicable law or regulation, and will set aside 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 later in this Guide.

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, the Authority will find that an arbitrator exceeds his or her authority where, for example, the arbitrator: resolves an issue not included among stipulated issues; makes no finding (and/or there is no claim) that it is necessary to address the resolved issue in order to resolve the stipulated issue; does not find that the resolved issue necessarily arose from the stipulated issue; and does not interpret the stipulation to include the resolved issue. *E.g., 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, 57 FLRA 648, 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

Section 7103(a)(9) of the Statute broadly defines the term “grievance” as meaning 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[.]

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 discussed further below, 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*, 56 FLRA 480, 482 (2000). In addition, as stated previously, 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 successfully able to resolve a grievance during the defined steps of the NGP, then either the union or the agency invokes arbitration. Employees may not invoke arbitration. 5 U.S.C. § 7121(b)(1)(C)(iii).

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 (5 U.S.C. § 4303) and serious adverse actions (5 U.S.C. § 7512 – suspensions that exceed 14 calendar days, removals from the Federal service, furlough, or reduction in grade).

For these types of matters, with the exception of certain employees (such as non-probationary, competitive-service employees), an employee has the right 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 from 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.

Not all Federal employees are employed in the ordinary civil service system. 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 Title 38 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 §§ 4303 and 7512, 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 not appealable to the Authority.

Discrimination Cases Under Title VII of the Civil Rights Act of 1964

This type of case typically is filed with the Equal Employment Opportunity Commission (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 MSPB), or filing a grievance under the NGP. 5 U.S.C. § 7121(d).

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. 5 U.S.C. § 7121(d). The employee also retains the right to file a civil action in an appropriate U.S. District Court. 29 C.F.R. part 1614.

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. 5 U.S.C. § 7121(d). The employee shall be deemed to have exercised a "choice" in this regard when he or she either initiates an action under the statutory EEO procedure or files a grievance in writing, whichever event occurs first. 5 U.S.C. § 7121(d). Arbitration awards that resolve Title VII discrimination issues are 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 days, removals, furloughs, or reductions in grade) 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 (e.g., nepotism) set forth in § 2302(b) (other than prohibited employment discrimination listed in (b)(1)). One example would be a grievance alleging that the agency disciplined the grievant based on reprisal for the grievant's filing of an earlier grievance against the agency. 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 appeal rights.

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). Although the employee has an option, 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 § 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 5 U.S.C. § 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 Authority. 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 HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000).

General Guidance for Parties During the Arbitration Hearing

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., 64 FLRA 916, 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.

Filing Exceptions and Oppositions

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.

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).

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* 5 C.F.R. § 2425.2(c). 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, and the excepting party will receive an additional five days for filing the exceptions under 5 C.F.R. § 2429.22. *See* 5 C.F.R. § 2425.2(c)(1).
- If the award is served by commercial delivery, then the date of service is the date on which the award was deposited with the commercial delivery service, and the excepting party will receive an additional five days for filing the exceptions under 5 C.F.R. § 2429.22. *See* 5 C.F.R. § 2425.2(c)(2).
- If the award is served by e-mail or fax, then the date of service is the date of transmission, and the excepting party will not receive an extra five days for filing the exceptions. *See* 5 C.F.R. § 2425.2(c)(3).
- If the award is served by personal delivery, then the date of service is the date on which the award is received, and the excepting party will not receive an additional five days for filing the exceptions. *See* 5 C.F.R. § 2425.2(c)(4).
- If the award is served by more than one method, then the first method is controlling. However, if the award is served by e-mail, fax, or personal delivery on one day, and by mail or commercial delivery on the same day, the excepting party will not receive an additional five days for filing the 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).

Once you have determined the date of service, count 30 days beginning on the day after, not the day of, the date of service. *See* 5 C.F.R. § 2425.2(b). 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 the Authority's close of business on the next day that is not a Saturday, Sunday, or Federal legal holiday. *See* 5 C.F.R. § 2429.21(a). In addition, whether or not the 30-day date falls on a Saturday, Sunday, or Federal legal holiday, if the award is served by mail or commercial delivery, then the Authority adds 5 days at the end to determine the due date. *See* 5 C.F.R. § 2429.22.

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

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

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: date + **30 Days** (5 C.F.R. §§ 2425.2, 2429.21 & 2429.22) =
date (day of week). But, if weekend or holiday, then advance to next workday =
date (day of week). (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) = date (day of week). But, if weekend or holiday, then
advance to next workday = date (day of week). (5 C.F.R. § 2429.21(a)).

Example #1

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	Mo	Tu	We	Th	Fr	Sa	Su	Mo	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 1 + 30 Days (5 C.F.R. §§ 2425.2, 2429.21 & 2429.22) = December 1 (Thursday). But, if weekend or holiday, then _____.

(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)).

Example #2

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.

November							December						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	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: 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)).

Example #3

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.

November							December						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	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: 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)).

Example #4

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	Mo	Tu	We	Th	Fr	Sa	Su	Mo	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 & 2429.22) =
December 19 (Sunday). But, if weekend or holiday, then December 20. (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)).

The Authority provides optional forms for filing exceptions, which can be found at www.flra.gov. 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* 5 C.F.R. § 2425.4. 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, 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). (As noted previously, the recognized grounds for review are discussed later in this Guide.)

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*:

- 5 C.F.R. §§ 2429.21 (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);
- 5 C.F.R. § 2429.22 (five additional days to file if exceptions served by mail or commercial delivery); and
- 5 C.F.R. § 2425.8 (time limit tolled if parties have agreed to use the Authority's Collaboration and Alternative Dispute Resolution (CADR) Program and time limit for filing opposition has not expired).

In addition to the optional forms for filing exceptions, the Authority provides optional forms for filing oppositions, which also can be found at www.flra.gov. 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 § 2425.7, then the opposing party should state whether it supports or opposes such a decision and provide supporting arguments. *See generally* 5 C.F.R. § 2425.5.

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* 5 C.F.R. § 2425.7.

In addition, 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* 5 C.F.R. § 2425.8. 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 5 C.F.R. § 2425.9.

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*, 64 FLRA 486, 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.*, 64 FLRA 586, 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.*, 48 FLRA 938, 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*, 61 FLRA 628, 630 (2006); *U.S. Dep’t of Commerce, Patent & Trademark Office*, 24 FLRA 835, 835-36 (1986); *AFGE, Local 2400*, 16 FLRA 1157, 1157-58 (1984). 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; *U.S. Dep’t of Transp., FAA, Wash., D.C.*, 60 FLRA 333, 334 (2004); *AFGE, Local 1760*, 37 FLRA 1193, 1200 (1990).

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; *AFGE, Local 1242, Council of Prison Locals 33*, 62 FLRA 477, 478-79 (2008) (*Local 1242*); *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. See *Local 1242*, 62 FLRA at 479. 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*, 63 FLRA 144, 144 n.* (2009); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Tinker Air Force Base, Okla.*, 53 FLRA 460, 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*, 62 FLRA 344, 347 (2008); *Army*, 16 FLRA at 830.

An award that postpones the determination of a submitted issue does not constitute a final award. *AFGE, Local 12*, 38 FLRA 1240, 1246 (1990). 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 5 C.F.R. § 2429.11. 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.*, 62 FLRA 121, 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. *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 47 FLRA 1391, 1392 (1993). 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*, 64 FLRA at 567. Generally, the jurisdictional issues considered on interlocutory appeal are those that arise pursuant to statute. *See Veterans*, 61 FLRA at 175. For example, in *United States Department of Labor*, 63 FLRA 216, 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 5 U.S.C. § 7121(c)(5). By contrast, in *United States Department of the Treasury, Bureau of Engraving & Printing, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 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*, 55 FLRA at 1232. 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*, 59 FLRA at 688.

Grounds for Review

Section 7122(a) 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. When an award is deficient on one of these grounds, the Authority generally will set it aside or modify the award to remove its deficiency. 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, absent settlement.

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. The pertinent Conference Report states: "The Authority will be authorized to review the award of an arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector." S. Rep. No. 95-1272, at 153 (1978) (Conf. Rep.). 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.

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. 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). 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. Several bases for finding an award contrary to law or regulation are discussed below.

Grievance Precluded by Law

As discussed earlier, all matters covered by the broad statutory definition of “grievance” are within the permissible coverage of a NGP, except for matters that are excluded by law.

Section 7121(c) of the Statute lists several types of matters that may not be raised under the NGP, specifically:

- (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
- (2) retirement, life insurance, or health insurance;
- (3) a suspension or removal under section 7532 of this title;
- (4) any examination, certification, or appointment; or
- (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

Of these types of matters, the type that most frequently arises in Authority decisions is § 7121(c)(5), i.e., classification matters. In this connection, the Authority has held that where the substance of a grievance concerns the grade level of the duties assigned to and performed by the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5) and may not be arbitrated. *E.g., U.S. Dep’t of HHS, FDA, 60 FLRA 352, 355-56 (2004)*. However, grievances are not barred under § 7121(c)(5) if they present an issue of whether a grievant was entitled under a CBA or agency regulation to have been temporarily promoted because he or she temporarily performed the duties of an already-classified, higher-graded position. *E.g., USDA, Food & Consumer Serv., Dallas, Tex., 60 FLRA 978, 982 (2005)*.

In addition, two types of matters may be resolved only by the Authority and may not be resolved by arbitrators.

First, negotiability issues under § 7117 of the Statute that have not previously been ruled on by the Authority must be resolved exclusively by the Authority as required by § 7105(a)(2)(E) of the Statute. 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).

Second, 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 grievant's grievance. *SBA*, 32 FLRA at 854. In these circumstances, an arbitrator would not be precluded from resolving the grievance.

Further, legal authorities outside the Statute sometimes preclude grievances from being filed under the NGP. *See, e.g., AFGE, Local 1513*, 52 FLRA 717, 721 (1996) (contracting-out issues that are governed by Office of Management and Budget Circular A-76 are not grievable under NGP); *AFGE, Local 2250*, 51 FLRA 52, 54 (1995) (pursuant to 5 U.S.C. § 5366, 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. *Id.* 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* 5 U.S.C. § 7122(b) (citing 5 U.S.C. § 5596).

The Back Pay Act: Backpay and Attorney Fees

Under the Back Pay Act (BPA), 5 U.S.C. § 5596, 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*, 64 FLRA at 329.

A violation of an applicable law, rule, regulation, or CBA provision is an unjustified or unwarranted personnel action. *E.g., AFGE, Local 1592*, 64 FLRA 861, 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,” 5 U.S.C. § 5596, the quoted term is defined as “pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation[.]” 5 C.F.R. § 550.803. Any loss that does not meet this definition may not provide the basis for an award of backpay. *E.g., FAA Detroit*, 64 FLRA at 329. 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*, 64 FLRA 922, 923 (2010).

With regard to attorney fees, although various statutes – such as the Fair Labor Standards Act, 29 U.S.C. § 216(b), and the Privacy Act, 5 U.S.C. § 552a(g)(4) – 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*, 45 FLRA 830, 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.*, 64 FLRA 925, 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 id.* If so, then the Authority will modify the award or deny the exception, as appropriate. *Id.* If not, then the Authority will remand the award for further proceedings. *Id.*

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 that the grievant must have obtained an enforceable judgment, order, consent decree, or settlement agreement as a result of the arbitration. *E.g.*, *AFGE, Local 987*, 64 FLRA 884, 886 (2010). This determination does not entail assessing the degree of the grievant's success in arbitration. *See id.* at 887 ("[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 § 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.

As to the first requirement, fees are incurred when an attorney-client relationship exists and the attorney has rendered legal services on behalf of the grievant. *E.g., U.S. DOD, Def. Fin. & Accounting Serv.*, 60 FLRA 281, 284 (2004) (*DOD*), *recons. denied*, 60 FLRA 636 (2005), *pet. for review dismissed sub nom., AFGE, Local 2510 v. FLRA*, 453 F.3d 500 (D.C. Cir. 2006). 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 id.*

In addressing the second requirement – that fees are warranted in the interest of justice – parties and arbitrators should consider *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (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 held that an award of fees would be warranted in the interest of justice in cases under the Statute based on service to the federal workforce or benefit to the public in bringing the grievance. *E.g., Navy Region Haw.*, 64 FLRA at 928.

Most requests for attorney fees in arbitration will 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*, 2 M.S.P.R. at 435. The five *Allen* categories involve cases where: (1) the agency engaged in a prohibited personnel practice under 5 U.S.C. § 2302; (2) the agency engaged in action that was clearly without merit or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency; (3) 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); (4) the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the action. Any of these five categories, by itself, is sufficient to support an “interest of justice” finding. Frequently, fee requests in arbitration cases rely on either the second (*Allen* 2) or fifth category (*Allen* 5), which are discussed further below.

With regard to *Allen 2*, this criterion 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 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.*

Under *Allen 2*, the "substantial innocence" standard 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). 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 exculpatory information during the investigation. *E.g., AFGE, Local 3105*, 63 FLRA 128, 130-31 (2009).

Allen 5, unlike *Allen 2*, does not focus on the result of the merits award. Rather, *Allen 5* – whether the agency knew or should have known that it would not prevail on the merits – focuses on the evidence and information available to the agency prior to the arbitration. *E.g., U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010) (*Davis-Monthan*). This requires an arbitrator to assess the reasonableness of the agency's actions in light of the information available to the agency at the time it took the disputed action, including whether the agency possessed trustworthy, admissible evidence or whether it was negligent in the conduct of its investigation. *E.g., NAGE, Local R4-6*, 56 FLRA 1092, 1095 (2001). An award of fees is warranted under *Allen 5* when the agency never possessed any credible, probative evidence to support the disputed action or relied on incomplete facts or information – i.e., when it persisted in its action even when a reasonable inquiry would have shown that its action was without merit. *Id.* This is a primarily factual determination, and when the arbitrator's factual findings support his or her determination as to whether the agency knew or should have known that it would not prevail on the merits, the Authority will defer to those findings and deny any exception to the arbitrator's determination. *E.g., Davis-Monthan*, 64 FLRA at 821. It is important to note that, in discipline cases, the particular penalty chosen by the agency is part of the merits of the

case. *Id.* Thus, fees are warranted under *Allen 5* when the agency knew or should have known that its choice of penalty would be rejected, even if its charges of misconduct are sustained. *See id.*

Both § 7701(g)(1) and the BPA require that the amount of attorney fees awarded be reasonable. To make this determination, the Authority applies a “lodestar” approach, which multiplies (a) the number of hours that would be reasonable to devote to the grievance by (b) the prevailing market hourly rate. *U.S. Dep’t of the Navy, U.S. Naval Acad., Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009) (*Naval Acad.*). In addition, when appropriate, any special factors not adequately reflected in the time and rate calculation – including, but not limited to, contingency-fee payment, extreme difficulty of the case, and extensive expertise of counsel that is not reflected in the hourly rate – can be applied to adjust the result. *See Naval Air Dev. Ctr., Dep’t of the Navy*, 21 FLRA 131, 140 (1986).

For attorneys in private practice, the prevailing market rate is presumptively the attorney’s customary hourly billing rate. *E.g., Fort McClellan Educ. Ass’n*, 56 FLRA 644, 645-46 (2000). The rate established by a fee agreement is presumed to be the attorney’s customary billing rate and constitutes the maximum rate that can be awarded, absent clear evidence to the contrary. *Id.* at 645. This presumption may be rebutted by convincing evidence that the attorney’s customary rate for similar work is higher and that the reduced rate was premised, for example, on a union’s inability to pay a higher amount. *Id.* at 646. 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.*, 51 FLRA 155, 162-63 (1995). The relevant community is the community in which the attorney ordinarily practices, not the community in which the arbitration was held. *E.g., Naval Acad.*, 63 FLRA at 103. 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. *Id.* at 101 n.3, 103. In addition, the Authority has approved arbitrators’ applications of an “adjusted” *Laffey* matrix. *E.g., U.S. Dep’t of the Army, U.S. Army Dental Activity, Fort Bragg, N.C.*, 65 FLRA 54, 58 (2010). The normal *Laffey* 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 *Laffey* matrix

calculates the matrix rates for each year using the legal-services component of the CPI, rather than the general CPI. *Id.* at 55 n.4.

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*, 53 FLRA 1688, 1693 (1998) (APHIS). 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*, 699 F.2d 1140, 1143-46 (Fed. Cir. 1983). Examples of reimbursable items are: travel expenses, postage, and telephone tolls. *Id.* Examples of non-reimbursable items are: stenographic fees for depositions and witness fees. *Id.*

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.*, 64 FLRA at 927. 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. 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.*, 56 FLRA 216, 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., U.S. DOD, Def. Logistics Agency, Def. Distrib. Region E., New Cumberland, Pa.*, 47 FLRA 791, 794-95 (1993). 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*, 48 FLRA at 940. Arbitrators should consider this in determining how long they should retain their records of the case on the merits.

Management Rights

Section 7106 of the Statute provides broad rights to management. Section 7106 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 not 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 subsection (b) or, for the rights set out in subsection (a)(2), 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. *Id.*

Thus, 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. *Id.* 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.

We note that this test for determining whether an agreed-upon provision is an appropriate arrangement is different in the arbitration context than it is in the negotiability context. In the negotiability context, in assessing whether something is an "arrangement," the Authority also applies a "tailoring" test, and in assessing whether an arrangement is "appropriate," the Authority applies an "excessive interference" test. *E.g., AFGE, Local 1367*, 64 FLRA 869, 870-71 (2010) (Member Beck dissenting in part). These tests are not applied in the arbitration context. *See EPA*, 65 FLRA at 216-18.

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." 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. 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, San Francisco Region*, 65 FLRA 102 (2010) (Chairman Pope concurring in part) (*FDIC*), the Authority modified the two-pronged test that had been set forth in *Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), for assessing whether an arbitration award impermissibly affects management rights. In *BEP*, the Authority had stated, among other things, that an arbitrator’s award must “reconstruct” what management would have done if it had not violated the contract provision or applicable law at issue. *Id.* at 154. In *FDIC*, the Authority eliminated the reconstruction requirement and stated:

It is sufficient that an arbitrator’s award that affects management rights under § 7106(a) of the Statute provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute.

....

[S]ubject to any specific limitations set forth in the pertinent contract and to the requirement that an award provide a remedy for a properly negotiated contract provision, an arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under § 7106(a). . . . This broad remedial discretion exists even if, due to insufficient record evidence or other reasons, the arbitrator does not “reconstruct” what management would have done but for the legal or contract violation.

....

However, such remedial authority is not unfettered. Rather, an arbitrator’s award must still be reasonably related to the negotiated provisions at issue and the harm being remedied.

This limitation on arbitral remedy is not intended to establish a new two-pronged analytical framework that will be recited in every case involving an award alleged to violate management rights. We include the point

simply to underscore for the parties and the arbitral community the legal requirements that apply to such awards. As in other types of arbitration cases, such awards must still withstand challenges raised in exceptions that the award does not satisfy the standards Congress established in the Statute for the Authority's review of arbitrators' awards. Where such a challenge establishes that an award imposes a constraint on management rights that was not agreed to by the parties, whether on essence grounds or otherwise, the award will be set aside.

....

[I]f an agency agrees to include in its collective bargaining agreement a provision negotiated under § 7106(b), and that provision is applied by an arbitrator in a way reasonably related to the provision and the harm being remedied, a subsequent challenge to such an award is likely to be rejected by the Authority.[]

65 FLRA at 106-07 (footnote omitted).

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. Together the representatives should provide information to their arbitrators 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 id.* The one exception involves government-wide regulations that implement 5 U.S.C. § 2302, which sets forth certain prohibited personnel practices. In this connection, if the regulation implements § 2302, then the regulation governs over the CBA, regardless of when the regulation or the CBA took effect. *See id.* 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.

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. 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., 37 FLRA 186, 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*, 64 FLRA at 514. However, consistent with the approach of the courts, the Authority declines to defer to an agency's litigative position. *Id.* 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. *Id.* Accordingly, for an agency's interpretation to be entitled to deference, the interpretation asserted in exceptions must have been publicly articulated prior to litigation. *Id.* 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. *Id.*

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*, 61 FLRA 810, 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); *MSPB Profl Ass'n*, 61 FLRA 650, 653 (2006) (reliance on extrinsic and parol evidence in interpreting CBA did not demonstrate denial of fair hearing). Conversely, 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., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 879 (2005). 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.

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*, 60 FLRA 241, 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*, 64 FLRA 330, 332 (2009).

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., AFGE, 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., AFGE, Local 1061*, 63 FLRA 317, 320 (2009). 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., AFGE, 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., AFGE, Local 1395*, 64 FLRA 622, 624 (2010). 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.*

An 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) (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*, 56 FLRA 196, 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.*, 51 FLRA 1371, 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*, 64 FLRA at 613-14. Arbitrators may not decide matters that are not before them. *Id.* at 614. 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.*, 64 FLRA 535, 538 (2010). 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.*, 64 FLRA 516, 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.

Claims that an arbitrator's factual findings are not sufficiently supported do not demonstrate that an award is deficient. *Id.* 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*, 64 FLRA 622, 625 (2010); *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 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.*, 64 FLRA 39, 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., AFGE, Local 1395*, 64 FLRA at 625-26.

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*, 50 FLRA 88, 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*, 64 FLRA at 696.

*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 deferential standard. 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)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576. 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*, 64 FLRA 689, 691 (2010).

In addition, a party's exceptions to an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement. *E.g., AFGE, Local 3354*, 64 FLRA 330, 333 (2009). (Challenges to an arbitrator's factual findings are more appropriately raised under the "nonfact" standard, discussed above.)

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*, 64 FLRA 504, 507 (2010). For an award to be deficient on this basis, the public policy asserted must be "explicit," "well-defined," and "dominant[.]" *Id.* 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*, 63 FLRA 198, 201 (2009). In addition, the alleged violation of that public policy "must be clearly shown." *NTEU*, 64 FLRA at 507.

COMPLIANCE WITH AWARDS & JUDICIAL REVIEW

Compliance with Arbitration Award

Parties are required to comply with a final and binding arbitration award. See 5 U.S.C. § 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*, 48 FLRA at 940. 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 (2d Cir. 1986); *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432 (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[.]” 5 U.S.C. § 7123(a)(1). 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.” S. Rep. No. 95-1272, at 153 (1978) (Conf. Rep.).

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 unfair labor practice” 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. *Id.* *Compare Overseas Educ. Ass’n v. FLRA*, 824 F.2d 61, 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).