

Slide 1

**Federal Labor Relations Authority**

*After Arbitration:  
Filing Exceptions with the Authority*

*July 18, 2017*

The slide features a light blue header with the title and a dark grey body with the subtitle and date. A circular seal of the Federal Labor Relations Authority is located in the top right corner.

Slide 2

**Introduction to  
Federal-Sector  
Arbitration  
&  
The Negotiated  
Grievance Procedure**

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The slide has a dark grey background with the title in blue, bold, serif font. A small number '2' is in the bottom right corner.

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**Federal Sector vs. Private Sector**

**What's the difference?**

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The slide has a light blue header with the title and a dark grey body with the question. The question is surrounded by several colorful question marks. A small number '3' is in the bottom right corner.

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**Private-Sector Arbitration**

- Normally confined to the interpretation/application of CBA
- No statutory requirement to arbitrate


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68 FLRA 999, 1004-05 (2015)

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**Federal-Sector Arbitration**

The Federal Service Labor-Management Relations Statute



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5 U.S.C. §§ 7101-7135

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Every CBA **MUST** include a negotiated grievance procedure (NGP) and provide for binding arbitration



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5 U.S.C. § 7121(a)-(b)

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**What is a Grievance?**

**§ 7103(a)(9)**

Any complaint by **any employee OR any union** concerning any matter relating to the employment of the employee

**AND**

Any complaint by any **employee, union, OR agency** concerning

- the effect or interpretation, or claim of breach, of a CBA
- any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment

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**Exclusions from NGP**

- Parties can negotiate matters out of coverage
- Some exclusions come from outside the Statute:
  - OMB Circular A-76
  - 5 C.F.R. § 575.311(g)
- Some exclusions are in the Statute

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- OMB Circular A-76
  - 52 FLRA 717, 719-21
- 5 C.F.R. § 575.311(g)
  - 69 FLRA 7, 9

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**What the Statute Excludes**

**§ 7121(c)**

- Prohibited political activities (Hatch Act)
- Retirement, life insurance, or health insurance
- Suspension or removal for national-security reasons
- Examination, certification, or appointment
- Classification of any position that does not result in a reduction in grade or pay

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- Hatch Act: 5 U.S.C. §§ 7321-7326
- Retirement, life insurance, or health insurance
  - *E.g.*, 51 FLRA 204, 207-08
  - *But see* 57 FLRA 415, 416-17
- Suspension or removal for national security reasons
  - *See* 62 FLRA 391, 391 n.2
- Examination, certification, or appointment
  - 57 FLRA 166, 168; 51 FLRA 210, 212-13; 48 FLRA 511, 513-15
- Classification...that doesn't result in reduction in grade/pay
  - 66 FLRA 34, 38-39

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**Classification**  
**What it IS**

- The grade level of the duties permanently assigned to, and performed by, the grievant
- Classifying currently unclassified duties
- Accretion of higher-graded duties to an existing position

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- Definition
  - 5 C.F.R. § 511.101(c)
    - “the analysis and identification of a position and placing it in a class under the position-classification plan established by” OPM “under chapter 51 of title 5, United States Code.”
- Grade level
  - 67 FLRA 67
  - 61 FLRA 194
- Currently unclassified duties
  - 31 FLRA 933, 936
  - See 55 FLRA 345, 347
- Accretion of duties
  - 61 FLRA 194
- Is classification the essential nature of the grievance?
  - 64 FLRA 829, 830-31

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**Classification**  
**What it is NOT**

- Grievances re: temporary promotion
- Promotion within existing career-ladder
- Failure to promote under competitive procedure
- Accuracy of a PD

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- Temporary promotions
  - 68 FLRA 83, 84-85
    - 64 FLRA 552, 554
- Promotion within existing career-ladder
  - 52 FLRA 217, 220-22
- Failure to promote
  - 49 FLRA 1387, 1389
- Accuracy of a PD
  - 57 FLRA 275, 277

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**Election of Remedies**

- § 7116(d): grievance or ULP
- § 7121(d): grievance or EEO complaint
- § 7121(e): grievance or MSPB appeal
  - adverse actions under § 7512
  - certain performance-based actions under § 4303
- § 7121(g): prohibited personnel practice
  - (§ U.S.C. § 2302(b)(2)) – grievance or appeal to MSPB, or through OSC

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- 7116(d)
  - 67 FLRA 442, 444-47
  - 64 FLRA 1110, 1111
- 7121(d)
  - 65 FLRA 704, 708-09
  - 61 FLRA 571, 573-74
- 7121(e)
  - 54 FLRA 235, 237-38
- 7121(g)
  - 61 FLRA 571, 574

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**When is a Grievance Barred by a ULP?**

- Same issue
  - same factual predicate AND
  - substantially similar legal theories
    - Statutory claim doesn't bar contractual claim.
- ULP was filed earlier
  - Does NOT matter if ULP wasn't pursued or fully litigated

**AND**

- Selection of ULP procedures was at discretion of aggrieved party
  - must be same aggrieved party
  - distinguish individual vs. institutional issues

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- Statutory claim doesn't bar contractual claim
  - 68 FLRA 573, 575
  - 67 FLRA 442, 445-46
  - 59 FLRA 112, 114-17
- ULP was filed earlier
  - *E.g.*, 64 FLRA 1110, 1112
- Selection of ULP procedures was at discretion of aggrieved party
  - *E.g.*, 63 FLRA 677, 679-80

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**When is a Grievance Barred by an EEO Complaint?**

- Same subject matter

**AND**

- Matter was earlier raised by the employee timely initiating an action under the statutory EEO procedure

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- *E.g.*, 69 FLRA 292, 294
  - reprimand = personnel action
- 61 FLRA 571, 573-74;
- 23 FLRA 414, 417-18
  - timely filing of formal written complaint under EEOC regulations, not pre-complaint process

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**Compliance with  
Arbitration Awards,  
Arbitral Retention of  
Jurisdiction,  
& Interlocutory Appeals**

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**Compliance with Arbitration Awards  
5 U.S.C. § 7122(b)**

- Failure to comply is a ULP if award is **FINAL AND BINDING**
  - Final award – see slide 21
  
- Validity of award **CANNOT** be challenged in ULP proceeding.

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**When is an Award Final & Binding?**

- No timely exceptions filed
  - compliance required when period for filing exceptions expires
  
- FLRA denies exceptions
  - compliance required upon denial

**BUT**

- Compliance not required while exceptions pending

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- No timely exceptions
  - 55 FLRA 293, 296
- Exceptions denied
  - 55 FLRA at 296
- Exceptions pending
  - 56 FLRA 848, 851-52

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**Arbitral Retention of Jurisdiction**


- “Functus Officio”
  - After arbitrator renders award regarding an issue, NO authority to take further action on that issue unless:
    - retained jurisdiction OR
    - parties jointly request

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E.g., 64 FLRA 823, 825-26

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**Functus Officio Exceptions**

- Arbitrator may:
  - clarify initial award
  - correct clerical or arithmetic error in initial award
  - complete an award by resolving a submitted issue that the arbitrator's initial award failed to resolve
  - **What about continuing violations?** 

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67 FLRA 19, 22

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**Arbitral Retention of Jurisdiction Requests for Attorney Fees**

[Back Pay Act \(5 U.S.C. § 5596\)](#)

- At any time during arbitration
- Within a reasonable period of time after award becomes final and binding
- CBA may govern timing for requests

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- Generally
  - 67 FLRA 721, 721-22 (then-Member Pizzella dissenting)
  - 67 FLRA 352, 352-53
- Attorney fees
  - 64 FLRA 925, 927

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**Final Awards & Interlocutory Appeals**

- What is an interlocutory appeal?
- What is a “final award”?
  - Is this different from final and binding?

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- 5 CFR § 2429.11
  - “ordinarily will not consider interlocutory appeals”
- 5 CFR § 2429.11
  - reflects judicial policy of discouraging fragmentary appeals of the same case
  - 66 FLRA 688, 689-90
  - 61 FLRA 355, 357

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**What is an Interlocutory Appeal?**

An exception filed before a *final award* has been issued

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64 FLRA 486, 489

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**What is a Final Award?**

An award that completely resolves all submitted issues

- If everything is decided, award is final
- EVEN if jurisdiction is retained to assist with implementation

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- Definition
  - 64 FLRA 586, 589
- Jurisdiction for implementation
  - 66 FLRA 235, 239



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**Final Awards & Interlocutory Appeals**  
**What if the Arbitrator ...**

- Directs the parties to determine:
  - Amount of backpay/damages/costs? **FINAL**
  - Identification of affected individuals? **FINAL**
  - An appropriate remedy? **NOT FINAL**
  - Whether monetary remedy would be appropriate? **NOT FINAL**

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- Backpay/damages/costs
  - 67 FLRA 336, 337
  - 66 FLRA 838, 841-42
- Identification
  - 66 FLRA 531, 534
  - 65 FLRA 252, 254
- Develop remedy
  - 61 FLRA 173, 174
- Determine monetary remedy
  - 58 FLRA 358, 359

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**Final Awards & Interlocutory Appeals**  
**More What Ifs...**

- What if the Arbitrator says the award is final?
  - DO NOT rely on arbitrator's characterization of award
- What if the Arbitrator bifurcated the hearing?
  - Just because arbitrator resolved all issues re: 1<sup>st</sup> part of bifurcated hearing, doesn't mean resolved all issues submitted
- What if the Arbitrator retained jurisdiction to resolve attorney fees?
  - Does NOT render exceptions to merits award interlocutory

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- Arb's characterization
  - 65 FLRA 672, 674
  - 61 FLRA 355, 357
- Bifurcated hearings
  - 61 FLRA at 356-57
- Attorney fees
  - 66 FLRA 838, 841-42
  - 64 FLRA 989, 991

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**Final Awards & Interlocutory Appeals**  
**THE EXCEPTION**

**Plausible Jurisdictional Defect**

Extraordinary circumstances warrant interlocutory review where there is a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case

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- 66 FLRA 688, 690
- 62 FLRA 344, 346-47

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**Final Awards & Interlocutory Appeals**  
**What is a Plausible Jurisdictional Defect?**

Plausible = claim is credible on its face;  
mere assertion not enough

Advancing the “ultimate disposition” of the  
case = resolution of the jurisdictional issue  
must end the dispute

**NOTE: usually statutory**

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- Plausible
  - 63 FLRA 216, 217
  - 55 FLRA 1230, 1232
- Advance ultimate disposition
  - 59 FLRA 686, 687

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**Final Awards & Interlocutory Appeals**  
**Plausible Jurisdictional Defect Examples**

- Exception granted
  - Claim arbitrator lacked jurisdiction to resolve a classification matter under 5 U.S.C. § 7121(c)(5)
- Exception dismissed
  - Claim arbitrator lacked jurisdiction based only on parties' agreement
  - Claim that arbitrator may not be impartial in determining arbitrability because he had “a financial interest in presiding over a prolonged merits hearing”

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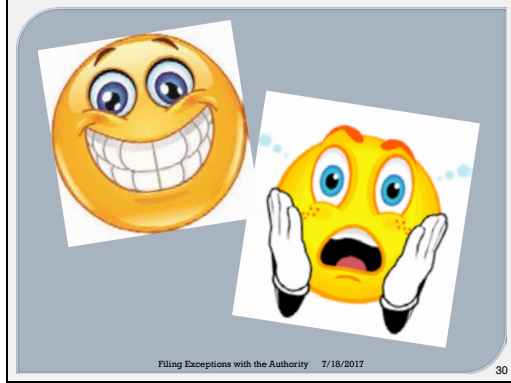
- Granted
  - 63 FLRA 216, 217-18
- Dismissed
  - 66 FLRA 848, 851
  - 58 FLRA 745, 746
- Arbitrator not impartial
  - 68 FLRA 640, 641

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**Filing Exceptions  
and Oppositions:  
Procedure**

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**Exceptions  
Who Can File**

- **Either PARTY to arbitration**
  - "Party" = any person who participated as a party in a matter where an arbitration award was issued
  - **Only union and agency** are entitled to file exceptions
    - Unless grievant is authorized to file exceptions

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- 7122(a)
- Party
  - 5 CFR § 2421.11
- Union authorized grievant
  - 60 FLRA 509, 509 n.1
- Union did not authorize grievant
  - 40 FLRA 1254, 1255

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**Exceptions  
How and Where to File**

**www.FLRA.gov**  
**5 C.F.R. §§ 2425 & 2429**  
(it's all in there)

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- Address and phone numbers on the website
- Where and how: 5 CFR § 2429.24
- Number of copies: 5 CFR § 2429.25
- Statement of service: 5 CFR § 2429.27
- Who to serve: 5 CFR 2429.12(b)
- Table of Contents: 5 CFR § 2429.29
- Other requirements: 5 CFR § 2425.2
- Forms: 5 CFR 2425.4 (optional)

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**Exceptions  
eFiling**

Exceptions and oppositions may be filed by registered users through the Authority's eFiling system

Benefits :

- *Free*
- *Convenient*

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The screenshot shows the FLRA.gov website homepage. At the top left is the FLRA logo and the text "FLRA.gov U.S. FEDERAL LABOR RELATIONS AUTHORITY". To the right is a search bar with the text "SEARCH" and a magnifying glass icon. Below the header is a navigation menu with links for "ABOUT", "COMPONENTS & OFFICES", "LIVE FEED", "DELIVERING", "RESOURCES & TRAINING", and "eFiling AUTHORITY LOGIN". A yellow "eFiling AUTHORITY LOGIN" button is prominent. Below the navigation menu is a breadcrumb trail: "Home / Components & Offices / eFiling / Office of Case Intake and Publication (CI)".

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The screenshot shows the FLRA eFiling System home page. At the top left is the "FLRA" logo. Below it is a "Home" link. The main heading is "FLRA eFiling System | Home". There is a "HOME" link. A welcome message reads: "Welcome to the FLRA Case eFiling System. Not a registered user? Please click here to create a user profile. Renewal is required every 270 days. Please click here to update your profile. Contact your supervisor if you have any questions." Below this is an "FAQ" section with links for "Home Page", "Search Case", "Search Case by Question", and "Attachment File Types". A link "View Allowed Attachment File Types" is also present.

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**Exceptions  
When to File**

5 C.F.R. § 2425.2

- Exceptions due **30** calendar days from date of service of award
  - Exclude date of service of the award
    - Method of service is up to arbitrator unless parties' agreement specifies
    - First service method controls
  - Date parties RECEIVE exceptions is irrelevant when calculating due date
- **What about weekends and holidays?**

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- See also 5 CFR § 2429.21
- More than one method of service
  - First controls, unless the arbitrator indicates that the first method is not the “official service”
    - 68 FLRA 1015, 1017-18 (then-Member Pizzella dissenting)

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**Exceptions  
When to File “What ifs”**

- Arbitrator uses regular mail or FedEx?
  - Calculate from postmark (mail) or date deposited (FedEx)
  - If illegible or missing, use date of the award
  - Add 5 days to the due date
- Arbitrator uses email or fax?
  - Calculate from date of transmission
  - No extra time
- Arbitrator uses personal delivery?
  - Calculate from date of delivery
  - No extra time

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- 5 C.F.R. § 2425.2
- See also §§ 2429.21, 2429.22

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**Exceptions: How to Calculate**

Sunday	Monday	Tuesday	Wed	Thursday	Friday	Saturday
May	23	24	25	26	27 Date of service of award	28 Start counting
29	30	31	June 1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26 30 days!	27 Due date (BUT add 5 days for mail)	28 Start counting	29	30	July 1	2 Fifth day
3	4 HOLIDAY	5 ACTUAL DUE DATE	6	7	8	9

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Exceptions

### What if You Miss the Deadline?

5 C.F.R. § 2425.2

- Time limit cannot be extended or waived
  - May be equitably tolled if:
    - (1) some extraordinary circumstance stood in a party's way to prevent timely filing; and
    - (2) the party was pursuing its rights diligently

Note: The Authority may waive an expired time limit in extraordinary circumstances for untimely filed **oppositions**

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- No extension or waiver
  - 5 C.F.R. § 2429.23(d)
  - 5 U.S.C. § 7122(b)
- Equitable tolling
  - 68 FLRA 231, 232-34 (then-Member Pizzella dissenting)
- No extraordinary circumstance found
  - 68 FLRA 443, 443-45 (Member DuBester dissenting)
- Oppositions
  - 68 FLRA 189, 191
  - 5 C.F.R. § 2429.23(b)

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Exceptions

### Common Procedural Deficiencies

The Authority will send a **deficiency** order for:

- Failure to provide copy of arbitrator's award
- Failure to provide statement of service
- Failure to provide table of contents
- Incorrect number of copies

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- Arbitrator's award
  - 5 C.F.R. § 2425.4(a)(5)
- Statement of service
  - 5 CFR § 2429.27
- Table of contents
  - 5 CFR § 2429.29
- Number of copies
  - 5 CFR § 2429.25

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Exceptions

**More Common Procedural Deficiencies**

The Authority will send a **show-cause** order for:

- Failure to Cure Procedural Deficiencies
- Timeliness
- Interlocutory
- Moot/Advisory Opinion
- Lack of Jurisdiction
- Lack of Standing

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- Moot/Advisory opinion
  - 5 C.F.R. § 2429.10
  - 64 FLRA 466, 467
  - 58 FLRA 327, 330
- Jurisdiction
  - 5 USC § 7121(f) matters
- Standing
  - See 5 CFR § 2421.11

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Exceptions

What if You Don't Respond to a Show-Cause Order?

**THE AUTHORITY WILL  
DISMISS YOUR EXCEPTIONS  
WITHOUT REGARD TO THE  
NATURE OF THE  
DEFICIENCY**

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- 63 FLRA 349, 350
  - Deficiency = lack of copies and statement of service. As U did not cure, Authority issued SCO. In response, U said (w/o support) deficiency had been cured. U exceptions dismissed.
- 67 FLRA 442 (incorrect number of copies)
- 67 FLRA 442, 444
  - Dismissing U's opp'n as untimely and declining to waive the expired deadline
- 68 FLRA 777, 777-78
  - Though Ag did respond to SCO, Ag's opp'n not considered because date of service, not date of receipt, controls filing due date
- 56 FLRA 829, 830 n.1
  - Ag failed to respond to SCO re: why exceptions shouldn't be dismissed as interlocutory; exceptions dismissed

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**Exceptions**

**Required Content**

5 C.F.R. § 2425.4

- ◉ What you must include
- ◉ What you can leave out

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- Include:
  - Copy of award
  - Arbitrator's info
  - Statement of grounds: *see* 5 CFR § 2425.6
  - Supporting arguments & citations
  - Copies of documents cited in arguments: E.g., CBA provisions, internal agency regulations
  - Support for expedited, abbreviated decision
- Exclude:
  - Authority and Fed. Court decisions
  - USC
  - Current CFR

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**Exceptions**

**Requests for Expedited, Abbreviated Decisions**

5 C.F.R. § 2425.7

- ◉ Excepting party may request
  - Authority has discretion over whether to grant request
  - Opposing party may respond to request in opposition
- ◉ Authority considers:
  - Complexity
  - Potential for precedential value
  - Similarity to other, fully detailed decisions involving same/similar issues
- ◉ Authority may issue even absent request
- ◉ Not in arbitration cases involving a ULP

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- Excepting party may request
  - 67 FLRA 257, 257
- Authority discretion
  - 68 FLRA 718, 719



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Exceptions

**Content that is NOT PERMITTED**

Anything you should have known to, but did not, raise below

- Evidence
- Factual assertions
- Arguments (including affirmative defenses)
- Requested remedies
- Potential challenges to a requested remedy

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- 5 CFR § 2425.4
- *See also* 5 CFR § 2429.5

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Exceptions

**Failure to Raise Below**

5 C.F.R. §§ 2425.4, 2429.5

- ⊙ **Not raised below**
  - Was there an opportunity to raise the issue?
    - Post-hearing brief
    - Other ways?
  - Was issue known before award issued?
  - What about arbitrator bias?
- ⊙ **Raised below in a contrary way**

**Authority will not consider arguments**

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- Not raised below
  - 67 FLRA 155, 156
  - 63 FLRA 178, 179-80
  - 68 FLRA 116, 117
  - 63 FLRA 213, 214
  - 63 FLRA 70, 74
  - 68 FLRA 829, 832-33
  - 67 FLRA 609, 610-11
  - *But see* 61 FLRA 637, 639
- Raised in contrary way
  - 64 FLRA 325, 328
  - 68 FLRA 116, 118
- Opportunity to raise below
  - 67 FLRA 287, 288-89
  - 67 FLRA 715, 716-17
  - 67 FLRA 356, 357
  - 67 FLRA 257, 257
  - *But see* 67 FLRA 387, 388-89

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Exceptions

### Potential Dismissal or Denial

- Authority has no jurisdiction
- Exceptions do not raise a recognized ground
- Exceptions do not support a recognized ground

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Exceptions

### Potential Dismissal

- Authority has no jurisdiction over exceptions to awards that concern:
  - Reductions in grade/removals based on unacceptable performance under 5 U.S.C. § 4303
  - Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days under 5 U.S.C. § 7512
  - Similar matters arising under other personnel systems
  - Matters "related to" – i.e., "inextricably intertwined with" – those matters

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- Reduction in grade/ removal
  - 61 FLRA 476, 477-78
- Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days
  - 62 FLRA 107, 108
- Similar matters arising under other personnel systems
  - 59 FLRA 545, 546 (removal of non-appropriated fund employees)
- Inextricably intertwined matters
  - 62 FLRA 505, 506-07 (claim for compensatory damages)


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Exceptions

### Potential Dismissal

5 C.F.R. § 2425.6(e)(1): Failure to raise

- Currently recognized grounds
  - The arbitrator:
    - exceeded his or her authority
    - was biased
    - denied the excepting party a fair hearing
  - The award:
    - is contrary to any law, rule or regulation
    - fails to draw its essence from the parties' agreement
    - is based on a nonfact
    - is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible
    - is contrary to public policy



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- All Members agreed to dismissal
  - 67 FLRA 375, 375
  - 67 FLRA 147, 147-48
- 68 FLRA 311, 313
  - Argument that an arbitrator "misapplied the doctrine of past practice" does not raise a recognized ground for review
- 67 FLRA 330, 331
  - Dismissing for failure to raise
  - then-Member Pizzella writes separately to contrast with 67 FLRA 239


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Exceptions

## Potential Denial

5 C.F.R. § 2425.6(e)(1): Failure to support

- Must offer sufficient argument or authority to support that ground



**Bare Assertion**

*A fallacy in formal logic where a premise in an argument is assumed to be true merely because it says that it is true.*

- To support a ground not currently recognized, a party must cite the legal authorities relied upon

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- 67 FLRA 327, 328.
  - Dismissing argument for failing to raise a ground
  - Denying another argument as raising, but not sufficiently supporting, a recognized ground
- 69 FLRA 149, 151
  - Denying a contrary to law exception for failure to support
- 67 FLRA 333, 333-34
  - Dismissing certain exceptions for failure to raise, denying others for failure to support
- 67 FLRA 378, 379
  - Denying one exceeded-authority exception for failure to support, denying another on its merits
- 67 FLRA 171, 172
  - To support a ground not currently recognized, a party must cite the legal authorities relied upon

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## Oppositions

5 C.F.R. § 2425.3

- Not required
- 30 days to file (from service of exceptions)
- Address:
  - Arguments, including failure to raise/support issues
  - Any request for expedited, abbreviated decision
- Include:
  - Documents relied on UNLESS provided with exceptions
  - Documents not readily accessible by the Authority

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- 5 C.F.R. § 2425.8 (use of Collaboration and Alternative Dispute Resolution Office)
- 5 C.F.R. § 2429.21 (computation of time for filing papers)
- 5 C.F.R. § 2429.22 (add'l time after service by mail or commercial delivery)
- 5 C.F.R. § 2429.24 (place and method of filing; acknowledgement)
- 5 C.F.R. § 2429.25 (number of copies and paper size)
- 5 C.F.R. § 2429.27 (service; statement of service)
- 5 C.F.R. § 2429.29 (content of filings)

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**Other Documents**  
5 C.F.R. § 2429.26

- Authority *may* consider “other documents,” but filing party must:
  - Request leave to file
    - 5 C.F.R. § 2429.26
  - Argue *why* submission is necessary
    - *E.g.*, Addresses new argument raised by opposing party
  - Serve copies on other parties

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**Collaboration and Alternative Dispute Resolution Office  
(CADRO)**



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5 CFR § 2425.8

**Note: Authority will toll filing for opposition if time hasn't expired**

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**Clarifying Records or Disputes  
(5 C.F.R. § 2425.9)**

- Direct parties to provide evidence (including arbitration record, see 5 C.F.R. § 2429.3)
- Direct parties to respond to requests for further information
- Meet with parties
- Direct oral argument
- Take any other appropriate action

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**Grounds for Reviewing  
Arbitration Awards**

**Overview  
&  
Private-Sector Grounds**

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**FLRA Review**

**Exceptions to arbitration awards = majority of Authority's case load**

◉ **Types of exceptions:**

- Private-sector grounds
  - Deference to arbitrator
- Contrary to law, rule, or regulation
  - De novo review of legal conclusions
  - Deference to arbitrator's factual findings

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- Private-sector grounds
  - 5 U.S.C. § 7122(a)(2)
  - 5 C.F.R. § 2425.6(a)(2)
- Contrary to law, rule, regulation
  - 5 U.S.C. § 7122(a)(1)
  - 5 C.F.R. § 2425.6 (a)(1)

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**Private-Sector Grounds for Review  
Exceeded Authority**

- (1) Arbitrator failed to resolve submitted issue
  - arbitrator not required to address every argument raised
- (2) Resolved an issue not submitted
- (3) Disregarded specific limitations on authority
  - a claim that the arbitrator added to/alterd/modified the CBA generally will not demonstrate exceeded authority
- (4) Awarded relief to non-grievants
  - remedy too broad

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- *Compare 65 FLRA 91, 95, with 64 FLRA 686, 687*
- *Compare 63 FLRA 476, 478-79, with 51 FLRA 1645, 1647; see also 67 FLRA 609, 611-12*
- 64 FLRA 547, 550
- 65 FLRA 657, 663-64

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Private-Sector Grounds for Review  
**Exceeded Authority (cont'd)**

**DEFERENCE**

Stipulated issue v. Framed issue

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- Stipulated issue
  - Arbitrators do not exceed authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues in stipulation
    - 67 FLRA 489, 492
    - 64 FLRA 982, 986-87.
  - 68 FLRA 992, 993-95 (then-Member Pizzella dissenting)
    - Arbitrator did not exceed his authority when interpretation of a stipulated issue was not irrational, unfounded, or implausible, and the award was responsive to the issue as interpreted by the arbitrator
- Framed issue
  - 68 FLRA 189, 191-92
  - 64 FLRA 1126, 1129-30

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Private-Sector Grounds for Review  
**Bias**

- Award procured by improper means
- Arbitrator was partial or corrupt
- Arbitrator engaged in misconduct that prejudiced party's rights

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- 67 FLRA 291, 292
- 64 FLRA 713, 716-17

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Private-Sector Grounds for Review  
**Fair Hearing**

- Arbitrator refused to hear or consider pertinent and material evidence
- Actions so prejudiced a party as to affect fairness of proceeding as a whole

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- 68 FLRA 116, 119
- 67 FLRA at 292
- 62 FLRA 360, 362

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Private-Sector Grounds for Review  
**Essence**

- Cannot be rationally derived from parties' agreement;
- So unfounded in reason and fact, unconnected w/wording and purpose of agreement as to manifest infidelity to obligation of arbitrator;
- Implausible interpretation of agreement;

OR

- Evidences manifest disregard of agreement

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- 59 FLRA 540, 541
  - granting exception
- *But see* 69 FLRA 149, 152; 68 FLRA 83, 85-86

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Private-Sector Grounds for Review  
**Nonfact**


- Central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result
- Cannot challenge factual matters disputed before arbitrator

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- 67 FLRA 306, 308
- 64 FLRA 692, 696

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Private-Sector Grounds for Review  
Incomplete, Ambiguous, or Contradictory as to Make  
Implementation of the Award Impossible



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Incomplete, ambiguous, or contradictory as to make implementation impossible

- 64 FLRA 622, 624
- 56 FLRA 1057, 1074

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Private-Sector Grounds for Review  
**Public Policy**

Must be explicit, well-defined,  
and dominant

**AND**

Violation of policy must be  
clearly shown

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61 FLRA 88, 91

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Private-Sector Grounds for Review  
**Other**

Must provide citations and explain  
how they support finding award  
deficient

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5 C.F.R. § 2425.6



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**Additional Grounds for Review**

- ◉ **Contrary to law, rule, or regulation**
  - Absent allegation of nonfact, Authority defers to arbitrator's factual findings
  - U.S. Constitution
  - Statutes
  - Regulations
    - Government-wide
    - *Governing* agency rules or regs

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- Standard: 66 FLRA 74, 78
- Examples:
  - 69 FLRA 149, 151
  - 69 FLRA 144, 145
  - 68 FLRA 531, 532-33
  - 68 FLRA 311, 314-16
  - 68 FLRA 116, 118-19

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**Separate and Independent Grounds**

- ◉ When award based on separate and independent grounds, appealing party must establish that all grounds are deficient
- ◉ For example:
  - Award based on interpretation of two CBA provisions and interpretation of either provision provides a sufficient basis for the award
    - Must show interpretation of BOTH provisions is deficient
  - Award based on interpretations of CBA and Statute
    - Must show interpretation of BOTH CBA and Statute are deficient

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- Examples
  - 68 FLRA 324, 326
  - 67 FLRA 597, 604 (multiple CBA provisions)
  - 65 FLRA 946, 949
  - 66 325, 332 (CBA and Statute)

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**Challenges to Arbitrability Findings**

- ◉ Procedural arbitrability
- ◉ Substantive arbitrability

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**Challenges to Arbitrability Findings**  
**Procedural Arbitrability**

- ◉ **Determined by:**
  - Whether procedural conditions to arbitrability have been met or excused
  
  - **Examples include:**
    - Timeliness of a grievance

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- Conditions met/excused
  - 64 FLRA 772, 773-74
  - 64 FLRA 612, 613
- Timeliness
  - 64 FLRA 772, 773

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**Challenges to Arbitrability Findings**  
**Procedural Arbitrability**

- ◉ **What grounds can you use to challenge it?**
  - Bias
  - Exceeded authority
  - Fair hearing
  - Law that establishes procedural requirements that apply to NGP

*What about essence?*  
*What about nonfact?*



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- Bias
  - 61 FLRA 681, 682-83
  - 60 FLRA 83, 86
- Exceeded authority
  - 61 FLRA 681, 682-83
  - 60 FLRA 83, 86
- Fair hearing
  - 60 FLRA 813, 815-16
- Law that establishes procedural requirements that apply to NGP
  - 68 FLRA 728, 730-31 (filing period for ULPs established by the Statute)
  - 58 FLRA 480, 481-82
  - *But see* 67 FLRA 264, 264-65)
- But not on essence grounds
  - 68 FLRA 852, 853-54
  - 68 FLRA at 730

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Challenges to Arbitrability Findings  
**Substantive Arbitrability**

◉ Determined by:

- Whether subject matter of dispute is arbitrable
  - If determination is based on CBA, then **essence standard**
  - If determination is based on law, then **de novo standard**

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- 64 FLRA 612, 613
- Essence
  - 64 FLRA 606, 609
- De Novo
  - 64 FLRA 1132, 1133-34

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**Management Rights  
(5 U.S.C. § 7106)**



Filing Exceptions with the Authority 7/18/2017 73

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**Burden in Arbitration Context**

◉ Party asserting that arbitration award is contrary to management rights must show **both**:

- Award affects a management right

**AND**

- Contract provision arbitrator enforced was not negotiated under § 7106(b)



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- 67 FLRA 597, 601-02 (then-Member Pizzella dissenting)
- 66 FLRA 426, 428 & n.5

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**Management Rights  
§ 7106 generally**

- Does the award *affect* a management right under § 7106(a)?
- If so, was arbitrator enforcing:
  - Contract provision negotiated under § 7106(b) (for any management-right claims);
  - or
  - applicable law (for § 7106(a)(2) claims)?

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- 65 FLRA 113, 115
- 65 FLRA 102, 106 (Chairman Pope concurring in part)

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**Management Rights  
§ 7106(a)(1)**

- Mission
- Budget
- Organization
- Number of employees
- Internal-security practices



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- Mission
  - 59 FLRA 159, 163
  - 58 FLRA 341, 342-43
- Budget
  - 61 FLRA 201, 205
- Organization
  - 63 FLRA 530, 532
  - 58 FLRA 175, 178-79
- Number of employees
  - 46 FLRA 298, 316-17
- Internal security practices
  - 64 FLRA 1153, 1156-58

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**Management Rights  
§ 7106(a)(2)(A)**

- Hire employees
- Assign employees
- Direct employees
- Layoff employees
- Retain employees in the agency



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- Hire employees
  - 62 FLRA 93, 94-95
- Assign employees
  - 64 FLRA 161, 165
  - 63 FLRA 222, 225
- Direct employees
  - 64 FLRA 532, 534
  - 63 FLRA 450, 452
  - 62 FLRA 15, 16-17
- Layoff employees
  - 64 FLRA 813, 815-16
- Retain employees in the agency
  - 60 FLRA 839, 841-45
  - 58 FLRA 344, 345-46

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**Management Rights**  
**§ 7106(a)(2)(A) cont'd**

- Suspend employees
- Remove employees
- Reduce in grade or pay
- Take other disciplinary action



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- Suspend employees
  - 48 FLRA 908, 911-12
- Remove employees
  - 46 FLRA 298, 319-20
- Reduce in grade or pay
  - 53 FLRA 539, 579-80
  - 40 FLRA 1181, 1200-02
- Take other disciplinary action
  - 62 FLRA 174, 180-81
  - 61 FLRA 341, 346-47

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**Management Rights**  
**§ 7106(a)(2)(B)**

- Assign work
- Make determinations with respect to contracting out
- Determine the personnel by which agency operations will be conducted



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- Assign work
  - 65 FLRA 13, 15
  - 64 FLRA 136, 138
  - 63 FLRA 530, 532
- Contracting out
  - 64 FLRA 474, 479
  - 61 FLRA 209, 210
- Determine the personnel . . .
  - 61 FLRA 371, 373-74

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**Management Rights**  
**§ 7106(a)(2)(C) & (D)**

- § 7106(a)(2)(C):
  - With respect to filling positions, make selections for appointments from:
    - (1) among properly ranked and certified candidates for promotion; or
    - (2) any other appropriate source
- § 7106(a)(2)(D):
  - Take whatever actions may be necessary to carry out the agency mission during emergencies


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- § 7106(a)(2)(C)
  - 65 FLRA 13, 15
  - 64 FLRA 76, 77
  - 62 FLRA 419, 424
  - 61 FLRA 226, 228-29
  - 61 FLRA 618, 622
  - 59 FLRA 780, 782-83
  - 58 FLRA 411, 412
- § 7106(a)(2)(D)
  - 58 FLRA 549, 551-52

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**Management Rights**  
**What Affects Management's Rights**

- Look to Authority precedent 
- Parties should brief arbitrators on:
  - How the award will affect management's rights
  - Exceptions to management's rights
- Arbitrators should be cognizant of possible effects and exceptions


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41 FLRA 795, 823

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**Management Rights**  
**What If ...**

- The award does NOT affect a § 7106(a) management right?
  - **Exception denied!**
- The award DOES affect a § 7106(a) management right?
  - Then ... 

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64 FLRA 76, 77-78

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**Management Rights**  
**What if ...**

... ask whether the arbitrator was enforcing:

- A provision negotiated under § 7106(b)(1), (2), or (3) (for all § 7106(a) rights); and/or
- An applicable law (for § 7106(a)(2) rights)


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**Management Rights – Exceptions  
§ 7106(b)(1)**

- Numbers, types, and grades
- Of employees or positions
- Assigned to any
  - Organizational subdivision,
  - Work project, or
  - Tour of duty



**PERMISSIVE**

Filing Exceptions with the Authority 7/18/2017 84

- 54 FLRA 807, 816-17
- 32 FLRA 944, 959
- Enforceable in arbitration

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**Management Rights – Exceptions  
§ 7106(b)(1)**

- Technology, methods, & means of performing work

**TECHNOLOGY**  
technical method used in accomplishing or furthering performance of agency's work

**METHOD**  
the way agency performs its work (the "how")

**MEANS**  
any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work ("with what")



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- Technology
  - 62 FLRA 321, 326
- Means
  - 54 FLRA 1582, 1589-91 & n.6

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**Management Rights – Exceptions  
§ 7106(b)(2)**

- Agency must bargain the "procedures which management . . . will observe in exercising" any § 7106 management right
- Look to the case law

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- 63 FLRA 585, 586
- 62 FLRA 328, 330
- Enforceable in arbitration

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**Management Rights – Exceptions  
§ 7106(b)(3)**

**APPROPRIATE ARRANGEMENTS**

- First ask: Whether the CBA provision, as interpreted and applied by the arbitrator:
  - Is an “arrangement” for employees adversely affected by the exercise of a management right
- If yes, then ask: Does the CBA provision, as interpreted and applied by the arbitrator:
  - Abrogate management’s rights
- Different analysis than in negotiability cases involving proposals

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- 5 U.S.C. § 7106(b)(3)
  - “appropriate arrangements for employees adversely affected by the exercise of” any management right under § 7106
- No tailoring or excessive interference in arbitration
  - See 65 FLRA 113, 116 (Member Beck concurring)
  - *But see* 739 F.3d 13 (D.C. Cir. 2014)

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**Management Rights  
Applicable Laws**

For § 7106(a)(2) rights, ask whether the arbitrator was enforcing an “applicable law”

**APPLICABLE LAW**

lawfully enacted statutes, the U.S. Constitution, controlling judicial decisions, executive orders issued pursuant to express statutory authorization, and regulations having the force and effect of law

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- 42 FLRA 1333, 1337

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**Management Rights  
What About Regulations?**

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

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- 65 FLRA 657, 661-63
- 61 FLRA 201, 206



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**Management Rights**

**Exceptions – Arbitral Remedies**

- Must provide a remedy for a violation of either an “applicable law” within the meaning of § 7106(a)(2)

**OR**

- a contract provision that was negotiated pursuant to § 7106(b) of the Statute
  
- No reconstruction

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65 FLRA 102, 106-07 (Chairman Pope concurring in part)

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**Arbitral Enforcement of,  
&  
Consistency of Awards  
with,  
Regulations**

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**Contrary to Regulation**

- Award must be consistent with any rule or regulation that governs the matter in dispute
  
- Government-wide regulations treated differently than agency-specific regulations

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37 FLRA 186, 190-96

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**Government-Wide Regulations**  
**What Are They?**

Rules, regulations, and official declarations of policy that are generally applicable throughout the federal government and are binding on the federal agencies and officials to whom they apply

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- Generally applicable
  - 53 FLRA 403, 416

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**Government-Wide Regulations**  
**What Came First?**

- Regulation before CBA
  - Reg governs
- CBA before regulation
  - CBA governs until it expires
  - **Exception:** gov't-wide regulations that implement 5 U.S.C. § 2302 (prohibited personnel practices)

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- Generally applicable
  - 53 FLRA 403, 416
- When CBA governs
  - 65 FLRA 817, 819
- Exception
  - 60 FLRA 398, 399 n.6 (reciting the standard)

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**Agency Regulations**  
**What Are They**

Rules, regulations, and official declarations of policy prescribed by an agency to govern matters within that agency



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- Definition
  - 37 FLRA 186, 192-95
- Must provide copy and explain
  - 37 FLRA at 195 n.2

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**Agency Regulations  
When Do They Control?**

- Only when there's no applicable, conflicting CBA provision
  - CBA, not agency regulations, governs matters to which they both apply when there is a conflict
  - Reason: Statute does not prevent agency from agreeing to a CBA that alters or modifies agency regulation
  - Deference to an arbitrator's finding that CBA governs

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- When CBA governs
  - 64 FLRA 1126, 1128-29
- Reason
  - 37 FLRA 186, 194
- Deference
  - 41 FLRA 1206, 1209-11

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**Agency Regulations  
Incorporation**

- An arbitrator may find that agency regulations have been incorporated into CBA
- And if CBA says matters will be conducted "in accordance with an agency regulation," that wording "effectively incorporates" the regulation into the CBA – unless the arbitrator indicates otherwise in the award
- Review of the arbitrator's interpretation and application of the incorporated agency regulations = essence standard

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- Arbitral finding
  - 51 FLRA 1210, 1217
  - 41 FLRA 284, 292-93
- Effectively incorporates
  - 51 FLRA 1210, 1216-17
- Unless arbitrator finds otherwise
  - 65 FLRA 13, 17 n.5
- Essence standard
  - 65 FLRA 1004, 1008

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**Arbitral Remedies  
&  
Backpay**

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**Arbitrator Remedies**

- Broad remedial discretion
- Authority denies exceptions that don't support setting aside remedy/attempt to substitute different remedy

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- Broad discretion
  - 64 FLRA 922, 924
- Deny Exceptions
  - 55 FLRA 789, 793

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**Arbitrator Remedies Limitations**

- Private and federal sectors: Can't dispense "own brand of industrial justice"
- Additional federal-sector exceptions stem from:
  - Laws and regulations governing employment
  - Expanded scope of grievance procedure (arbitrators substitute for other forums)

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- No industrial justice
  - 64 FLRA 916, 920

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**Monetary Remedies**

- Sovereign immunity
  - May be raised at any time, even if not raised before arbitrator
- Must be explicit statutory waiver
  - Common examples:
    - Back Pay Act, 5 U.S.C. § 5596
    - FLSA, 29 U.S.C. §§ 201-219
- No sovereign-immunity waiver required for monetary remedies that are "equitable" in nature

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- Sovereign immunity
  - 68 FLRA 960, 963-66
- Explicit statutory waiver
  - 52 FLRA 46, 49
- Back Pay Act
  - 52 FLRA 46, 49
- FLSA
  - 63 FLRA 100, 103
- Raise anytime
  - 68 FLRA 841, 842
- No waiver for equitable remedies
  - 68 FLRA 960, 965

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The Back Pay Act (5 U.S.C. § 5596)  
**Requirements**

- Unjustified or unwarranted personnel action
  - Violation of applicable law, rule, regulation, or CBA
  - Includes governing agency-wide regs
- Resulting in loss of pay, allowances, or differentials
  - "Pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation ...."

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- Violation of law, rule, reg, CBA
  - Compare 56 FLRA 887, 888 with 68 FLRA 841, 842-43
- Agency-wide regs
  - 64 FLRA 922, 923
- Loss of pay . . .
  - 5 C.F.R. § 550.803
  - Accord 60 FLRA 202, 212

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The Back Pay Act  
**"Resulted in"**

- Causal connection necessary
  - Essential because backpay is make-whole remedy
- FLRA reviews for evidence of connection
  - Does not require particular words or phrases (such as "but for")
- No requirement to identify specific employees when award sufficiently identifies specific circumstances warranting backpay

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- Causal connection
  - 63 FLRA 646, 648
- FLRA review
  - 52 FLRA 938, 942
- No need to ID specific employees
  - 68 FLRA 718, 720

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The Back Pay Act  
**Recovery Period**

- Cannot exceed "a period beginning more than 6 years before the date of the filing of a timely appeal" (e.g., a grievance)
- Does not establish when period can end/total duration of recovery period

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- No more than 6 years
  - 5 U.S.C. § 5596(b)(4)
  - 60 FLRA 565, 570
- End of recovery period
  - 67 FLRA 384, 385
  - 60 FLRA 565, 570

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**Interest on Backpay**

**STATUTORY ENTITLEMENT**

- ◉ Begins: Date of Loss
- ◉ Ends: Date not more than 30 days before date on which paid

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- Statutory
  - 5 U.S.C. § 5596(b)(2)(A)
- Timing
  - 58 FLRA 447, 447
- Error to deny interest
  - 64 FLRA 906, 907

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**Attorney Fees**


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**Attorney Fees**

**Sources of Authority to Award**

- ◉ Primary: Back Pay Act, 5 U.S.C. § 5596
- ◉ Others:
  - FLSA
  - Privacy Act
  - Rehabilitation Act



Filing Exceptions with the Authority 7/18/2017 107

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Attorney Fees  
**Prerequisites I**

- The Back Pay Act requires that an award of fees be:
  - Awarded in conjunction with backpay award;
  - Reasonable and related to personnel action;
  - Awarded in accordance with standards established under 5 U.S.C. § 7701(g)

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64 FLRA 925, 928

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Attorney Fees  
**Prerequisites II**

- Standards established under 5 U.S.C. § 7701(g)
  - Prevailing party
  - Incurred by the employee
  - Warranted in the interest of justice
  - Reasonable amount

**Note:** Arbitrator must make specific findings supporting each pertinent statutory requirement

Filing Exceptions with the Authority 7/18/2017 109

- 64 FLRA 925, 928
- Specific findings
  - *But see* 70 FLRA 214, 215 (arbitrator adopted agency's brief)

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Attorney Fees  
**Standard of 7701(g)**

**Prevailing Party**

- Enforceable judgment on the merits
- Degree of success not a consideration

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- Enforceable judgment
  - 68 FLRA 120, 122
  - 65 FLRA 921, 922 (citing Buckhannon, 532 U.S. 598 (2001))
- Degree of success
  - 57 FLRA 784, 786

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**Attorney Fees  
Fees Incurred**

- Attorney-client relationship
- Legal services rendered
- Under certain circumstances, attorney fees may be awarded for the services of non-attorney representatives

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- Relationship & services rendered
  - 53 FLRA 1688, 1691
- Non-attorney reps
  - 63 FLRA 492, 493-94
  - 5 C.F.R. § 550.807(f)
    - fees for law clerks, law students, and paralegals assisting attorneys

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**Attorney Fees  
Interest of Justice**

**How can you meet § 7701(g)(1)'s standard?**

ALLEN CRITERIA      ?      THE STATUTE

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- Criteria may be reexamined
  - 69 FLRA 573
- Allen v. USPS, 2 M.S.P.R. 420, 434-35 (1980)
- Show under the Statute:
  - Service to federal workforce or
  - Benefit to public
    - 64 FLRA 925, 928

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**Attorney Fees  
Allen criteria**

- (1) Prohibited personnel practice
- (2) Clearly without merit/wholly unfounded or employee substantially innocent
- (3) Bad faith
- (4) Gross procedural error; OR
- (5) Agency knew or should have known would not prevail

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**Attorney Fees**  
***Allen 1***

**Prohibited personnel practice**

- 5 U.S.C. § 2302
- Distinct from “unjustified or unwarranted personnel action”

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64 FLRA 819, 821

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**Attorney Fees**  
***Allen 2***

- Clearly without merit/wholly unfounded
  - Examine competing interests of fault of employee and reasonableness of agency action
- Employee substantially innocent
  - Employee prevails on substantive rather than technical grounds on major charges
- Focal point is result of merits award

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- W/O merit/wholly unfounded
  - 68 FLRA 690, 691-92
  - 64 FLRA 925, 929
- Substantially innocent
  - 63 FLRA 317, 319-20
- Focus on merits award
  - 63 FLRA at 319

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**Attorney Fees**  
***Allen 3***

**Bad faith**

- Action brought to “harass” the employee
- Action brought to exert improper pressure on the employee to act in certain ways

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64 FLRA 925, 928

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Attorney Fees  
**Allen 4**

**Gross procedural error**

- Prolonged proceeding or severely prejudiced employees
- More than simple harmful error warranting reversal of agency action

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61 FLRA 582, 586

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Attorney Fees  
**Allen 5**

- Agency knew or should have known would not prevail
  - Analysis of agency evidence and agency conduct of investigation
- Focal point = reasonableness of agency actions in view of information available at the time of the action
- Penalty an aspect of merits; if penalty mitigated on evidence available to agency, and no new info presented at hearing, then agency knew or should have known

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- Analysis & Focal point
  - 65 FLRA 575, 578
- Penalty is aspect of merits
  - 66 FLRA 22, 24 & n.5

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Attorney Fees  
**Reasonable Amount**

- Billing rate
- Reasonable number of hours
- No explicit provision for interest on attorney fees

**NOTE:** Degree of success IS a consideration

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- Number of hours
  - 64 FLRA 1003, 1007-09
- No interest
  - 65 FLRA 54
- Degree of success matters
  - 65 FLRA 452, 454

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**Attorney Fees**  
**Procedural Notes**

- Petition for fees and opportunity to respond
- May resolve in merits award, but ...
- Back Pay Act jurisdiction
  - Doctrine of *functus officio* does not permit refusal to consider timely request
  - Arbitrator may resolve fee issue at any time during arbitration, or within reasonable period after award becomes "final and binding," or if the parties agree to a different period
- Requests for fees determined by "appropriate authority" as defined by 5 C.F.R § 550.807

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When arbitrator can resolve fee issue

- 67 FLRA 721, 721-22
- 67 FLRA 352, 352-53

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**Judicial Review  
of  
Authority Decisions**

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**Judicial Review**

- § 7123(a): FLRA decisions in arbitration cases reviewable only if the order involves a ULP
- Look at order - not award, not grievance
  - More than acknowledge ULP
  - Must necessarily implicate a statutory ULP even if no explicit discussion
- Conduct must actually have been characterized as a ULP

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- Congressional intent
  - 665 F.3d 1339, 1344-45 (D.C. Cir. 2012)
  - 507 F.3d 697, 698-700 (D.C. Cir. 2007)
- Look at order
  - 453 F.3d 500, 504 (D.C. Cir. 2006)
  - 507 F.3d 700
- Actually characterized as ULP
  - 824 F.2d 61, 66 (D.C. Cir. 1987)

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**Judicial Review**

- No jurisdiction where CBA was basis for arb's award and FLRA's review
- No automatic grant of jurisdiction when an agency claims order violates sovereign immunity
  - "Routine statutory and regulatory questions—in this case, the meaning of the 'shall not exceed' clause in the Back Pay Act and 'administrative error' in [the agency's] assignment policy—are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity."

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- No jurisdiction
  - 981 F.2d 1339, 1342-44 (D.C. Cir. 1993)
- Sovereign immunity claim not enough
  - 784 F.3d 821, 823-24 (D.C. Cir. 2015)

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**Judicial Review**

- Furthers Congressional interest in:
  - providing arbitration awards substantial finality
  - ensuring a single, uniform body of case law concerning ULPs
- Standard of review:
  - Arbitrary/capricious
  - Court will uphold remedial order for a ULP "unless it can be shown that the order is a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

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- Legislative history
  - 507 F.3d 697, 699-700 (D.C. Cir. 2007)
  - 824 F.2d 61, 63 (D.C. Cir. 1987)
  - 792 F.2d 25, 28-29 (2d. Cir. 1986)
- "Patent attempt . . ."
  - 647 F.3d 514, 517 (4th Cir. 2011) (quoting 910 F.2d 964, 968 (D.C. Cir. 1990) (en banc))

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**THE END**

**Questions, Feedback,  
&  
Thank You For  
Participating**

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