

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



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## Table of Contents

§ 1	<u>GRIEVANCES AND ARBITRATION</u>	1
1.1	<u>Statutory Requirements</u>	1
1.2	<u>Coverage of the Negotiated Grievance Procedure</u>	1
1.3	<u>Types of Grievances and the Negotiated Grievance Procedure</u>	4
	(a) <u>Unacceptable Performance and Serious Adverse Actions</u>	5
	(b) <u>Discrimination Cases Under Title VII of the Civil Rights Act of 1964</u>	6
	(c) <u>“Mixed Cases” Under 5 U.S.C. § 7702</u>	7
	(d) <u>Prohibited-Personnel-Practice Cases Under 5 U.S.C. § 2302</u>	7
	(e) <u>Grieving Unfair Labor Practices</u>	8
1.4	<u>General Guidance for Parties During the Arbitration Hearing</u>	9
§ 2	<u>AUTHORITY REVIEW OF ARBITRATION AWARDS</u>	11
2.1	<u>Introduction</u>	11
2.2	<u>Filing Exceptions and Oppositions</u>	11
	(a) <u>Who May File Exceptions</u>	11
	(b) <u>Time Limits for Filing Exceptions</u>	11
	(c) <u>Additional Requirements for Filing Exceptions</u>	14
	(d) <u>Examples of How to Calculate the Due Date for Filing Exceptions</u>	14
	(e) <u>Content of Exceptions</u>	19
	(f) <u>Oppositions</u>	20
	(g) <u>Requests for Expedited, Abbreviated Decisions</u>	21

(h)	<a href="#"><u>Alternative-Dispute-Resolution Assistance</u></a>	21
(i)	<a href="#"><u>Methods of Clarifying the Record</u></a>	21
2.3	<a href="#"><u>Interlocutory Appeals</u></a>	22
2.4	<a href="#"><u>Grounds for Review</u></a>	26
2.5	<a href="#"><u>Contrary to Law or Regulation</u></a>	27
(a)	<a href="#"><u>Grievance Precluded by Law</u></a>	28
(b)	<a href="#"><u>Monetary Remedies - Sovereign Immunity and Other Limitations</u></a>	31
(c)	<a href="#"><u>The Back Pay Act</u></a>	31
(d)	<a href="#"><u>Backpay with Interest</u></a>	32
(e)	<a href="#"><u>Attorney Fees</u></a>	34
(f)	<a href="#"><u>Management Rights</u></a>	42
(g)	<a href="#"><u>Status of Regulations</u></a>	47
2.6	<a href="#"><u>Private-Sector Grounds</u></a>	49
(a)	<a href="#"><u>Denial of a Fair Hearing</u></a>	49
(b)	<a href="#"><u>Arbitrator Bias</u></a>	50
(c)	<a href="#"><u>Incomplete, Ambiguous, or Contradictory Award</u></a>	51
(d)	<a href="#"><u>Arbitrator Exceeded Authority</u></a>	51
(e)	<a href="#"><u>Award Based on Nonfact (Challenges to Factual Findings)</u></a>	53
(f)	<a href="#"><u>Award Fails to Draw Its Essence from Agreement (Challenges to Contract Interpretation)</u></a>	54
(g)	<a href="#"><u>Public Policy</u></a>	55
2.7	<a href="#"><u>Challenges to Arbitrability Findings</u></a>	55

2.8	<a href="#"><u>Awards Based on Separate and Independent Grounds</u></a>	56
2.9	<a href="#"><u>Authority Practice with Regard to Deficient Awards</u></a>	57
§ 3	<a href="#"><u>COMPLIANCE WITH AWARDS &amp; JUDICIAL REVIEW</u></a>	58
3.1	<a href="#"><u>Compliance with Arbitration Award</u></a>	58
3.2	<a href="#"><u>Judicial Review</u></a>	59

## FOREWORD

The [Federal Labor Relations Authority](#)'s (FLRA's) three-member, decisional component (the [Authority](#)) has prepared this Guide. The FLRA, an independent agency of the executive branch of the federal government, administers the labor-relations program under the Federal Service Labor-Management Relations Statute<sup>1</sup> (the [Statute](#)) for federal agencies, federal employees, and the unions that represent those employees.

A primary responsibility of the Authority under the Statute is to resolve exceptions to arbitration awards that arise out of grievances filed by an employee, union, or agency. This Guide is designed to assist parties and arbitrators to understand the arbitration process and their rights and responsibilities under the Statute. We believe that an understanding of the statutory scheme will enhance arbitration as an effective and efficient means of dispute resolution.<sup>2</sup>

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.

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

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

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<sup>1</sup> [5 U.S.C. §§ 7101-7135](#).

<sup>2</sup> [Id. § 7101](#).

oppositions, file exceptions and oppositions using the Authority's electronic-filing ([eFiling](#)) system, and research Authority [decisions](#), which may be searched in a variety of ways, including by using search terms.

# § 1 GRIEVANCES AND ARBITRATION

## 1.1 Statutory Requirements

Employment in the federal government is subject to numerous statutory and regulatory requirements. As a result, in contrast to much 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 federal-sector collective-bargaining agreements (CBAs) must provide procedures for the settlement of grievances, including questions of “arbitrability” – in other words, whether an arbitrator has the authority to resolve the grievance – and the required procedures must provide for binding arbitration of any grievance not satisfactorily settled.<sup>3</sup>
- 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 NGP up to arbitration, the union is permitted to be present during grievance proceedings. And although an employee may personally file a grievance, an aggrieved employee may not be represented in the NGP by an attorney or a representative other than the union or a representative designated by the union.<sup>4</sup>
- The NGP must be fair and simple<sup>5</sup> and provide for expeditious processing.<sup>6</sup>

## 1.2 Coverage of the NGP

Sections [7121](#) and [7103\(a\)\(9\)](#) of the Statute establish the coverage and scope of an NGP. [Section 7103\(a\)\(9\)](#) broadly defines “grievance” as any complaint:

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

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<sup>3</sup> [5 U.S.C. § 7121\(a\)\(1\)](#).

<sup>4</sup> [Id. § 7121\(b\)\(1\)\(C\)\(ii\)-\(iii\)](#).

<sup>5</sup> [Id. § 7121\(b\)\(1\)\(A\)](#).

<sup>6</sup> [Id. § 7121\(b\)\(1\)\(B\)](#).

- (C) by any employee, labor organization, or agency concerning –
- (i) the effect or interpretation, or a claim of breach, of a [CBA];  
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, the NGP covers matters unless the parties negotiate to *exclude* them. The law also prohibits federal-sector NGPs from covering certain matters; this Guide discusses some of those legal exclusions [below](#).

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

- In the private sector, the NGP typically enforces terms and conditions of the parties' CBA. In the federal sector, the NGP more frequently enforces – and arbitrators therefore often interpret – not only CBAs, but also laws, regulations, and agency policies.
- In the private sector, although mandatory subjects of bargaining continue in effect after a bargaining agreement has expired, arbitration clauses do not continue while the parties are negotiating a new agreement because “arbitration is a matter of consent” that will “not be imposed upon parties beyond the scope of their agreement.”<sup>7</sup> In the federal sector, when a negotiated agreement expires, personnel policies, practices, and matters affecting working conditions continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute. These continuing policies, practices, and matters encompass the negotiated grievance and arbitration procedures, including the selection of an arbitrator. Furthermore, such negotiated procedures survive and remain in full effect not only following contract expiration, but even following the decertification of one exclusive representative and the installation of a new one.<sup>8</sup>
- In the private sector, arbitration awards are subject to appeal to the federal courts on very narrow grounds. In the federal sector, arbitration awards are subject to

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<sup>7</sup> *Indep. Union of Pension Emps. for Democracy & Justice*, [68 FLRA 999](#), 1004-05 (2015) (quoting *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, [501 U.S. 190](#), 200-01 (1991)).

<sup>8</sup> [Id. at 1004-05](#).

appeal (exceptions) to the Authority.<sup>9</sup> On exceptions, the Authority will consider whether the arbitrator properly considered and applied applicable law or regulation, and it will set aside or modify an award where the excepting party has demonstrated that the arbitrator failed to do so. Therefore, party representatives should advise arbitrators of applicable law, regulation, and policy, and they should provide accurate and complete reference materials to arbitrators. This Guide addresses other grounds for review [below](#).

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 the arbitrator finds a violation of law or contract, then:
  - The award should specify clearly which contractual provisions, laws, or regulations were violated. If the arbitrator finds a violation of a contract provision that looks similar to a legal provision – for example, a contract provision requiring bargaining – the arbitrator should state whether he or she interprets the contract provision as having the same meaning as, or a different meaning from, the legal provision.
  - The violation found should be encompassed within or related to the stated issue(s). Although the Authority gives arbitrators substantial deference to determine what issues were submitted to arbitration, that deference is not unlimited. For example, the Authority has found that an arbitrator exceeded her authority in a situation where the arbitrator: resolved an issue that was not included among stipulated issues; made no finding (and there was no claim) that it was necessary to address the resolved issue in order to resolve the stipulated issue; did not find that the resolved issue necessarily arose from the stipulated issue; and did not interpret the stipulation to include the resolved issue.<sup>10</sup>
- The remedy should not exceed the scope of the grievance and/or issues before the arbitrator.

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<sup>9</sup> [5 U.S.C. § 7122](#).

<sup>10</sup> *U.S. Dep't of Transp., FAA*, [64 FLRA 612](#), 613-14 (2010) (*DOT*).

- Example: If the issue addresses whether one employee should have been promoted, then the arbitrator must limit the remedy to that employee.<sup>11</sup>
- Example: If the arbitrator does not find a violation, then he or she may not award a remedy.<sup>12</sup>
- 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 the arbitrator’s factual findings.

### 1.3 Types of Grievances and the NGP

As [stated previously](#), [§ 7103\(a\)\(9\)](#) of the Statute broadly defines the term “grievance.” Thus, as a general matter, in the federal sector, NGPs are broad in scope and permit grievances over violations of not only CBAs but also laws, rules, and regulations affecting conditions of employment. As [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 NGPs.<sup>13</sup> In addition, as [stated previously](#) (and [discussed in further detail below](#)), the law excludes certain matters 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, 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 that bargaining-unit employees may use to resolve the grievance.<sup>14</sup>

If parties are not able to successfully resolve a grievance during the defined steps of the NGP, then either the union or the agency may invoke arbitration. Employees may not invoke arbitration.<sup>15</sup>

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

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<sup>11</sup> E.g., *U.S. DOJ, Exec. Office for Immigration Review, Bd. of Appeals*, [65 FLRA 657](#), 663-64 (2011) (EOIR) (Member Beck concurring); *U.S. EPA*, [57 FLRA 648](#), 651-52 (2001).

<sup>12</sup> 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).

<sup>13</sup> E.g., *AFGE, Local 3911*, [56 FLRA 480](#), 482 (2000).

<sup>14</sup> [5 U.S.C. § 7121\(a\)\(1\)](#).

<sup>15</sup> [Id. § 7121\(b\)\(1\)\(C\)\(iii\)](#).

(a) *Unacceptable Performance and Serious Adverse Actions*

These matters include unacceptable performance matters<sup>16</sup> and serious adverse actions.<sup>17</sup> Two broad categories of employees are relevant here.

The first group comprises employees who are employed in the ordinary civil-service system. Employees in this group (with the exception of certain employees, such as non-probationary, competitive-service employees) have the right, when faced with an unacceptable performance or serious adverse action, to choose either: (1) an appeal to the [Merit Systems Protection Board](#) (MSPB), which is an independent, quasi-judicial agency established by the Civil Service Reform Act of 1978<sup>18</sup> to adjudicate appeals by employees of serious adverse actions and performance-based actions; or (2) a grievance under the NGP.<sup>19</sup> 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\(c\)](#).<sup>20</sup> [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;

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<sup>16</sup> [Id. § 4303](#).

<sup>17</sup> [Id. § 7512](#) (suspensions that exceed 14 days, removals from the federal service, furloughs of 30 days or less, or reductions in grade or pay).

<sup>18</sup> [Pub. L. No. 95-454, 92 Stat. 1111 \(1978\)](#).

<sup>19</sup> [5 U.S.C. § 7121\(e\), \(f\)](#).

<sup>20</sup> [Id. § 7121\(e\)\(2\)](#).

- (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](#) (Federal Circuit) – *not* to the Authority.

The second group comprises federal employees who are *not* employed in the ordinary civil-service system. In this connection, some federal employees are employed in other personnel systems – for example, personnel systems that apply to the Federal Aviation Administration, the Securities and Exchange Commission, health-care professionals in the Department of Veterans Affairs covered by [Title 38](#) of the U.S. Code, and overseas teachers of the Department of Defense Dependents Schools.<sup>21</sup> 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; arbitration awards involving those actions are also *not* appealable to the Authority.

(b) *Discrimination Cases Under [Title VII of the Civil Rights Act of 1964](#)*

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 (possibly resulting in an appeal to the [Equal Employment Opportunity Commission](#) (EEOC)), or filing a grievance under the NGP.<sup>22</sup>

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.<sup>23</sup> The employee also retains the right to file a civil action in an appropriate U.S. District Court.<sup>24</sup>

In a discrimination case, the employee's choice of either the NGP or the EEO procedure is an election of remedies; the employee cannot pursue his or her claim

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<sup>21</sup> See, e.g., *U.S. Dep't of Transp., FAA*, [54 FLRA 235](#), 237-38 (1998).

<sup>22</sup> [5 U.S.C. § 7121\(d\)](#).

<sup>23</sup> *Id.*

<sup>24</sup> [29 C.F.R. § 1614.301](#).

under both procedures.<sup>25</sup> The employee exercises this choice when he or she either timely initiates an action under the statutory EEO procedure or timely files a grievance in writing, whichever event occurs first.<sup>26</sup> 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.

(c) *"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 from the federal service, furloughs of 30 days or less, or reductions in grade or pay) *and* the employee claims that the action was based on discrimination of the type prohibited by [any law that the EEOC administers](#). 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, you should carefully consult the applicable statutory and regulatory provisions, primarily: [5 U.S.C. § 7702](#); [5 C.F.R. part 1201, subpart E](#); and [29 C.F.R. part 1614, subpart C](#). But please note that arbitration awards that resolve these matters are *not* appealable to the Authority.<sup>27</sup>

(d) *Prohibited-Personnel-Practice Cases Under [5 U.S.C. § 2302](#)*

These are cases where an agency takes one of the personnel actions listed in [5 U.S.C. § 2302\(a\)\(2\)](#) against an employee, and the employee claims that the action was for one of the prohibited reasons set forth in [§ 2302\(b\)](#)<sup>28</sup> (other than prohibited employment discrimination listed in (b)(1)).<sup>29</sup> One example would be where an agency disciplines an employee based on reprisal for the employee's filing of a grievance, an appeal of an adverse action to the MSPB, or a complaint with the EEOC. Such a disciplinary action would be a prohibited personnel practice under [5 U.S.C. § 2302\(b\)\(9\)](#), which prohibits retaliation for, among other things, the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.

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<sup>25</sup> [5 U.S.C. § 7121\(d\)](#).

<sup>26</sup> *Id.*; e.g., *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, [69 FLRA 292](#), 296 (2016) (*Keyport*); *AFGE, Local 2145*, [61 FLRA 571](#), 573-74 (2006) (*Local 2145*) (portion of grievance barred by prior EEO filing); *U.S. DOJ, U.S. Marshals Serv.*, [23 FLRA 414](#), 417-18 (1986) (timely filing of formal EEO complaint indicates election of EEO process). Cf. *NTEU, Chapter 145*, [65 FLRA 898](#), 899-900, *recons. denied*, [65 FLRA 1015](#) (2011) (untimely EEO complaint did not bar grievance).

<sup>27</sup> See, e.g., *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, [65 FLRA 5](#), 6-7 (2010); *U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, [61 FLRA 476](#), 477-78 (2006).

<sup>28</sup> [5 U.S.C. § 2302\(b\)\(2\)](#).

<sup>29</sup> See, e.g., *Local 2145*, [61 FLRA at 574](#).

As with other categories of cases, if an employee believes that he or she has been subjected to a prohibited personnel practice, then he or she has several options available. He or she may: 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\(a\)\(1\)](#).<sup>30</sup> Once he or she chooses one of these procedures, he or she may not raise the matter under the other procedures. [Section 7121\(g\)\(4\) of the Statute](#) 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 employee 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](#).

(e) *Grieving ULPs*

As [mentioned previously](#), an aggrieved party also may raise an alleged ULP under the NGP (unless the parties have agreed to exclude it from coverage of the NGP). However, under [§ 7116\(d\)](#) of the Statute, the aggrieved party (which may be an employee, agency, or union) may not raise the issue under both the NGP and as a ULP charge filed with the FLRA’s [Office of the General Counsel](#).<sup>31</sup> If the aggrieved party already has filed a ULP charge, then the party cannot later file a grievance over the same issue(s), and an arbitrator may not issue an award regarding such a grievance. For an earlier-filed ULP charge to preclude the grievance, all of the following conditions must be met: (1) the issue that is the subject matter of the grievance is the same as the issue that was the subject matter of the ULP charge; (2) that issue was raised earlier under the ULP procedures; and (3) the selection of the ULP procedures was in the discretion of the aggrieved party.<sup>32</sup> An issue is “raised” within the meaning of [§ 7116\(d\)](#) when the grievance or the ULP charge is filed, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits.<sup>33</sup>

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<sup>30</sup> [5 U.S.C. § 7121\(g\)](#).

<sup>31</sup> [Id. § 7116\(d\)](#); see, e.g., *AFGE, Local 919*, [68 FLRA 573](#), 575-76 (2015) (Member Pizzella dissenting).

<sup>32</sup> E.g., *U.S. Dep’t of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, [63 FLRA 677](#), 679-80 (2009) (aggrieved parties differed); *U.S. Dep’t of Transp., FAA*, [62 FLRA 54](#), 55 (2007).

<sup>33</sup> E.g., *U.S. Dep’t of the Navy, Naval Air Eng’g Station, Lakehurst, N.J.*, [64 FLRA 1110](#), 1112 (2010).

## 1.4 General Guidance for Parties During the Arbitration Hearing

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

(a) *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 §§ [2425.4\(c\)](#) and [2429.5](#) of the Authority's Regulations make clear, the Authority generally will *not* consider anything that a party could have presented, but did not present, to the arbitrator.<sup>34</sup> This includes factual assertions, exhibits, legal arguments, requests for a specific remedy, and arguments against remedies that another party requests.<sup>35</sup>

- 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.

(b) *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.<sup>36</sup> However, also be aware that, in the absence of a stipulated issue, the Authority gives an arbitrator's formulation of the issue(s) substantial deference.<sup>37</sup>

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<sup>34</sup> E.g., SSA, Region V, [67 FLRA 155](#), 156 (2013); 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); U.S. Dep't of the Army, Army Tank-Auto. & Armaments Command, Warren, Mich., [61 FLRA 637](#), 639 (2006) (argument sufficiently raised in post-hearing brief).

<sup>35</sup> [5 C.F.R. § 2429.5](#); e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Oakdale, La., [63 FLRA 178](#), 179-80 (2009) (failing to raise management-right argument before arbitrator); AFGE Council 236, [63 FLRA 213](#), 214 (2009) (failing to raise ULP argument before arbitrator).

<sup>36</sup> E.g., U.S. Dep't of the Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office, [68 FLRA 992](#), 993-95 (2015) (Member Pizzella dissenting) (Interior); U.S. Dep't of the Interior, Nat'l Park Serv., [67 FLRA 489](#), 492 (2014); DOT, [64 FLRA at 613](#) (citation omitted).

<sup>37</sup> E.g., USDA, Forest Serv., Monongahela Nat'l Forest, [64 FLRA 1126](#), 1129-30 (2010); U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn., [52 FLRA 920](#), 924 (1997) (Eng'rs Memphis).

- 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 that necessarily arise from, the stipulated issue.<sup>38</sup>

(c) *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 that 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.<sup>39</sup>

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

(d) *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 that 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 that you want to enter into evidence and important points that you want to make. Determine ahead of time the remedies that 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 that you spend preparing for the arbitration hearing beforehand, the better and more convincing a case you will be able to present.

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<sup>38</sup> E.g., *U.S. DHS, U.S. CBP*, [64 FLRA 916](#), 919-20 (2010).

<sup>39</sup> E.g., *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, [68 FLRA 116](#), 117 (2014) (*VA Boston*) (finding that mere submission of agency handbook and policy to arbitrator, without explanation, did not sufficiently raise argument to arbitrator); *AFGE, Local 3937*, [64 FLRA 1113](#), 1114, *recons. denied*, [65 FLRA 21](#) (2010).

## § 2 AUTHORITY REVIEW OF ARBITRATION AWARDS

### 2.1 Introduction

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

### 2.2 Filing Exceptions and Oppositions

#### (a) *Who May File Exceptions*

Under [§ 7122\(a\)](#) of the Statute and [§ 2425.2\(a\)](#) of the Authority's Regulations, either "party" to an arbitration may file with the Authority exceptions to an arbitration award. The Authority's Regulations define "party" to include any person who participated as a party in a matter where an arbitration award was issued.<sup>40</sup> This means that, generally, only the agency and the union are entitled to file exceptions because they are the only parties to the arbitration proceeding. Thus, a grievant cannot file exceptions to an arbitration award unless the union authorizes him or her to do so.<sup>41</sup> In addition, as [discussed earlier](#) in this Guide, an award relating to a [§ 4303](#) or [§ 7512](#) matter is subject to review by 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.

#### (b) *Time Limits for Filing Exceptions*

Under [§ 7122\(b\)](#) of the Statute and [§ 2425.2\(b\)](#) of the Authority's Regulations, parties have 30 days to file exceptions, beginning the day after service of the award. The 30-day filing period is significant; the Authority may not waive or extend it, and must dismiss untimely filed exceptions.<sup>42</sup> However, the Authority has determined that

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<sup>40</sup> [5 C.F.R. § 2421.11\(b\)\(3\)\(ii\)](#).

<sup>41</sup> Compare *AFGE, Nat'l INS Council*, [69 FLRA 549](#), 550-51 (2016) (*Nat'l INS Council*) (union authorized grievant), and *AFGE, Local 3495*, [60 FLRA 509](#), 509 n.1 (2004) (same), with *U.S. Dep't of the Treasury, U.S. Customs Serv.*, [40 FLRA 1254](#), 1255 (1991) (union did not authorize grievant).

<sup>42</sup> [5 U.S.C. § 7122\(b\)](#); [5 C.F.R. § 2425.2\(b\)](#); *AFGE, Local 3961*, [68 FLRA 443](#), 443-44 (2015) (Member DuBester dissenting).

the 30-day filing period is not jurisdictional; therefore, the Authority may equitably toll the filing date for exceptions for some extraordinary circumstances.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>

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

- If the arbitrator serves the award by regular U.S. mail, then the date of service is the postmark date or, if there is no legible postmark, then the date of the award.<sup>46</sup>
- If the arbitrator serves the award by commercial delivery – such as FedEx or UPS – then the date of service is the date on which the arbitrator deposited the award with the commercial-delivery service, or, if that date is not indicated, the date of the award.<sup>47</sup>
- If the arbitrator serves the award by e-mail or fax, then the date of service is the date of transmission.<sup>48</sup>
- If the arbitrator serves the award by personal delivery, then the date of service is the date of personal delivery.<sup>49</sup>
- If the arbitrator serves the award by more than one method, then – with an exception [discussed below](#) – the first method is controlling.<sup>50</sup>

Consider the following principles in determining the due date for your exceptions to the award. Once you have determined the date of service based on the principles stated above, then count 30 *calendar* days (including weekends and holidays)

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<sup>43</sup> *U.S. Dep’t of VA Med. Ctr., Richmond, Va.*, [68 FLRA 231](#), 232-34 (2015) (Member Pizzella dissenting), *overruling U.S. Dep’t of HUD*, [27 FLRA 852](#), 853-54 (1987) and other Authority precedent to the contrary, e.g., *U.S. Dep’t of Commerce, Patent & Trademark Office, Arlington, Va.*, [60 FLRA 869](#), 877 (2005) (*PTO Arlington*).

<sup>44</sup> [5 C.F.R. § 2425.2\(c\)](#).

<sup>45</sup> *Id.*

<sup>46</sup> [Id. § 2425.2\(c\)\(1\)](#).

<sup>47</sup> [Id. § 2425.2\(c\)\(2\)](#).

<sup>48</sup> [Id. § 2425.2\(c\)\(3\)](#); see, e.g., *NTEU, Chapter 164*, [65 FLRA 901](#), 903 (2011) (*Chapter 164*).

<sup>49</sup> [5 C.F.R. § 2425.2\(c\)\(4\)](#).

<sup>50</sup> [Id. § 2425.2\(c\)\(5\)](#); see also [id. § 2429.22\(b\)](#).

beginning on the day *after*, not the day of, the date of service.<sup>51</sup> For example, if the award is served on May 1, then May 2 is counted as day 1, and May 31 is day 30. If day 30 is *not* a Saturday, Sunday, or federal legal holiday, then the exceptions are due at 5 p.m. Eastern Time (E.T.) – or midnight E.T., for exceptions that are eFiled – on that day.<sup>52</sup> (We note that the Authority cautions parties not to wait until the last minute to eFile documents, in case technical difficulties arise.) However, if day 30 *is* a Saturday, Sunday, or federal legal holiday, then the exceptions are not due until 5 p.m. E.T. – or midnight E.T., for exceptions that are eFiled (see cautionary note above) – on the next day that is *not* a Saturday, Sunday, or federal legal holiday.<sup>53</sup> Please note that, if you eFile your exceptions, then you may – but are not required to – file them on the Saturday, Sunday, or federal legal holiday.<sup>54</sup>

Once you have calculated that date, you must consider the method by which the arbitrator served the award on you. If the arbitrator appropriately (i.e., consistently with any agreement of the parties) served the award on you by e-mail, fax, or personal delivery, then your exceptions must be filed by 5 p.m. E.T. – or midnight E.T., for exceptions that are eFiled – on the date that you have calculated above.<sup>55</sup> However, if the award was served on you by regular mail or commercial delivery, then add 5 days to the date that you have calculated above.<sup>56</sup> If the resulting date is *not* a Saturday, Sunday, or federal legal holiday, then that date is your due date for filing exceptions; by contrast, if the resulting date *is* a Saturday, Sunday, or federal legal holiday, then your exceptions are not due until 5 p.m. E.T. on the next day that is not a Saturday, Sunday, or federal legal holiday.<sup>57</sup> Again, please note that if you eFile your exceptions, then you may – but are not required to – file them on the Saturday, Sunday, or federal legal holiday.<sup>58</sup>

Also, as [noted above](#), there is a special rule that applies if the arbitrator served you with the award by more than one method on the same day.<sup>59</sup> Specifically, if the arbitrator served the award by mail or commercial delivery, and on the same day, he or she also served it by e-mail, fax, or personal delivery, then you will *not* receive an additional 5 days to file your exceptions – even if the arbitrator postmarked the award or deposited it with the commercial-delivery service before he or she transmitted the e-mail or fax.<sup>60</sup> However, where an arbitrator indicates that a particular service is not the

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<sup>51</sup> [Id.](#) § 2425.2(b); see, e.g., Chapter 164, [65 FLRA at 903](#).

<sup>52</sup> [5 C.F.R. §§ 2429.21\(a\), 2429.24\(a\)](#).

<sup>53</sup> [Id.](#) §§ 2429.21(a), [2429.24\(a\)](#); see, e.g., Chapter 164, [65 FLRA at 903](#).

<sup>54</sup> [5 C.F.R. § 2429.24\(a\)](#).

<sup>55</sup> See [id.](#) §§ 2425.2(c)(3)-(4), [2429.24\(a\)](#).

<sup>56</sup> [Id.](#) § 2429.22(a); see also [id.](#) § 2425.2(c)(1)-(2).

<sup>57</sup> [Id.](#) §§ 2429.21(a), [2429.22\(a\)](#), [2429.24\(a\)](#).

<sup>58</sup> See [id.](#) § 2429.24(a).

<sup>59</sup> [Id.](#) § 2425.2(c)(5); see also [id.](#) § 2429.22(b).

<sup>60</sup> See [id.](#) § 2425.2(c)(5).

“official service,” then the Authority will allow the arbitrator’s designation of the “official service” to control the calculation of the due date for timely exceptions.<sup>61</sup>

(c) *Additional Requirements for Filing Exceptions*

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 filings to [Authority’s Office of Case Intake and Publication](#) by personal delivery, certified mail, first-class mail, commercial delivery, or eFiling; documents must be signed, unless eFiled);
- [Id. § 2429.25](#) (must submit one original plus four copies of anything filed, with certain exceptions, such as eFiled documents);
- [Id. § 2429.27](#) (must serve all counsel of record with anything filed and submit signed statement of service or, for eFiled documents, certify in the Authority’s eFiling system that you have completed such service); and
- [Id. § 2429.29](#) (must submit table of contents if document exceeds 10 double-spaced pages, with the exception of fillable forms in the eFiling system).

(d) *Examples of How to Calculate the Due Date for Exceptions*

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

Date of Service of Award: \_\_\_\_\_ date \_\_\_\_\_ + **30 Days** ([5 C.F.R. §§ 2425.2, 2429.21, 2429.22](#)) = date  
(day of week). But if the 30th day falls on a weekend or federal holiday, then advance  
to next workday = date (day of week). ([Id. § 2429.21\(a\)](#)). If service by mail or commercial  
delivery, then + **5 days** ([Id. §§ 2425.2, 2429.22](#)) = date (day of week). But, if weekend or federal  
holiday, then advance to next workday = date (day of week). ([Id. §§ 2429.21\(a\), 2429.22\(a\)](#)).

<sup>61</sup> U.S. DHS, U.S. CBP, [68 FLRA 1015](#), 1017-18 (2015) (Member Pizzella dissenting).

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 = federal holiday

Date of Service of Award: November 1 + **30 Days** ([5 C.F.R. §§ 2425.2, 2429.21, 2429.22](#)) = **December 1** ( Wednesday ). But if the 30th day falls on a weekend or federal holiday, then \_\_\_\_\_. ([Id. § 2429.21\(a\)](#)). If service by mail or commercial delivery, then + 5 days ([Id. §§ 2425.2, 2429.22](#)) = \_\_\_\_\_ ( \_\_\_\_\_ ). But, if weekend or federal holiday, then \_\_\_\_\_. ([Id. §§ 2429.21\(a\), 2429.22\(a\)](#)).

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.

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

11 = federal holiday

Date of Service of Award: October 12 + **30 Days** ([5 C.F.R. §§ 2425.2, 2429.21, 2429.22](#)) = November 11 ( Thursday/federal holiday - Veterans' Day ). But if the 30th day falls on a weekend or federal holiday, then November 12. ([Id. § 2429.21\(a\)](#)). If service by mail or commercial delivery, then + **5 days** ([Id. §§ 2425.2, 2429.22](#)) = **November 17** ( Wednesday ). But, if weekend or federal holiday, then \_\_\_\_\_ . ([Id. §§ 2429.21\(a\), 2429.22\(a\)](#)).

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.

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

11 = federal holiday

Date of Service of Award: October 12 + **30 Days** ([5 C.F.R. §§ 2425.2, 2429.21, 2429.22](#)) = November 11 (Thursday/federal holiday – Veterans’ Day). But if the 30th day falls on a weekend or federal holiday, then **November 12**. ([Id. § 2429.21\(a\)](#)). If service by mail or commercial delivery, then + **5 days** ([Id. §§ 2425.2, 2429.22](#)) = (                      ). But if weekend or federal holiday, then \_\_\_\_\_ . ([Id. §§ 2429.21\(a\), 2429.22\(a\)](#)).

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 = federal holidays

Date of Service of Award: November 19 + **30 Days** ([5 C.F.R. §§ 2425.2, 2429.21, 2429.22](#)) = December 19 (Sunday). But if 30th day falls on a weekend or federal holiday, then December 20. ([Id. § 2429.21\(a\)](#)). If service by mail or commercial delivery, then + **5 days** ([Id. §§ 2425.2, 2429.22](#)) = December 25 (Saturday/federal holiday - Christmas). But if weekend or federal holiday, then the next business day, **December 27**. ([Id. §§ 2429.21\(a\), 2429.22\(a\)](#)).

(e) *Content of Exceptions*

The Authority provides [optional forms](#) for filing exceptions, which can be found at [www.FLRA.gov](http://www.FLRA.gov). Also, parties may file exceptions using the Authority's [eFiling](#) system.<sup>62</sup> In addition to the previously discussed procedural requirements that an excepting party must meet, exceptions must contain certain information and documents.<sup>63</sup> Specifically, exceptions must be dated (unless eFiled), 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 U.S. Code and the Code of Federal Regulations);
- A statement regarding whether you are requesting an expedited, abbreviated decision under [§ 2425.7](#) (which is [described further below](#)), and, if so, arguments in support of such request;
- A legible copy of the arbitrator's award; and
- The arbitrator's name, mailing address, and, if available and authorized for use by the arbitrator, the arbitrator's e-mail address or facsimile number.

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.<sup>64</sup> 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.<sup>65</sup> Moreover, merely submitting evidence as part of the record at arbitration, without any explanation, is insufficient to

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<sup>62</sup> [5 C.F.R. § 2429.24\(f\)\(10\)](#).

<sup>63</sup> See *id.* [§ 2425.4](#).

<sup>64</sup> E.g., *Sheppard AFB*, [65 FLRA at 139 n.4](#).

<sup>65</sup> [5 C.F.R. §§ 2425.4\(c\), 2429.5](#).

raise an argument before the arbitrator.<sup>66</sup> In addition, an excepting party may not make an argument that is inconsistent with that party's arguments before the arbitrator.<sup>67</sup>

Further, 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.<sup>68</sup> (As noted above, the recognized grounds for review are [discussed later](#) in this Guide.)

(f) *Oppositions*

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

- [5 C.F.R. § 2429.21](#) (if last day of 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);
- [Id. § 2429.22](#) (five additional days to file if exceptions served by mail or commercial delivery); and
- [Id. § 2425.8](#) (time limit tolled if parties have agreed to use the Authority's [Collaboration and Alternative Dispute Resolution](#) 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](http://www.FLRA.gov). Also, parties may file oppositions using the Authority's [eFiling](#) system.<sup>69</sup> An opposition should address any arguments in the exceptions that the opposing party is disputing. If an excepting party has raised a matter that it could have raised, but did not raise, before the arbitrator, then the opposing party should inform the Authority of that. In addition, an opposing party should provide copies of any documents on which the opposing party relies, unless those documents were already provided with the exceptions or are documents that are readily accessible to the Authority (such as Authority decisions, decisions of federal courts, and current provisions of the U.S. Code and the Code of Federal Regulations). Further, if the excepting party has requested an expedited, abbreviated decision under [§ 2425.7](#) ([which is described further below](#)), then the

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<sup>66</sup> VA Boston, [68 FLRA at 117](#).

<sup>67</sup> See [5 C.F.R. §§ 2425.4\(c\), 2429.5](#); see also VA Boston, [68 FLRA at 118](#); NTEU, Chapter 26, [66 FLRA 650](#), 652 (2012).

<sup>68</sup> [5 C.F.R. § 2425.6\(e\)](#); see, e.g., U.S. Dep't of VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex., [66 FLRA 71](#), 73 (2011).

<sup>69</sup> [5 C.F.R. § 2429.24\(f\)\(11\)](#).

opposing party should state whether it supports or opposes such a decision and provide supporting arguments.<sup>70</sup>

(g) *Requests for Expedited, Abbreviated Decisions*

In arbitration cases that do not involve ULPs, the excepting party may request that the Authority provide an expedited, abbreviated decision.<sup>71</sup> 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.<sup>72</sup> Even absent a request by the excepting party, the Authority may issue expedited, abbreviated decisions in appropriate cases. For an example of an expedited, abbreviated decision see *AFGE, Local 3781*.<sup>73</sup>

(h) *Alternative-Dispute-Resolution Assistance*

The Authority encourages the parties to consider informal resolution of their disputes, and parties may request assistance from the Authority's Collaboration and Alternative Dispute Resolution Office (CADRO) to voluntarily attempt to resolve exceptions before or after an opposition is filed.<sup>74</sup> CADRO offers no-cost intervention and dispute-resolution services to quickly, informally, and confidentially help parties assess the strengths and weaknesses of their case, explore possible solutions, and usually resolve the case in ways that minimize risk and increase opportunities for mutual success. If the time for filing an opposition has not expired at the time the parties agree to use CADRO services, the Authority will toll the time limit for filing an opposition until the CADRO process is completed. Parties may email the CADRO staff at [CADRO@flra.gov](mailto:CADRO@flra.gov) or call (202) 218-7933 to request assistance or information.

(i) *Methods of Clarifying the Record*

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 of the arbitration proceedings); 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.<sup>75</sup>

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<sup>70</sup> See [id. § 2425.5](#).

<sup>71</sup> [Id. § 2425.7](#).

<sup>72</sup> See, e.g., *Nat'l INS Council*, [69 FLRA at 550](#) (denying request for an expedited, abbreviated decision).

<sup>73</sup> [69 FLRA 518](#) (2016).

<sup>74</sup> See [5 C.F.R. § 2425.8](#).

<sup>75</sup> See [id. § 2425.9](#).

## 2.3 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.<sup>76</sup> Consistent with this policy, the Authority generally will not grant interlocutory review of arbitration awards.<sup>77</sup> 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).<sup>78</sup>

An exception is considered an interlocutory appeal when it is filed before the arbitrator has issued a final award.<sup>79</sup> An award is final, for purposes of filing exceptions, when it completely resolves all of the issues submitted to arbitration.<sup>80</sup> Please note that 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.<sup>81</sup>

The mistaken belief that a final award is not yet final will not excuse a party’s failure to file timely exceptions.<sup>82</sup> Additionally, an arbitrator’s characterization of an award does not, by itself, demonstrate whether or not the award is final.<sup>83</sup>

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<sup>76</sup> *AFGE, Local 12*, [61 FLRA 355](#), 357 (2005) (*Local 12*).

<sup>77</sup> *E.g., U.S. Dep’t of VA, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, [61 FLRA 173](#), 175 (2005).

<sup>78</sup> *See, e.g., U.S. Dep’t of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, [68 FLRA 640](#), 641 (2015) (*Letterkenny*).

<sup>79</sup> *E.g., id.*

<sup>80</sup> *E.g., U.S. DOJ, Exec. Office for Immigration Review*, [67 FLRA 131](#), 131 (2013) (*Immigration Review*);

*U.S. Dep’t of the Treasury, IRS, Nat’l Distrib. Ctr., Bloomington, Ill.*, [64 FLRA 586](#), 589 (2010) (*IRS*).

<sup>81</sup> *E.g., U.S. Dep’t of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, [48 FLRA 938](#), 940 (1993) (*Customs*).

<sup>82</sup> *See, e.g., AFGE, Council 243*, [67 FLRA 96](#), 97 (2012) (where arbitrator rejected attorney-fee request in award and later clarified in email that he had done so, exceptions filed in response to email were untimely because period for filing exceptions to award had expired); *AFGE, Local 12*, [61 FLRA 628](#), 630 (2006) (where award resolved all issues submitted to arbitration, and arbitrator later issued letter that denied reconsideration and did not modify award, time period for filing exceptions began with service of award, not letter); *U.S. Dep’t of Commerce, Patent & Trademark Office*, [24 FLRA 835](#), 835-36 (1986) (when arbitrator issued final award, and later modified award in a way that did not give rise to the deficiencies alleged in the exceptions, exceptions were untimely because they were not filed within the requisite time period after service of the first award).

<sup>83</sup> *See, e.g., Local 12*, [61 FLRA at 357](#) (arbitrator’s statements indicating his intention to issue a “final” award regarding certain issues did not indicate that he intended the award to be a complete resolution of all issues presented); *AFGE, Local 1760*, [37 FLRA 1193](#), 1200 (1990) (although arbitrator characterized his award as an “[i]nterim [a]ward,” Authority found “it was clearly final”).

Where an arbitrator or the parties identify multiple issues, an arbitrator may bifurcate their resolution.<sup>84</sup> 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.<sup>85</sup> 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 completely resolve all of the issues submitted to arbitration.<sup>86</sup>

An award that disposes of all submitted issues is final even if the arbitrator did not reach the merits of each issue.<sup>87</sup> Thus, an arbitrator's finding that a grievance is not arbitrable may be a final award for purposes of filing exceptions.<sup>88</sup> Similarly, where the only issue submitted to arbitration is the question of arbitrability, exceptions to such an award are not interlocutory,<sup>89</sup> even if the parties contemplate further proceedings on the merits of the grievance before a different arbitrator.<sup>90</sup> However, an arbitrability ruling is not a final award, for purposes of filing exceptions, when issues regarding the merits are still pending before the same arbitrator.<sup>91</sup>

An award that postpones the determination of a submitted issue is not a final award.<sup>92</sup> So where an arbitrator possesses remedial authority but has not made a final disposition as to a remedy, an award is not final, and exceptions to such an award are interlocutory.<sup>93</sup> Further, where an arbitrator who has remedial authority declines to order a remedy, directing instead that the parties attempt to develop an appropriate remedy, the award is not a final award to which exceptions may be filed.<sup>94</sup>

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

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<sup>84</sup> See, e.g., *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, [64 FLRA 566](#), 567 (2010) (*Carswell*); *U.S. Dep't of the Interior, Bureau of Reclamation*, [59 FLRA 686](#), 687 (2004) (*Reclamation*).

<sup>85</sup> 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*).

<sup>86</sup> E.g., *Carswell*, [64 FLRA at 568](#); *Local 12*, [61 FLRA at 357](#); *HHS*, [57 FLRA at 926](#).

<sup>87</sup> *AFGE, Local 1242, Council of Prison Locals 33*, [62 FLRA 477](#), 479 (2008).

<sup>88</sup> *Id.*

<sup>89</sup> E.g., *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).

<sup>90</sup> *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range N.M.*, [67 FLRA 619](#), 620 (2014) (*White Sands*) (citing *U.S. EPA, Region 2*, [59 FLRA 520](#), 524 (2003)).

<sup>91</sup> E.g., *U.S. Dep't of Transp., FAA*, [62 FLRA 344](#), 347 (2008); *Army*, [16 FLRA at 830](#).

<sup>92</sup> E.g., *Immigration Review*, [67 FLRA at 131](#) (citing *AFGE, Local 12*, [38 FLRA 1240](#), 1246 (1990); *U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, [58 FLRA 356](#), 357 (2003) (*Navajo Area*)); *U.S. DOL, Bureau of Labor Statistics*, [65 FLRA 651](#), 653-54 (2011).

<sup>93</sup> E.g., *Letterkenny*, [68 FLRA at 641](#); *IRS*, [64 FLRA at 589](#).

<sup>94</sup> E.g., *Navajo Area*, [58 FLRA at 357](#); *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. GPO, 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).

would be appropriate, the award was not final.<sup>95</sup> 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.<sup>96</sup> Similarly, an award was not final where the arbitrator found the record inadequate or insufficient to determine and effect an appropriate remedy.<sup>97</sup> By contrast, an award *was* final where an arbitrator outlined a procedure by which he would hear testimony by representative employees regarding loss of pay, even though he had not yet ordered further proceedings to determine the amounts.<sup>98</sup>

Arbitrators often retain jurisdiction for a period of time to resolve questions or problems that might arise concerning their awards; this does not render their awards interlocutory or extend the time limit for filing exceptions.<sup>99</sup> 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.<sup>100</sup> Such an award is final for purposes of filing exceptions because, while the award may leave room for further disputes about compliance, it does not indicate that the arbitrator or parties contemplate the introduction of some new measure of damages.<sup>101</sup> And an arbitrator's retention of jurisdiction in order to resolve questions regarding attorney fees does not preclude a party from filing exceptions to an underlying award.<sup>102</sup>

Where a party asks an arbitrator to clarify his or her award, and the arbitrator responds by modifying the original award, the time limit for filing exceptions to the modified award begins upon service of that modified award on the excepting party.<sup>103</sup> 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.<sup>104</sup>

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<sup>95</sup> E.g., *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, [58 FLRA 358](#), 359 (2002).

<sup>96</sup> E.g., *Phila. Naval Shipyard*, [33 FLRA 868](#), 868-69 (1989).

<sup>97</sup> E.g., *IRS*, [64 FLRA at 589-90](#); *U.S. DOD, Army & Air Force Exch. Serv.*, [38 FLRA 587](#), 587-88 (1990).

<sup>98</sup> *U.S. DHS, U.S. Citizenship & Immigration Servs.*, [68 FLRA 1074](#), 1075, 1076 (2015) (*Immigration Servs.*).

<sup>99</sup> *Portsmouth Naval Shipyard*, [15 FLRA 181](#), 182 (1984).

<sup>100</sup> E.g., *NTEU, Chapter 164*, [67 FLRA 336](#), 337 (2014) (*NTEU 164*) (citing *U.S. DHS, ICE*, [66 FLRA 880](#), 883 (2012)); *Cong. Research Emps. Ass'n, IFPTE, Local 75*, [64 FLRA 486, 489-90](#) (2010) (*CREA*); *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).

<sup>101</sup> E.g., *NTEU 164*, [67 FLRA at 337](#); *Local 75*, [64 FLRA at 489-90](#); *Kirtland*, [62 FLRA at 123](#).

<sup>102</sup> E.g., *USDA, Rural Dev., Wash., D.C.*, [60 FLRA 527](#), 528 n.2 (2004).

<sup>103</sup> E.g., *U.S. DOL, Wash., D.C.*, [59 FLRA 131](#), 132 (2003).

<sup>104</sup> E.g., *U.S. Customs Serv., Region I, Boston, Mass.*, [15 FLRA 816](#), 817 (1984).

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.<sup>105</sup>

A plausible jurisdictional defect means that, “as a matter of law,” the arbitrator did not have the power to issue the award.<sup>106</sup> In this connection, generally, the jurisdictional issues considered on interlocutory appeal are those that arise pursuant to statute.<sup>107</sup> For example, in *U.S. DOL*,<sup>108</sup> the Authority modified an award after considering an interlocutory appeal that claimed that the arbitrator lacked jurisdiction to resolve a classification matter, under [5 U.S.C. § 7121\(c\)\(5\)](#). By contrast, in *U.S. Department of the Treasury, BEP, Western Currency Facility, Fort Worth, Texas*,<sup>109</sup> the Authority dismissed an interlocutory appeal because the claimed jurisdictional defect arose solely from the parties’ agreement. Further, a claim that an arbitrator had a financial interest in presiding over a protracted merits hearing was not sufficient to raise a plausible jurisdictional defect.<sup>110</sup>

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.<sup>111</sup> Specifically, the exceptions must present a “credible claim” that the arbitrator lacked jurisdiction as a matter of law.<sup>112</sup>

Moreover, resolving the exceptions must “advance the ultimate disposition” of the case, which means that granting interlocutory review “would end the litigation.”<sup>113</sup> Where the favorable resolution of an excepting party’s interlocutory appeal would not resolve the parties’ dispute, interlocutory exceptions have been dismissed without consideration of the merits of those exceptions.<sup>114</sup>

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<sup>105</sup> E.g., *Carswell*, [64 FLRA at 567](#).

<sup>106</sup> *Keyport*, [69 FLRA at 293](#) (quoting *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, [66 FLRA 848](#), 851 (2012) (*Pope AFB*)); *Immigration Review*, [67 FLRA at 132](#) (citing *Pope AFB*, [66 FLRA at 851](#)).

<sup>107</sup> E.g., *Keyport*, [69 FLRA at 293](#) (§ 7121(d) bar to grievance).

<sup>108</sup> [63 FLRA 216](#), 217-18 (2009).

<sup>109</sup> [58 FLRA 745](#), 746 (2003).

<sup>110</sup> *Letterkenny*, [68 FLRA at 641](#).

<sup>111</sup> *Wapato*, [55 FLRA at 1232](#).

<sup>112</sup> *Immigration Review*, [67 FLRA at 132](#) (citing *Pope AFB*, [66 FLRA at 851](#)).

<sup>113</sup> *Keyport*, [69 FLRA at 293](#) (citing *U.S. DHS, U.S. Citizenship & Immigration Servs.*, [65 FLRA 723](#), 725 (2011)).

<sup>114</sup> E.g., *Reclamation*, [59 FLRA at 688](#).

Please note that, although parties *may* file interlocutory exceptions if these requirements are met, they are not *required* to do so.<sup>115</sup> Instead, they may wait until the arbitrator issues a final award before they file their exceptions.<sup>116</sup>

## 2.4 Grounds for Review

[Section 7122\(a\)](#) of the Statute provides, in pertinent part:

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

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

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

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

In addressing the grounds on which an arbitration award can be found deficient, it is important to recognize the context of the Authority’s review. Although Congress specifically provided for Authority review of arbitration awards, Congress also made clear that the scope of that review is very limited.<sup>117</sup> Thus, the Authority gives arbitrators substantial deference and will set aside or modify their awards only when excepting parties establish that the awards are deficient on one of the specific grounds set forth in [§ 7122\(a\)](#) of the Statute. These grounds, which are also listed in [5 C.F.R. § 2425.6](#), are discussed below.

Under [§ 2425.6](#), an exception is “subject to dismissal or denial if: . . . [t]he excepting party fails to raise and support” the grounds listed in [§ 2425.6\(a\)-\(c\)](#), “or otherwise fails to demonstrate a legally recognized basis for setting aside the award.”<sup>118</sup>

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<sup>115</sup> E.g., *NTEU, Chapter 103*, [66 FLRA 416](#), 417 (2011).

<sup>116</sup> E.g., *id.*

<sup>117</sup> See [H.R. Rep. No. 95-1717](#), at 153 (1978) (conf. rep.), reprinted in [1978 U.S.C.C.A.N. 2860](#), 2887 (Authority is authorized to review awards only “on very narrow grounds”).

<sup>118</sup> [5 C.F.R. § 2425.6\(e\)\(1\)](#).

In accordance with [§ 2425.6](#), the Authority will not construe parties' exceptions as raising grounds that the exceptions do not raise.<sup>119</sup>

The recognized grounds for review are discussed below.

## 2.5 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.<sup>120</sup> 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 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](#)).<sup>121</sup> As [discussed earlier](#), an arbitrator in the federal sector generally may not 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.<sup>122</sup>

Please note that when an arbitrator has interpreted a CBA, rather than a law, he or she is not required to apply standards that apply to the interpretation of the law.<sup>123</sup> In that situation, the Authority will deny exceptions arguing that the arbitrator misapplied such standards.<sup>124</sup> However, there is an exception to this principle where the CBA provisions at issue "mirror," or are intended to be interpreted in the same manner as, the Statute.<sup>125</sup> In that circumstance, when the Authority reviews exceptions to the arbitrator's award, the Authority applies the standards that apply to the interpretation of the Statute.<sup>126</sup> And if the excepting party demonstrates that the award is contrary to those standards, then the Authority sets aside the award.<sup>127</sup>

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<sup>119</sup> E.g., *AFGE, Local 3955, Council of Prison Locals 33*, [65 FLRA 887](#), 889 (2011) (Member Beck dissenting in part).

<sup>120</sup> E.g., *U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Fla.*, [65 FLRA 908](#), 909-10 (2011) (*Eglin AFB*).

<sup>121</sup> E.g., *AFGE, Local 1164*, [66 FLRA 74](#), 77-78 (2011).

<sup>122</sup> See, e.g., *U.S. Dep't of the Treasury, IRS*, [65 FLRA 369](#), 371-72 (2010) (*Treasury, IRS*) (award contrary to grade- and pay-retention regulations); see also *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, [67 FLRA 382](#), 382-83 (2014) (award contrary to Federal Travel Regulation).

<sup>123</sup> E.g., *AFGE, Local 3448*, [67 FLRA 73](#), 75 (2012).

<sup>124</sup> See, e.g., *Eglin AFB*, [65 FLRA at 909-10](#).

<sup>125</sup> E.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [66 FLRA 978](#), 980 (2012) (*FCC Lompoc*). Cf. *AFGE, Local 2152*, [69 FLRA 149](#), 151 (2015) (*Local 2152*) (while arbitrators are required to apply statutory standards when resolving an alleged ULP, they need not do so if they are interpreting a CBA provision that does not "mirror" the Statute).

<sup>126</sup> *FCC Lompoc*, [66 FLRA at 981](#).

<sup>127</sup> E.g., *id.* Cf. *AFGE, Local 3974*, [67 FLRA 306](#), 308-10 (2014) (remanding award where it was unclear, among other things, whether arbitrator resolved contractual or statutory bargaining issues).

(a) *Grievance Precluded by Law*

As [discussed earlier](#), all matters covered by the broad statutory definition of “grievance” are within the coverage of a NGP, except for matters that are excluded by the parties’ CBA or by law. Four different categories of legal exclusions from the NGP are discussed here.

- *Category 1 – Matters Excluded Under [§ 7121\(c\)](#) of the Statute*

[Section 7121\(c\)](#) of the Statute lists several types of matters that may not be raised under NGPs.

First, [§ 7121\(c\)\(1\)](#) provides that NGPs may not cover grievances concerning claimed violations of [5 U.S.C. §§ 7321-7326](#) – commonly referred to as the “Hatch Act.”

Second, [§ 7121\(c\)\(2\)](#) provides that NGPs may not cover grievances concerning retirement, life insurance, or health insurance.<sup>128</sup> For example, the Authority has found that NGPs may not cover grievances involving sick-leave “buy back” available to employees only upon retirement<sup>129</sup> and involving creditable hours and retirement eligibility.<sup>130</sup> However, the Authority has found that NGPs may cover grievances involving voluntary-separation-incentive pay<sup>131</sup> and involving an employee’s status as an intermittent, rather than a part-time, employee.<sup>132</sup>

Third, [§ 7121\(c\)\(3\)](#) provides that NGPs may not cover grievances concerning suspensions or removals relating to national-security matters under [5 U.S.C. § 7532](#).<sup>133</sup>

Fourth, [§ 7121\(c\)\(4\)](#) provides that NGPs may not cover grievances concerning any examination, certification, or appointment. The Authority has defined: (1) “examination” as the process by which an applicant’s qualification for employment is determined before the applicant is considered as a candidate for appointment;<sup>134</sup> (2) “certification” as the process by which the Office of Personnel Management submits certificates of a list of eligibles from a register to appointing officials so that the eligibles may be considered for appointment;<sup>135</sup> and (3) “appointment” as referring to the action that takes place at the time an individual is initially hired into federal service.<sup>136</sup> Thus, these three terms apply to matters regarding an individual’s initial entry into federal

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<sup>128</sup> E.g., *MSPB Prof'l Ass'n*, [61 FLRA 650](#), 652 (2006) (*MSPBPA*).

<sup>129</sup> *U.S. Dep't of Transp., FAA*, [59 FLRA 579](#), 581 (2004) (then-Member Pope dissenting).

<sup>130</sup> *NATCA, MEBA, AFL-CIO*, [51 FLRA 204](#), 208 (1995).

<sup>131</sup> E.g., *MSPBPA*, [61 FLRA at 652](#).

<sup>132</sup> E.g., *Prof'l Airways Sys. Specialists*, [57 FLRA 415](#), 416-17 (2001).

<sup>133</sup> E.g., *AFGE, Local 1013*, [60 FLRA 712](#), 714 n.3 (2005).

<sup>134</sup> E.g., *NFFE, Local 1636*, [48 FLRA 511](#), 514 (1993).

<sup>135</sup> E.g., *id.*

<sup>136</sup> E.g., *NFFE, Local 2010*, [55 FLRA 533](#), 534 (1999).

service – not matters regarding an agency’s hiring (or not hiring) of an individual who already is a federal employee.<sup>137</sup>

Finally, [§ 7121\(c\)\(5\)](#) provides that NGPs may not cover grievances concerning the classification of any position that does not result in the reduction in grade or pay of an employee. The Authority has held that where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by a grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of [§ 7121\(c\)\(5\)](#).<sup>138</sup> In addition, a grievance concerns classification if it contends that the grievant’s permanent position warrants a change in its journeyman level or promotion potential.<sup>139</sup>

In contrast, the Authority has found that grievances or arbitration awards did *not* involve classification under [§ 7121\(c\)\(5\)](#) where they concerned, for example: allegations of a right to be placed in a previously classified position;<sup>140</sup> allegations that an agency failed to promote a grievant under a competitive procedure;<sup>141</sup> arbitrators’ determinations that grievants were entitled to career-ladder, temporary, or other noncompetitive promotions based on previously classified duties;<sup>142</sup> challenges to delays in receiving career-ladder promotions;<sup>143</sup> challenges to how employees advance within established career ladders;<sup>144</sup> the duty to bargain over the impact and implementation of the reclassification of positions;<sup>145</sup> the accuracy of a job description;<sup>146</sup> and arguments regarding the pay step that an employee should have received upon promotion.<sup>147</sup>

Please note, however, that even if a grievance does not involve classification, an award will be found contrary to [§ 7121\(c\)\(5\)](#) if an arbitrator awards reclassification as a remedy.<sup>148</sup>

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<sup>137</sup> E.g., U.S. Dep’t of VA, *James N. Quillen VA Med. Ctr., Mountain Home, Tenn.*, [69 FLRA 144](#), 145 (2015).

<sup>138</sup> E.g., U.S. Dep’t of the Navy, *Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, [67 FLRA 542, 544](#) (2014) (*Marine Corps*).

<sup>139</sup> E.g., U.S. Dep’t of the Army, *Womack Army Med. Ctr., Fort Bragg, N.C.*, [65 FLRA 1017](#), 1020 (2011) (*Womack*).

<sup>140</sup> E.g., *id.*

<sup>141</sup> E.g., *id.*

<sup>142</sup> E.g., *id.*; see also U.S. Dep’t of VA, *Med. Ctr., Richmond, Va.*, [69 FLRA 427, 428-29](#) (2016) (award involving temporary promotion).

<sup>143</sup> E.g., *Womack*, [65 FLRA at 1020](#).

<sup>144</sup> E.g., U.S. DOJ, *U.S. Marshals Serv.*, [66 FLRA 531](#), 535 (2012).

<sup>145</sup> *Marine Corps*, [67 FLRA at 544](#).

<sup>146</sup> AFGC, *Local 953*, [68 FLRA 644, 647](#) (2015) (*Local 953*).

<sup>147</sup> E.g., U.S. Dep’t of VA, *Reg’l Office, Winston-Salem, N.C.*, [66 FLRA 34](#), 39 (2011) (*VA Winston-Salem*).

<sup>148</sup> E.g., U.S. Dep’t of HUD, [65 FLRA 433](#), 435-36 (2011).

- *Category 2 – Certain Negotiability Issues*

A negotiability issue under [§ 7117](#) of the Statute 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. Parties may not use NGPs to resolve negotiability issues that the Authority has not previously ruled on; [§ 7105\(a\)\(2\)\(E\)](#) of the Statute provides that only the Authority may resolve those issues. Thus, unless the Authority already has resolved the negotiability issue that is raised before the arbitrator, the arbitrator may not resolve it, either in the guise of a grievance or in the resolution of a bargaining impasse.<sup>149</sup> However, where a grievance involves a ULP, and resolving that ULP requires a negotiability determination, the arbitrator may make that determination.<sup>150</sup>

For more information regarding negotiability, please see the Authority's [Guide to Negotiability Under the Statute](#).

- *Category 3 – Questions Regarding Bargaining-Unit Status*

Arbitrators may not resolve questions concerning whether employees are included in a bargaining unit.<sup>151</sup> As a consequence, whenever a question has been raised regarding a grievant's bargaining-unit status, an arbitrator may not address the merits of the grievance. In that situation, parties can place the grievance in abeyance pending the resolution of the employee's unit status.<sup>152</sup> However, the Authority has advised that there is no unit-status question when the Authority has already determined that the grievant or the grievant's position is in the unit and when, in making that determination, the Authority rejected the basis on which the agency contests the grievability of the grievance.<sup>153</sup> In these circumstances, an arbitrator may not resolve the grievance.

- *Category 4 - Legal Authorities Outside the Statute*

Legal authorities outside the Statute sometimes preclude NGPs from covering certain grievances.<sup>154</sup> Moreover, based on the U.S. Supreme Court's (Supreme Court's)

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<sup>149</sup> E.g., *AFGE, AFL-CIO, Dep't of Educ. Council of AFGE Locals*, [42 FLRA 1351](#), 1353-55 (1991).

<sup>150</sup> E.g., *NTEU*, [61 FLRA 729](#), 732-33 (2006).

<sup>151</sup> E.g., *U.S. Small Bus. Admin.*, [32 FLRA 847](#), 852 (1988) (SBA), *recons. granted as to other matters*, [36 FLRA 155](#), 161 (1990); *U.S. Dep't of VA, Med. Ctr., Coatesville, Pa.*, [56 FLRA 966](#), 969 (2000) (VA Coatesville).

<sup>152</sup> E.g., *VA Coatesville*, [56 FLRA at 969](#).

<sup>153</sup> E.g., *SBA*, [32 FLRA at 854](#).

<sup>154</sup> See, e.g., *AFGE, Local 1513*, [52 FLRA 717](#), 721 (1996) (CBAs may not contain provisions that would subject disputes over compliance with [Office of Management and Budget Circular A-76](#) to the NGP); *AFGE, Local 2250*, [51 FLRA 52](#), 54 (1995) (under [5 U.S.C. § 5366](#), termination of employee's grade- and pay-retention benefits is not grievable under NGP).

decision in *Department of the Navy v. Egan (Egan)*,<sup>155</sup> arbitrators may not review the merits of agencies' security-clearance determinations. However, the Authority has held that *Egan* does not prohibit grievances that raise issues that do require a review of the security-clearance determinations.<sup>156</sup>

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.

(b) *Monetary Remedies – Sovereign Immunity and Other Limitations*

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, under the doctrine of "sovereign immunity," there is no right to non-equitable monetary remedies against a U.S. government agency unless Congress has waived sovereign immunity in a statute.<sup>157</sup> Further, the federal government may not pay non-equitable monetary remedies that exceed statutory and regulatory entitlements, even if they agree to do so in a CBA.<sup>158</sup> And any federal agency's disbursement of appropriated funds must be authorized by statute.<sup>159</sup>

The Statute is not a waiver of sovereign immunity for monetary remedies.<sup>160</sup> Thus, in order for an arbitrator to award non-equitable monetary remedies, he or she must have some basis in law for doing so.<sup>161</sup> A frequently used basis is the [Back Pay Act](#).<sup>162</sup> Please note that the [U.S. Court of Appeals for the District of Columbia Circuit](#) (D.C. Circuit) has held, however, that routine statutory and regulatory questions regarding the Back Pay Act's application do not raise sovereign-immunity issues.<sup>163</sup>

(c) *The [Back Pay Act](#)*

The Back Pay Act (BPA)<sup>164</sup> provides for the recovery of backpay (with interest) and attorney fees. These types of remedies are discussed separately below.

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<sup>155</sup> [484 U.S. 518](#), 526-34 (1988).

<sup>156</sup> E.g., *U.S. Nuclear Regulatory Comm'n*, [65 FLRA 79](#), 83 (2010).

<sup>157</sup> E.g., *U.S. Dep't of Transp., FAA, Detroit, Mich.*, [64 FLRA 325](#), 328 (2009) (*FAA Detroit*).

<sup>158</sup> E.g., *U.S. DHS, CBP*, [67 FLRA 107](#), 109-110 (2013) (*DHS CBP*).

<sup>159</sup> E.g., *U.S. Dep't of HHS, Wash., D.C.*, [68 FLRA 239](#), 241 (2015).

<sup>160</sup> E.g., *FAA Detroit*, [64 FLRA at 329](#).

<sup>161</sup> E.g., *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, [68 FLRA 960](#), 963 (2015) (citing *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, [61 FLRA 366](#), 370 (2005)); *DHS CBP*, [67 FLRA at 110](#).

<sup>162</sup> See [5 U.S.C. § 7122\(b\)](#) (citing [5 U.S.C. § 5596](#)).

<sup>163</sup> *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, [784 F.3d 821](#), 823 (D.C. Cir. 2015) (*Scobey*); see also *U.S. DHS, U.S. CBP*, [68 FLRA 807](#), 809 (2015).

<sup>164</sup> [5 U.S.C. § 5596](#)

(d) *Backpay with Interest*

Under the [BPA](#), an arbitrator may award backpay when he or she finds: (1) an unjustified or unwarranted personnel action; and (2) that action directly resulted in the withdrawal of “pay, allowances, or differentials.”<sup>165</sup>

A violation of an applicable law, rule, regulation, or CBA provision is an unjustified or unwarranted personnel action.<sup>166</sup> This includes “governing” agency regulations.<sup>167</sup> As [discussed further below](#), agency regulations “govern” only when they do not conflict with provisions of an applicable CBA.<sup>168</sup>

As for whether the unjustified or unwarranted personnel action directly resulted in the withdrawal of “pay, allowances, or differentials,”<sup>169</sup> the quoted term is defined as “pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation.”<sup>170</sup> Any loss that does not meet this definition may not provide the basis for an award of backpay.<sup>171</sup> In this regard, where there is no statute or regulation permitting the backpay remedy, the Authority has set aside the remedy.<sup>172</sup> And where there was no finding that an employee’s compensation actually decreased, the Authority has found that backpay was not permitted.<sup>173</sup>

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 – in other words, 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.<sup>174</sup>

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<sup>165</sup> E.g., *FAA Detroit*, [64 FLRA at 329](#).

<sup>166</sup> E.g., *AFGE, Local 1592*, [64 FLRA 861](#), 861-62 (2010).

<sup>167</sup> E.g., *U.S. Dep’t of Transp., FAA*, [64 FLRA 513](#), 515 (2010) (*FAA*); see also *U.S. DHS, U.S. CBP*, [69 FLRA 19](#), 21 (2015) (setting aside award of backpay where there was no finding of an unjustified or unwarranted personnel action); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, [68 FLRA 151](#), 152 (2014) (Member DuBester dissenting), *recons. denied* [68 FLRA 716](#) (2015) (*FCC Pollock*) (same); *U.S. Dep’t of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, [67 FLRA 342](#), 343 (2014) (Member Pizzella concurring) (same).

<sup>168</sup> E.g., *EOIR*, [65 FLRA at 660](#) (Member Beck concurring).

<sup>169</sup> [5 U.S.C. § 5596](#).

<sup>170</sup> [5 C.F.R. § 550.803](#); see also *AFGE, Local 342*, [69 FLRA 278](#), 279 (2016) (Member DuBester concurring); *U.S. DHS, CBP*, [67 FLRA at 110](#).

<sup>171</sup> E.g., *FAA Detroit*, [64 FLRA at 329](#).

<sup>172</sup> *DHS CBP*, [67 FLRA at 110](#) (citing *U.S. Dep’t of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, [60 FLRA 202](#), 212 (2004); *FAA Detroit*, [64 FLRA at 329](#); *U.S. Dep’t of Transp., FAA, Salt Lake City, Utah*, [63 FLRA 673](#), 676 (2009)).

<sup>173</sup> E.g., *Immigration Servs.*, [68 FLRA at 1077](#).

<sup>174</sup> E.g., *AFGE, Council of Prison Locals, Local 4052*, [68 FLRA 38](#), 43-44 (2014) (*Local 4052*); *U.S. Dep’t of Transp., FAA*, [64 FLRA 922](#), 923 (2010).

When an arbitrator finds that these requirements are met, the arbitrator must award backpay; a failure to do so is contrary to the BPA.<sup>175</sup>

One common example of a backpay remedy is a monetary remedy for a missed overtime opportunity. In this regard, if an agency improperly (for example, in violation of a CBA) denies an employee the opportunity to work overtime, the employee may recover backpay – despite the fact that he or she did not actually work the overtime.<sup>176</sup>

Further, the Authority has addressed the meaning of [§ 5596\(b\)\(4\)](#) of the BPA, which provides:

The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or [CBA] under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.<sup>177</sup>

The Authority has held that the purpose of [§ 5596\(b\)\(4\)](#) is to place an outermost time limit on backpay awards, while allowing for a shorter limitations period when authorized by the applicable law, rule, regulation, or agreement under which the unjustified or unwarranted personnel action is found.<sup>178</sup> In other words, [§ 5596\(b\)\(4\)](#) establishes the earliest date from which an award of backpay may accrue.<sup>179</sup>

Finally, under the BPA, “interest must be paid” on backpay awards.<sup>180</sup> Therefore, if an arbitrator awards backpay but fails to award interest, and a party excepts to that failure, the Authority will modify the arbitrator’s award to provide for interest.<sup>181</sup>

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<sup>175</sup> E.g., *NTEU 164*, [67 FLRA at 338](#) (citing *NTEU, Chapter 231*, [66 FLRA 1024](#), 1026-27 (2012); *U.S. Dep’t of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, [62 FLRA 4](#), 7-8 (2007)).

<sup>176</sup> E.g., *AFGE, Local 1034*, [68 FLRA 718](#), 720 (2015) (citing *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, [67 FLRA 101](#), 105 (2012)).

<sup>177</sup> [5 U.S.C. § 5596\(b\)\(4\)](#).

<sup>178</sup> *NTEU 164*, [67 FLRA at 338](#) (citing *NTEU, Chapter 231*, [67 FLRA 247](#), 250 (2014)); see also *U.S. DHS, U.S. CBP, Savannah, Ga.*, [68 FLRA 324](#), 327 (2015) (*DHS Savannah*); *U.S. DHS, U.S. CBP, Brownsville, Tex.*, [67 FLRA 688](#), 692 (2014).

<sup>179</sup> E.g., *NFFE, Local 1968*, [67 FLRA 384](#), 385 (2014) (citing *U.S. DHS, U.S. CBP*, [65 FLRA 978](#), 985 (2011)).

<sup>180</sup> *AFGE, Council of Prison Locals, Local 405*, [67 FLRA 395](#), 398 (2015) (*Local 405*) (citing *NATCA*, [64 FLRA 906](#), 907 (2010)); see also [5 U.S.C. § 5596\(b\)\(2\)\(A\)](#).

<sup>181</sup> *Local 405*, [67 FLRA at 398](#).

(e) *Attorney Fees*

Parties to federal-sector arbitration proceedings often rely on the BPA to request attorney fees, although various statutes – such as the Fair Labor Standards Act (FLSA),<sup>182</sup> and the Privacy Act,<sup>183</sup> – also allow arbitrators to award fees. As discussed below, the BPA independently authorizes arbitrators to award such fees under certain conditions. Consequently, the parties' CBA need not independently authorize an arbitrator to award fees, and the Authority has set aside awards requiring such CBA authorization.<sup>184</sup>

An arbitrator may award attorney fees after he or she issues an award on the merits.<sup>185</sup> In this regard, parties may negotiate time limits to govern the filing of fee requests.<sup>186</sup> Absent such an agreement, a fee request may be filed either during the arbitration hearing or within a “reasonable time” after the backpay award becomes final and binding.<sup>187</sup>

But an arbitrator alternatively may choose to award attorney fees in the merits award, so long as: (1) the grievant or the grievant's representative has requested fees from the arbitrator; and (2) the employing agency has had an opportunity to respond to that request.<sup>188</sup> In this connection, [5 C.F.R. § 550.807](#) sets forth procedures that parties and arbitrators must follow before fees may be granted<sup>189</sup> – specifically, that a grieving party must present a fee request to the arbitrator, and the employing agency must have an opportunity to respond.<sup>190</sup> Failure to follow these procedures will render the fee award deficient.<sup>191</sup> For example, if an arbitrator denies fees in the absence of a fee request, and a party files an appropriate exception, the Authority will modify the arbitrator's award to strike the denial of fees, without prejudice to the union's right to file a fee request.<sup>192</sup>

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<sup>182</sup> [29 U.S.C. § 216\(b\)](#).

<sup>183</sup> [5 U.S.C. § 552a\(g\)\(4\)](#).

<sup>184</sup> E.g., *AFGE, Local 2145*, [67 FLRA 438](#), 439 (2014) (citing *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, [39 FLRA 1215](#), 1223 (1991) (*Texarkana*)); *NAGE, Local R14-52*, [45 FLRA 830](#), 833 (1992).

<sup>185</sup> E.g., *Womack*, [65 FLRA at 1021](#).

<sup>186</sup> E.g., *NTEU, Chapter 67*, [67 FLRA 630](#), 631 (2014) (citing *AFGE, Local 1148*, [65 FLRA 402](#), 403 (2010) (*Local 1148*)).

<sup>187</sup> E.g., *AFGE, Local 44, Nat'l Joint Council of Food Inspection Locals*, [67 FLRA 721](#), 722 (2014) (*Local 44*) (citing *Phila. Naval Shipyard*, [32 FLRA 417](#), 421 (1988); *U.S. DOJ, Fed. BOP, Wash., D.C.*, [64 FLRA 1148](#), 1152) (2010)).

<sup>188</sup> See, e.g., *Fraternal Order of Police, Pentagon Police Labor Comm.*, [65 FLRA 781](#), 784 (2011) (*Pentagon*).

<sup>189</sup> [5 C.F.R. § 550.807](#).

<sup>190</sup> E.g., *Local 405*, [67 FLRA at 399](#).

<sup>191</sup> E.g., *AFGE, Local 2002*, [69 FLRA 425](#), 426 (2016).

<sup>192</sup> E.g., *id.*; *AFGE, Local 2145*, [67 FLRA at 439](#); *Local 405*, [67 FLRA at 399](#).

In order to award attorney fees, the arbitrator must award backpay under the BPA requirements [discussed above](#).<sup>193</sup> Also, the fee award must be reasonable and related to the personnel action. The Authority has found that fees are “related to” the personnel action even where the attorney’s time has been spent litigating entitlement to non-monetary remedies, as long as those non-monetary remedies are linked to an award of backpay that corrects an unjustified or unwarranted personnel action.<sup>194</sup>

Further, 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 [Federal Circuit](#).<sup>195</sup>

In resolving a request for fees, arbitrators must set forth specific findings supporting their determination on each pertinent statutory requirement.<sup>196</sup> When a party files exceptions with the Authority, and the arbitrator has not sufficiently explained the determinations – whether the arbitrator has granted or denied fees – the Authority will examine the record to determine whether it permits the Authority to resolve whether the award is deficient.<sup>197</sup> If so, then the Authority will modify the award or deny the exception, as appropriate.<sup>198</sup> If not, then the Authority will remand the award for further proceedings.<sup>199</sup>

[Section 7701\(g\)](#) provides that, for an employee to be eligible for an award of attorney fees, the employee must be the “prevailing party,” which means, generally, that the grievant must have obtained an enforceable judgment that benefited him or her at the time of the judgment.<sup>200</sup> For example, an employee who has received a mitigated penalty is considered to be a prevailing party.<sup>201</sup> But where an agency has revoked an employee’s suspension before an arbitration hearing, the Authority has held that the employee was not a prevailing party at arbitration.<sup>202</sup> Nevertheless, a prevailing-party

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<sup>193</sup> See, e.g., *AFGE, Local 1156*, [68 FLRA 531](#), 533 (2015) (because arbitrator had not awarded backpay, Authority denied union exception to arbitrator’s failure to award fees).

<sup>194</sup> E.g., *U.S. DHS, U.S. CBP*, [66 FLRA 556](#), 558 (2012).

<sup>195</sup> E.g., *U.S. Dep’t of VA, Med. Ctr., Detroit, Mich.*, [64 FLRA 794](#), 796 (2010).

<sup>196</sup> 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.*).

<sup>197</sup> E.g., *U.S. DHS, U.S. CBP*, [69 FLRA 412](#), 415 (2016); *AFGE, Local 3690*, [69 FLRA 154](#), 155 (2015); *Int’l Bhd. of Elec. Workers, Local 2219*, [68 FLRA 448](#), 451 (2015) (*Local 2219*); *Local 44*, [67 FLRA at 722](#); *Navy Region Haw.*, [64 FLRA at 928](#).

<sup>198</sup> E.g., *Navy Region Haw.*, [64 FLRA at 928](#).

<sup>199</sup> E.g., *id.*

<sup>200</sup> E.g., *AFGE, Local 2145*, [68 FLRA 120](#), 122 (2014) (citing *AFGE, Local 987*, [64 FLRA 884](#), 887 (2010) (*Local 987*)); *NFFE, Local 405*, [67 FLRA 352](#), 353 (2014); *AFGE, Local 1592*, [65 FLRA 921](#), 922 (2011).

<sup>201</sup> E.g., *NFFE, Local 405*, [67 FLRA at 353](#) (citing *NAGE, Local R5-66*, [65 FLRA 452](#), 454 (2011)).

<sup>202</sup> E.g., *AFGE, Local 2145*, [68 FLRA at 122](#) (citing *U.S. Dep’t of State*, [59 FLRA 129](#), 130 (2003)).

determination does not entail assessing the *degree* of the grievant's success in arbitration.<sup>203</sup>

[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](#).<sup>204</sup> 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.<sup>205</sup>

In non-employment-discrimination cases, [§ 7701\(g\)\(1\)](#) governs requests for fees. [Section 7701\(g\)\(1\)](#) requires that: (1) the employee incurred the fees; (2) an award of fees is warranted in the interest of justice; and (3) the amount of fees awarded is reasonable. These requirements are discussed separately below.

- *Fees Incurred*

Attorney fees are incurred when an attorney-client relationship exists and the attorney has rendered legal services on behalf of the grievant.<sup>206</sup> 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 grievant incur the fees, even though the union actually incurs the fees and the attorney represents the grievant on behalf of the union.<sup>207</sup>

- *Fees in the Interest of Justice*

In addressing the requirement that fees be warranted in the interest of justice, parties and arbitrators should consider the MSPB's decision in *Allen v. U.S. Postal Service (Allen)*,<sup>208</sup> and decisions applying the criteria set forth in *Allen*, which are discussed

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<sup>203</sup> See, e.g., *Local 987*, [64 FLRA at 887](#) ("[A]n employee who receives a mitigated penalty is considered to have received significant relief and is, therefore, a prevailing party.").

<sup>204</sup> E.g., *FDIC, Chi. Region*, [45 FLRA 437](#), 453-55 (1992).

<sup>205</sup> E.g., *id.* at 455-56.

<sup>206</sup> E.g., *Ala. Ass'n of Civilian Technicians*, [56 FLRA 231](#), 233 (2000) (Chairman Wasserman dissenting as to other matters).

<sup>207</sup> E.g., *id.*

<sup>208</sup> [2 M.S.P.R. 420](#) (1980).

further below.<sup>209</sup> In addition to the five *Allen* criteria, the Authority – citing MSPB precedent – has stated that an award of attorney fees is warranted in the interest of justice when there is either a service rendered to the federal workforce or there is a benefit to the public derived from maintaining the action.<sup>210</sup>

Most requests for attorney fees in arbitration involve the *Allen* factors. In *Allen*, the MSPB identified five broad categories of cases in which an award of fees would be in the interest of justice. These categories are not exhaustive, but merely illustrative.<sup>211</sup>

*Allen* category 1 pertains to cases where the agency engaged in a prohibited personnel practice under [5 U.S.C. § 2302](#).<sup>212</sup> As [discussed previously](#), such prohibited practices include, for example, disciplinary action based on retaliation for an employee's previous filing of a grievance, an appeal of an adverse action to the MSPB, or a complaint with the EEOC.<sup>213</sup> The existence of a prohibited personnel action is distinct from, and in addition to, the requirement that a fee request occur in response to an unjustified or unwarranted personnel action, as [discussed above](#). In other words, the existence of an unjustified or unwarranted personnel action, by itself, does not necessarily show that a prohibited personnel practice occurred.<sup>214</sup>

*Allen* category 2 pertains to cases where the agency engaged in action that was clearly without merit or was wholly unfounded, or the employee was substantially innocent of the charges brought by the agency.<sup>215</sup> This category actually involves two distinct issues that are assessed independently: (1) whether the agency's action was clearly without merit or wholly unfounded; and (2) whether the employee is substantially innocent of the charges brought by the agency.<sup>216</sup>

The inquiry into whether the agency's action is clearly without merit or wholly unfounded under *Allen* category 2 involves an assessment of competing interests, specifically the degree of fault on the employee's part and the existence of any reasonable basis for the agency's actions.<sup>217</sup> 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. The Authority has found this factor satisfied when an agency presents little or no evidence to support its actions, or where the

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<sup>209</sup> *But see NAIL, Local 5*, [69 FLRA 573](#), 577 (2016) (stating that the Authority may, in an appropriate case, reconsider its nearly exclusive reliance on the *Allen* factors and "fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context").

<sup>210</sup> *Naval Air Dev. Ctr., Dep't of the Navy*, [21 FLRA 131](#), 139 (1986) (citing *Wells v. Harris*, [2 M.S.P.R. 420](#), 434-35 (1980)); see also *Local 1148*, [65 FLRA at 404 n.\\*](#) (citing *Texarkana*, [39 FLRA at 1223](#)).

<sup>211</sup> *Allen*, [2 M.S.P.R. at 435](#).

<sup>212</sup> *Id.*

<sup>213</sup> See [5 U.S.C. § 2302\(b\)\(9\)](#).

<sup>214</sup> E.g., *U.S. DHS, U.S. CBP*, [69 FLRA at 415](#).

<sup>215</sup> *Allen*, [2 M.S.P.R. at 434](#).

<sup>216</sup> E.g., *Navy Region Haw.*, [64 FLRA at 929](#).

<sup>217</sup> E.g., *NTEU, Chapter 32*, [68 FLRA 690](#), 691 (2015) (citing *Navy Region Haw.*, [64 FLRA at 929](#)).

agency charge is based on incredible or unspecific evidence that the grievant/appellant fully countered.<sup>218</sup>

The “substantial-innocence” standard under *Allen* category 2 is met when the employee is without fault and was needlessly subjected to attorney fees to vindicate himself or herself.<sup>219</sup> 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.<sup>220</sup> In this regard, the arbitrator must objectively assess the success of the employee’s challenge to the agency’s disciplinary action.<sup>221</sup> 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.<sup>222</sup>

*Allen* category 3 pertains to cases where the agency initiated the action against the employee in bad faith (including situations where the agency brought the action to harass the employee or to exert improper pressure on the employee to act in certain ways).<sup>223</sup>

*Allen* category 4 pertains to cases where the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee.<sup>224</sup> The Authority has noted that the MSPB has found a gross procedural error when an agency, while conducting a reduction in force (RIF): failed to give an employee the required specific RIF notice; did not establish required competitive areas, competitive levels, and retention lists; did not consider or honor the employee’s “bump-and-retreat” rights; and did not accord him priority placement required for preference-eligible employees.<sup>225</sup>

*Allen* category 5 pertains to cases where the agency knew or should have known that it would not prevail on the merits when it brought the action.<sup>226</sup> Making this determination requires the arbitrator to evaluate the reasonableness of the agency’s actions and positions in light of the information available to the agency at the time of the disputed action.<sup>227</sup> An arbitrator’s assessment of whether the agency knew or

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<sup>218</sup> E.g., *id.* (citing *Navy Region Haw.*, [64 FLRA at 929](#)).

<sup>219</sup> E.g., *AFGE, Local 1061*, [63 FLRA 317](#), 319 (2009) (*Local 1061*).

<sup>220</sup> E.g., *id.*

<sup>221</sup> E.g., *id.*

<sup>222</sup> E.g., *AFGE, Local 3105*, [63 FLRA 128](#), 130-31 (2009).

<sup>223</sup> E.g., *Pentagon*, [65 FLRA at 781](#).

<sup>224</sup> *Allen*, [2 M.S.P.R. at 435](#).

<sup>225</sup> E.g., *AFGE, Council 220*, [61 FLRA 582](#), 586 (2006) (citing *Thomas v. U.S. Postal Serv.*, [77 M.S.P.R. 502](#) (1998)).

<sup>226</sup> E.g., *U.S. Dep’t of the Army, Med. Activity (MEDDAC), Fort Drum, N.Y.*, [65 FLRA 575](#), 578 (2011).

<sup>227</sup> E.g., *id.*

should have known that it would not prevail is primarily factual.<sup>228</sup> When an arbitrator's factual findings support the arbitrator's legal conclusion, the Authority denies exceptions to the arbitrator's determination.<sup>229</sup>

In disciplinary actions, the penalty imposed by the agency is an aspect of the merits of an agency's case, and fees are warranted in the interest of justice if the agency knew or should have known that it would not prevail on the merits when it disciplined the employee.<sup>230</sup> When the penalty is mitigated based on evidence that was before, or readily available to, the agency at the time of the discipline, and no new information was presented at the merits hearing that was not available to the agency at the time of the discipline, such mitigation establishes that the agency knew or should have known that its choice of penalty would not be sustained.<sup>231</sup> In that situation, *Allen* criterion 5 is met as a matter of law.<sup>232</sup>

- *Amount of Fees is Reasonable*

Both [§ 7701\(g\)\(1\)](#) and the [BPA](#) require that the amount of attorney fees awarded be reasonable.<sup>233</sup> The computation of a reasonable attorney-fee award begins with an analysis of the attorney's customary billing rate and the number of hours reasonably devoted to the case.<sup>234</sup> For attorneys in private practice, there is a presumption that an agreed-upon fee between client and counsel is the maximum reasonable fee that may be awarded.<sup>235</sup> However, the presumption may be rebutted by convincing evidence that the counsel's customary rate for similar work is higher and that the agreed-upon rate either was not based on marketplace considerations or was provided only because of the client's inability to pay.<sup>236</sup> In addition, the Authority has upheld the application of fee agreements that set forth a higher rate for favorable decisions, where the higher rate is consistent with prevailing market rates.<sup>237</sup>

The standard of review as to the reasonableness of the number of hours awarded is deferential.<sup>238</sup> The Authority has stated that the arbitrator is in the best position to determine whether the number of hours expended was reasonable.<sup>239</sup> Thus, the

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<sup>228</sup> E.g., [id.](#)

<sup>229</sup> E.g., [id.](#)

<sup>230</sup> E.g., *AFGE, Local 1923*, [66 FLRA 22](#), 24 (2011) (Member Beck dissenting).

<sup>231</sup> E.g., [id.](#)

<sup>232</sup> E.g., [id.](#)

<sup>233</sup> E.g., *U.S. DHS, ICE*, [64 FLRA 1003](#), 1006 (2010).

<sup>234</sup> E.g., [id. at 1007](#).

<sup>235</sup> E.g., [id.](#)

<sup>236</sup> E.g., [id.](#)

<sup>237</sup> E.g., *U.S. Dep't of the Army, U.S. Army Dental Activity, Fort Bragg, N.C.*, [65 FLRA 54](#), 57-58 (2010) (*Fort Bragg*).

<sup>238</sup> E.g., *U.S. DHS, U.S. CBP*, [65 FLRA 603](#), 606 (2011).

<sup>239</sup> E.g., [id.](#)

Authority will not second-guess the arbitrator's evaluation absent a specific showing that his or her evaluation was incorrect.<sup>240</sup>

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.<sup>241</sup> The relevant community is the community in which the attorney ordinarily practices, *not* the community in which the arbitration was held.<sup>242</sup> 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.<sup>243</sup> In addition, the Authority has approved arbitrators' applications of an "adjusted" *Laffey* matrix.<sup>244</sup> 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.<sup>245</sup>

In determining the reasonableness of fees under [§ 7701\(g\)\(1\)](#), the Authority has held that it is reasonable to reduce requested attorney fees based on the degree of success achieved at arbitration.<sup>246</sup> In so holding, the Authority relied on Supreme Court decisions concluding that, when awarding attorney fees, the extent to which a plaintiff prevailed in the underlying litigation is the most critical factor to consider in determining the reasonableness of the amount.<sup>247</sup> And, like the Court, the Authority has held that a reduction in a fee award is appropriate when the relief, however significant, is limited in comparison to the scope of the litigation as a whole.<sup>248</sup> Consistent with these principles, 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

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<sup>240</sup> E.g., *id.*

<sup>241</sup> E.g., U.S. DOD, *Def. Distrib. Region E., New Cumberland, Pa.*, [51 FLRA 155](#), 162-63 (1995).

<sup>242</sup> E.g., U.S. Dep't of the Navy, *U.S. Naval Acad., Nonappropriated Fund Program Div.*, [63 FLRA 100](#), 103 (2009).

<sup>243</sup> E.g., *id.* at 101 n.3 & 103.

<sup>244</sup> E.g., *Fort Bragg*, [65 FLRA at 58](#).

<sup>245</sup> E.g., *id.* at 55 n.4.

<sup>246</sup> E.g., *AFGE, Local 3354*, [66 FLRA 305](#), 306 (2011) (*Local 3354*).

<sup>247</sup> E.g., *id.* (citing *Farrar v. Hobby*, [506 U.S. 103](#), 114 (1992)).

<sup>248</sup> E.g., *id.* (citing *Hensley v. Eckerhart*, [461 U.S. 424](#), 440 (1983) (*Hensley*)).

determination of a reasonable amount should reflect the significance of the overall relief obtained in relation to the number of hours reasonably expended.<sup>249</sup> Further, like the Court, the Authority has held that there is no precise rule or formula for reducing fees, and that fees should be reduced to account for limited success consistent with the other principles that the Court has identified in its attorney-fee cases.<sup>250</sup>

In addition, an award of attorney fees may include reimbursement of incidental and necessary expenses incurred in furnishing effective and competent representation.<sup>251</sup> 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.<sup>252</sup> Examples of reimbursable items are: travel expenses, postage, and telephone tolls.<sup>253</sup> Examples of *non*-reimbursable items are: stenographic fees for depositions and witness fees.<sup>254</sup>

Arbitrators and practitioners should be aware that, in employment-discrimination cases where the broader standards of [§ 7701\(g\)\(2\)](#) govern (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.<sup>255</sup> Thus, the doctrine of “*functus officio*” – which, as [discussed further below](#), generally provides that an arbitrator has no authority to proceed further in a case after he or she completes and delivers an award – does not apply to attorney-fee requests or permit an arbitrator to deny such requests.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> Arbitrators should be aware that, if parties file exceptions to their awards on

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<sup>249</sup> E.g., *NFFE, Forest Serv. Council, Local 1771*, [56 FLRA 737](#), 742 (2000).

<sup>250</sup> E.g., *Local 3354*, [66 FLRA at 306](#) (citing *Hensley*, [461 U.S. at 436-37](#)).

<sup>251</sup> E.g., *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, [53 FLRA 1688](#), 1693 (1998).

<sup>252</sup> E.g., *Bennett v. Dep't of the Navy*, [699 F.2d 1140](#), 1143-46 (Fed. Cir. 1983).

<sup>253</sup> E.g., [id.](#)

<sup>254</sup> E.g., [id.](#)

<sup>255</sup> E.g., *Navy Region Haw.*, [64 FLRA at 927](#).

<sup>256</sup> E.g., *Ala. Ass'n of Civilian Technicians*, [52 FLRA 1386](#), 1388 (1997).

<sup>257</sup> E.g., *U.S. Dep't of VA, Med. Ctr., Ann Arbor, Mich.*, [56 FLRA 216](#), 224-25 (2000).

<sup>258</sup> E.g., *Local 1148*, [65 FLRA at 403](#).

the merits, then their awards will not become final and binding until either the Authority issues its decision resolving the exceptions or the exceptions are withdrawn.<sup>259</sup> Arbitrators should consider this in determining how long they should retain their records of the case on the merits.

(f) *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,

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<sup>259</sup> E.g., *Customs*, [48 FLRA at 940](#).

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 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 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. Parties and arbitrators also should consult the Authority’s [Guide to Negotiability Under the Statute](#), which discusses each of the management rights individually.

If an arbitrator’s award affects a right under [§ 7106\(a\)\(1\)](#), then the Authority will deny exceptions to the award only if the arbitrator enforced a contract provision that was negotiated pursuant to [§ 7106\(b\)](#).<sup>260</sup> If an arbitrator’s award affects a right under [§ 7106\(a\)\(2\)](#), then the Authority will deny exceptions to the award only if the arbitrator enforced: (1) a contract provision that was negotiated pursuant to [§ 7106\(b\)](#); or (2) an applicable law.<sup>261</sup>

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.<sup>262</sup> When there is no

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<sup>260</sup> E.g., *U.S. EPA*, [65 FLRA 113](#), 115 (2010) (*EPA*) (Member Beck concurring as to result).

<sup>261</sup> E.g., [id. at 115 n.7](#).

<sup>262</sup> E.g., [id. at 115](#).

such effect, the Authority denies the exception.<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> But where an agency files a management-rights exception to an arbitration award that enforces a contract provision, the agency has the burden to allege not only that the award affects a management right(s), but also that the relevant contract provision (as interpreted and applied by the arbitrator) does not fall within one of the exceptions set forth in [§ 7106\(b\)](#).<sup>266</sup> If the agency does not do so, then its exception fails as a matter of law.<sup>267</sup>

[Section 7106\(b\)](#) sets forth three types of contract provisions that are enforceable in arbitration. If a contract provision (as interpreted and applied by the arbitrator) falls within any of the three types, then it is unnecessary for the Authority to address whether it falls within the other types; the Authority will deny the management-rights exception as long as the provision falls within *one* subsection of [§ 7106\(b\)](#).<sup>268</sup> We discuss each of the three types of provisions below. And, again, we encourage parties to also consult the [Guide to Negotiability Under the Statute](#), which provides a detailed discussion of the subsections of [§ 7106\(b\)](#).

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 provision.<sup>269</sup>

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<sup>263</sup> E.g., *U.S. Dep't of Energy, Rocky Flat Field Office, Golden, Colo.*, [59 FLRA 159](#), 163 (2003) (Chairman Cabaniss concurring).

<sup>264</sup> E.g., *EPA*, [65 FLRA at 115](#).

<sup>265</sup> E.g., *id.*

<sup>266</sup> E.g., *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, [69 FLRA 10](#), 14 (2015) (Member Pizzella dissenting); *U.S. DOJ, Fed. BOP*, [68 FLRA 311](#), 315 (2015) (Member Pizzella dissenting); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, [67 FLRA 609](#), 613 (2014) (*Red River*) (Member Pizzella dissenting); *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, [67 FLRA 597](#), 602 (2014) (*ODAR Region VI*) (Member Pizzella dissenting) (citing *U.S. DHS, U.S. CBP*, [66 FLRA 634](#), 638 (2012)); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, [67 FLRA 442](#), 447 (2014) (Member Pizzella dissenting) (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, [66 FLRA 235](#), 242 (2011)).

<sup>267</sup> E.g., *Red River*, [67 FLRA at 613](#) (citing *ODAR Region VI*, [67 FLRA at 603](#)).

<sup>268</sup> E.g., *U.S. DOJ, Fed. BOP*, [68 FLRA at 315](#) (because agency did not argue that the provision was not a procedure under [§ 7106\(b\)\(2\)](#), it was unnecessary for the Authority to address the agency's claim that the provision was not an appropriate arrangement under [§ 7106\(b\)\(3\)](#)).

<sup>269</sup> 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 both within an agency’s duty to bargain and are fully enforceable in arbitration.<sup>270</sup>

Third, [§ 7106\(b\)\(3\)](#) provisions are “appropriate arrangements” for employees who are adversely affected by the exercise of a management right.<sup>271</sup> In the arbitration context, to be 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.<sup>272</sup> (We note that, in the negotiability context, the Authority also applies a “tailoring” test in assessing whether either a bargaining proposal or an agreed-upon provision that has been disapproved on agency-head review is an appropriate arrangement.<sup>273</sup> The Authority does not apply a tailoring test in the arbitration context.<sup>274</sup>)

Also, in the arbitration context, to be “appropriate,” the Authority previously has held that the contract provision – as interpreted and enforced by the arbitrator – cannot “abrogate” (or “waive”) the affected management right.<sup>275</sup> An award abrogates the exercise of a management right if it precludes the agency from exercising that right.<sup>276</sup>

This is the same test that the Authority previously has applied, in the negotiability context, to assess whether an *agreed-upon contract provision* (as distinct from a bargaining proposal) constitutes an appropriate arrangement.<sup>277</sup> However, in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, D.C. v. FLRA*,<sup>278</sup> the D.C. Circuit set aside the Authority’s application of the abrogation standard in the negotiability context, stating that the Authority could not apply two different appropriate-arrangement standards in two different contexts.<sup>279</sup> In this connection, in the negotiability context, if the Authority is assessing whether a *bargaining proposal* is within the duty to bargain, then the Authority assesses whether the proposal “excessively interferes” with – not whether it “abrogates” – the affected management right.<sup>280</sup> As of the date on the front of this Guide, the Authority has not yet held whether it will follow the D.C. Circuit’s decision in either arbitration cases or

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<sup>270</sup> E.g., *SSA, Office of Hearings & Appeals*, [54 FLRA 1365](#), 1373 (1998).

<sup>271</sup> [5 U.S.C. § 7106\(b\)\(3\)](#).

<sup>272</sup> E.g., *EPA*, [65 FLRA at 116](#).

<sup>273</sup> E.g., *NTEU*, [65 FLRA 509](#), 511 (2011) (Member Beck dissenting in part), *review denied sub nom. U.S. Dep’t of the Treasury, Bureau of the Pub. Debt, Wash., D.C. v. FLRA*, [670 F.3d 1315](#) (D.C. Cir. 2012).

<sup>274</sup> E.g., *EPA*, [65 FLRA at 116-18](#).

<sup>275</sup> E.g., *id.*

<sup>276</sup> E.g., *U.S. Dep’t of VA, Med. Ctr., Kan. City, Mo.*, [65 FLRA 809](#), 814 (2011).

<sup>277</sup> E.g., *NTEU*, [65 FLRA at 511-15](#).

<sup>278</sup> [739 F.3d 13](#) (D.C. Cir. 2014).

<sup>279</sup> *Id.* at 21.

<sup>280</sup> E.g., *AFGE, Local 1367*, [64 FLRA 869](#), 870-71 (2010) (Member Beck dissenting in part).

negotiability cases involving agreed-upon contract provisions.<sup>281</sup> As with all areas of the law, we encourage parties and arbitrators to research the most recent Authority and court decisions when litigating these issues.

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.”<sup>282</sup> Applicable laws include not only statutes, but also the [U.S. Constitution](#), judicial decisions, executive orders, and regulations having the force and effect of law.<sup>283</sup> 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.<sup>284</sup> The Statute is *not* an “applicable law” within the meaning of [§ 7106\(a\)\(2\)](#).<sup>285</sup>

With regard to arbitral remedies that affect management rights, in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region (FDIC)*<sup>286</sup> the Authority stated that an arbitrator’s award that affects management rights under [§ 7106\(a\)](#) of the Statute must provide 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. In *FDIC*, the Authority stated that although, generally, an arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under [§ 7106\(a\)](#), such remedial authority is not unfettered; rather, the remedy must be reasonably related to the negotiated provisions at issue and the harm being remedied.<sup>287</sup> However, where there is no claim that a remedy is not reasonably related to the violation that the arbitrator found, it suffices that the award provides a remedy for the violation.<sup>288</sup>

Thus, in processing a grievance and participating in arbitration proceedings, party representatives should consider whether the dispute may involve the exercise of a management right and, if so, whether the contract provision(s) or legal provision(s) relied on are enforceable, despite any possible effects on management rights. If the arbitrator finds merit to the grievance and believes that sustaining the grievance would

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<sup>281</sup> See, e.g., *NTEU, Chapter 299*, [68 FLRA 835](#), 836-37 (2015) (*Chapter 299*) (assuming without deciding that the excessive-interference test applies in the arbitration context); *Local 4052*, [68 FLRA at 41](#) (finding it unnecessary to address whether to follow the D.C. Circuit’s decision in deciding the case).

<sup>282</sup> E.g., *U.S. DOD, Ill. Nat’l Guard, Scott Air Force Base, Ill.*, [69 FLRA 345](#), 347-48 (2016) (*Scott AFB*); *U.S. OPM*, [68 FLRA 1039](#), 1041 (2015) (Member Pizzella dissenting); *EOIR*, [65 FLRA at 662-63](#).

<sup>283</sup> E.g., *Fed. Prof’l Nurses Ass’n, Local 2707*, [43 FLRA 385](#), 390 (1991).

<sup>284</sup> E.g., *AFGE, Local 1441*, [61 FLRA 201](#), 206 (2005) (Chairman Cabaniss concurring).

<sup>285</sup> E.g., *IRS v. FLRA*, [494 U.S. 922](#), 930 (1990).

<sup>286</sup> [65 FLRA 102](#), 106 (2010) (Chairman Pope concurring in part).

<sup>287</sup> E.g., *id.* at 106-07.

<sup>288</sup> *Scott AFB*, [69 FLRA at 349](#).

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.” And if a union relies on a particular contract provision and proposes that it be interpreted in a manner that would affect management rights under [§ 7106\(a\)](#), then the agency must argue not only that the proposed interpretation would affect rights under [§ 7106\(a\)](#), but also that the contract provision, so interpreted, would not be a provision that was negotiated under [§ 7106\(b\)](#).<sup>289</sup> If the agency does not make those arguments at arbitration, then, consistent with §§ [2425.4\(c\)](#) and [2429.5](#) of the Authority’s Regulations, it may not make those arguments on exceptions to the Authority.<sup>290</sup>

Finally, in filing exceptions and oppositions with the Authority in cases involving management rights, parties should address these elements. As stated above, in order for an agency to demonstrate to the Authority that an arbitrator’s award is contrary to [§ 7106](#), the agency must argue and prove to the Authority not only that the award affects a management right under [§ 7106\(a\)](#), but also that the arbitrator was not enforcing an exception to [§ 7106\(a\)](#), such as a contract provision negotiated under [§ 7106\(b\)](#).<sup>291</sup>

(g) *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 regulations and agency 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 officials to whom they apply.<sup>292</sup>

If a government-wide regulation was in effect before a CBA took effect, then the government-wide regulation governs over related CBA provisions.<sup>293</sup> 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.<sup>294</sup> The one exception involves government-wide regulations that implement [5 U.S.C. § 2302](#), which, as [set forth previously](#) in this Guide, lists certain prohibited personnel practices. If the

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<sup>289</sup> See *U.S. DHS, U.S. CBP*, [66 FLRA at 636-38](#).

<sup>290</sup> *Id.*

<sup>291</sup> E.g., *id.* at 638.

<sup>292</sup> E.g., *NAGE, Local R1-109*, [53 FLRA 403](#), 416 (1997).

<sup>293</sup> See [5 U.S.C. § 7116\(a\)\(7\)](#).

<sup>294</sup> E.g., *U.S. Dep’t of Commerce, Patent & Trademark Office*, [65 FLRA 817](#), 819 (2011) (PTO).

regulation implements [§ 2302](#), then the regulation governs over the CBA, regardless of when the regulation or the CBA took effect.<sup>295</sup> Accordingly, most newly prescribed government-wide regulations will not control over a preexisting, conflicting CBA provision until the preexisting CBA expires. But 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.<sup>296</sup>

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.<sup>297</sup> 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, such as 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 these agency rules and regulations. An arbitration award that conflicts with a *governing* agency regulation is deficient under [§ 7122\(a\)\(1\)](#) of the Statute.<sup>298</sup>

Where a CBA provision *concerns the same matter as* an agency regulation, the CBA provision governs over the agency regulation.<sup>299</sup> Thus, if an arbitrator is enforcing a CBA provision that concerns a matter, then the Authority will not set aside the arbitrator’s award as contrary to an agency regulation that concerns the same matter.<sup>300</sup> Agency regulations are different from government-wide regulations in this respect. And where a CBA expressly *incorporates* an agency regulation, and a party challenges the arbitrator’s interpretation of the regulation, the Authority views the issue as one of contract interpretation – and therefore applies an “essence” analysis (discussed in [Section 2.6\(f\) below](#)) in resolving the exception.<sup>301</sup>

The Authority will defer to an agency’s interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the wording of the

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<sup>295</sup> E.g., *NATCA*, [60 FLRA 398](#), 399 n.6 (2004).

<sup>296</sup> E.g., *PTO*, [65 FLRA at 819](#).

<sup>297</sup> See, e.g., *Treasury, IRS*, [65 FLRA at 371-72](#).

<sup>298</sup> E.g., *U.S. Dep’t of Transp., FAA*, [64 FLRA 680](#), 683 (2010).

<sup>299</sup> E.g., *EOIR*, [65 FLRA at 660](#) (citing *U.S. Dep’t of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, [37 FLRA 186](#), 190-96 (1990)).

<sup>300</sup> E.g., *U.S. Dep’t of the Air Force, Seymour Johnson Air Force Base, N.C.*, [55 FLRA 163](#), 166 (1999).

<sup>301</sup> E.g., *AFGE, Local 15*, [68 FLRA 877](#), 879 (2015).

regulation.<sup>302</sup> However, consistent with the approach of the courts, the Authority declines to defer to an agency’s litigative position.<sup>303</sup> 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.<sup>304</sup> So if an agency’s exceptions put forth an interpretation of agency regulations, then the Authority will defer to that interpretation only if the interpretation was publicly articulated prior to litigation.<sup>305</sup> Where an agency fails to establish that deference is due its alleged interpretation, the Authority independently assesses whether the arbitrator’s interpretation of the regulation is consistent with its provisions.<sup>306</sup> In doing so, the Authority determines whether the arbitrator’s award is inconsistent with the plain wording of, or is otherwise impermissible under, the agency regulation.<sup>307</sup>

## 2.6 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.<sup>308</sup> 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.<sup>309</sup>

### (a) *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 and 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.<sup>310</sup> 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.<sup>311</sup> 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

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<sup>302</sup> E.g., *FAA*, [64 FLRA at 514](#).

<sup>303</sup> E.g., *NTEU, Chapter 231*, [67 FLRA at 249](#) (citing *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, [51 FLRA 1126](#), 1136 (1996) (*Prisons Med. Facility*)); *FAA*, [64 FLRA at 514](#).

<sup>304</sup> E.g., *FAA*, [64 FLRA at 514](#).

<sup>305</sup> E.g., *NTEU, Chapter 231*, [67 FLRA at 249](#) (citing *Prisons Med. Facility*, 51 FLRA at 1136); *FAA*, [64 FLRA at 514](#).

<sup>306</sup> E.g., *FAA*, [64 FLRA at 514](#).

<sup>307</sup> E.g., *Local 2219*, [68 FLRA at 450](#); *U.S. DHS, ICE*, [66 FLRA at 884](#).

<sup>308</sup> [5 U.S.C. § 7122\(a\)\(2\)](#).

<sup>309</sup> See [5 C.F.R. § 2425.6](#).

<sup>310</sup> E.g., *AFGE, Local 2152*, [69 FLRA 149](#), 152 (2015) (*Local 2152*).

<sup>311</sup> E.g., *AFGE, Local 3979, Council of Prisons Locals*, [61 FLRA 810](#), 813-14 (2006) (*Local 3979*).

award deficient.<sup>312</sup> In this connection, arbitrators may allow the liberal admission of testimony and other evidence.<sup>313</sup> Further, an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.<sup>314</sup> And disagreement with an arbitrator's evaluation of testimony and other evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient on this ground.<sup>315</sup> But the Authority has found that an arbitrator denied a party a fair hearing where, for example, the arbitrator relied on evidence, from a different case, that the party was unable to contest.<sup>316</sup>

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 – absent extraordinary circumstances – it will not consider issues involving an arbitrator's conduct at a hearing that could have been, but were not, raised before the arbitrator.<sup>317</sup>

(b) *Arbitrator Bias*

To establish that an award is deficient because the arbitrator was biased, 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.<sup>318</sup>

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.<sup>319</sup> 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.<sup>320</sup>

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.<sup>321</sup> Similarly,

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<sup>312</sup> E.g., *Pension Benefit Guar. Corp.*, [68 FLRA 916](#), 922-23 (2015).

<sup>313</sup> E.g., *id.*; *AFGE, Local 376*, [62 FLRA 138](#), 142 (2007) (Chairman Cabaniss concurring) (consideration of hearsay evidence did not demonstrate denial of fair hearing); *MSPBPA*, [61 FLRA at 653](#) (reliance on extrinsic and parol evidence in interpreting CBA did not demonstrate denial of fair hearing).

<sup>314</sup> E.g., *AFGE, Council of Prison Locals, Local 3828*, [66 FLRA 504](#), 505 (2012).

<sup>315</sup> E.g., *U.S. Dep't of the Treasury, IRS*, [68 FLRA 1027](#), 1031 (2015) (*Dep't of Treasury IRS*).

<sup>316</sup> E.g., *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, [62 FLRA 360](#), 362-63 (2008).

<sup>317</sup> E.g., *AFGE, Local 2923*, [69 FLRA 286](#), 291 (2016).

<sup>318</sup> E.g., *Chapter 299*, [68 FLRA at 839](#).

<sup>319</sup> E.g., *Local 3979*, [61 FLRA at 813](#).

<sup>320</sup> E.g., *id.*

<sup>321</sup> E.g., *Chapter 299*, [68 FLRA at 839](#).

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.<sup>322</sup> In addition, an arbitrator's decision to credit one party's evidence over another party's evidence is not sufficient to demonstrate bias.<sup>323</sup>

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.<sup>324</sup>

(c) *Incomplete, Ambiguous, or Contradictory Award*

The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.<sup>325</sup> 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.<sup>326</sup> The Authority has found that an award that granted remedies to five unnamed grievants was deficient in this regard because the identities of the grievants could not be determined from the record.<sup>327</sup> In that situation, the Authority remanded the matter to the parties, absent settlement, for resubmission to the arbitrator for clarification.<sup>328</sup>

Please note, however, that the mere allegation that an award is confusing or inconsistent does not demonstrate that an award is impossible to implement.<sup>329</sup> 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.<sup>330</sup>

(d) *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

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<sup>322</sup> E.g., *Local 1061*, [63 FLRA at 320](#).

<sup>323</sup> E.g., *U.S. Dep't of the Army, Norfolk Dist., Army Corps of Eng'rs, Norfolk, Va.*, [59 FLRA 906](#), 910 (2004).

<sup>324</sup> E.g., *AFGE 3354*, [64 FLRA at 332](#).

<sup>325</sup> E.g., *Local 2152*, [69 FLRA at 153](#).

<sup>326</sup> E.g., *id.*

<sup>327</sup> E.g., *U.S. EEOC, Balt. Field Office, Balt., Md.*, [59 FLRA 688](#), 692 (2004).

<sup>328</sup> E.g., *id.*

<sup>329</sup> E.g., *AFGE, Local 2923*, [61 FLRA 725](#), 728 (2006); see also *U.S. DOD, Def. Contract Mgmt. Agency*, [59 FLRA 396](#), 404 (2003) (then-Member Pope dissenting in part) (even if arbitrator made inconsistent findings, that would not, by itself, render award deficient).

<sup>330</sup> E.g., *NFFE, Local 1904*, [56 FLRA 196](#), 200-01 (2000).

specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance.<sup>331</sup> The Authority, like the federal courts, gives arbitrators substantial deference in determining what issues were submitted to arbitration.<sup>332</sup>

Arbitrators are not required to address every argument raised by the parties.<sup>333</sup> In addition, in the absence of a stipulated issue, the arbitrator's formulation of the issue receives substantial deference.<sup>334</sup> 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.<sup>335</sup> 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](#)).<sup>336</sup> 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.<sup>337</sup>

However, arbitrators must confine their awards to those issues that the parties have submitted.<sup>338</sup> Arbitrators may not decide matters that are not before them.<sup>339</sup> Thus, if a grievance is limited to a particular grievant, then the remedy must be similarly limited.<sup>340</sup> 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.<sup>341</sup>

Arbitrators also exceed their authority if they violate the doctrine of "functus officio."<sup>342</sup> Under that doctrine, once an arbitrator resolves the matter submitted to arbitration, he or she is generally without further authority.<sup>343</sup> Thus, the doctrine prevents arbitrators from reconsidering a final award.<sup>344</sup> So unless arbitrators have retained jurisdiction or received permission from the parties, arbitrators exceed their authority when they reopen or reconsider an original award that has become final and

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<sup>331</sup> E.g., *U.S. DOD, Army & Air Force Exch. Serv.*, [51 FLRA 1371](#), 1378 (1996).

<sup>332</sup> E.g., *AFGE, Local 3911*, [69 FLRA 233](#), 236-37 (2016).

<sup>333</sup> E.g., *AFGE, Local 3911*, [64 FLRA 686](#), 687-88 (2010); *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, [63 FLRA 553](#), 557 (2009).

<sup>334</sup> E.g., *NTEU, Chapter 160*, [67 FLRA 482](#), 484 (2014).

<sup>335</sup> E.g., *Interior*, [68 FLRA at 995](#).

<sup>336</sup> E.g., *id.* [at 993-95](#).

<sup>337</sup> E.g., *U.S. Dep't of VA, Med. Ctr., W. Palm Beach, Fla.*, [63 FLRA 544](#), 548 (2009).

<sup>338</sup> E.g., *DOT*, [64 FLRA at 613-14](#).

<sup>339</sup> E.g., *id.* [at 614](#).

<sup>340</sup> E.g., *DHS, CBP*, [69 FLRA 244](#), 246-47 (2016).

<sup>341</sup> E.g., *FCC Pollock*, [68 FLRA at 152](#).

<sup>342</sup> E.g., *AFGE, Local 2172*, [57 FLRA 625](#), 627 (2001).

<sup>343</sup> E.g., *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, [67 FLRA 19](#), 22 (2012).

<sup>344</sup> E.g., *id.*

binding.<sup>345</sup> But consistent with decisions of federal courts, the Authority recognizes exceptions to the doctrine, and finds that arbitrators do not exceed their authority, where the arbitrators merely clarify their awards, correct clerical mistakes or obvious errors in arithmetical computations in their awards, or complete their awards by resolving issues that were submitted to the arbitrator but unresolved in the original award.<sup>346</sup>

(e) *Award Based on Nonfact (Challenges to Factual Findings)*

When a party wants to challenge an arbitrator's factual findings, the party 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.<sup>347</sup> 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.<sup>348</sup> For examples of decisions where the Authority found awards based on nonfacts, see *U.S. DOD, Defense Commissary Agency, Randolph Air Force Base, Texas*<sup>349</sup> (arbitrator's finding that agency admitted that it had engaged in favoritism was a nonfact) and *Department of the Interior, Bureau of Reclamation, Great Plains Region, Colorado/Wyoming Area Office*<sup>350</sup> (arbitrator's math error in calculating a remedy was a nonfact).

Claims that an arbitrator's factual findings are not sufficiently supported do not demonstrate that an award is deficient.<sup>351</sup> 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.<sup>352</sup> This includes exceptions to an arbitrator's determinations regarding the credibility of witnesses.<sup>353</sup> 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.<sup>354</sup>

An arbitrator's conclusion that is based on an interpretation of the parties' CBA is not a "fact" that can be challenged as a nonfact.<sup>355</sup> In addition, an exception that

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<sup>345</sup> E.g., *id.*

<sup>346</sup> E.g., *id.*

<sup>347</sup> E.g., *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, [48 FLRA 589](#), 593 (1993).

<sup>348</sup> E.g., *Pension Benefit Guar. Corp.*, [64 FLRA 692](#), 696 (2010) (PBGC).

<sup>349</sup> [65 FLRA 310](#), 311 (2010).

<sup>350</sup> [68 FLRA 992](#), 995 (2015).

<sup>351</sup> E.g., PBGC, [64 FLRA at 696](#).

<sup>352</sup> E.g., *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, [68 FLRA 969](#), 971 (2015); *Dep't of the Treasury IRS*, [68 FLRA at 1031-32](#).

<sup>353</sup> E.g., *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, [64 FLRA 39](#), 58 (2009).

<sup>354</sup> E.g., *AFGE, Local 1395*, [64 FLRA 622](#), 625-26 (2010).

<sup>355</sup> E.g., *NLRB*, [50 FLRA 88](#), 92 (1995).

challenges an arbitrator's legal conclusions does not demonstrate that the award is based on a nonfact.<sup>356</sup>

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

When a party wants to challenge an arbitrator's interpretation of a CBA, the appropriate argument to make is that the award fails to draw its "essence" from the CBA. However, this is another situation in which the Authority gives great deference to the arbitrator. In this connection, the Authority will find that an arbitration award fails 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.<sup>357</sup>

Generally, the Authority has found that an award failed to draw its essence from the CBA when the award was expressly contrary to the CBA. For example, in *U.S. Small Business Administration*,<sup>358</sup> the Authority found that an award directing the agency to pay the union's costs and expenses failed to draw its essence from the CBA because the CBA expressly required that the agency and union bear costs and expenses equally.

The Authority and the courts defer to an arbitrator's interpretation of a CBA "because it is the arbitrator's construction of the agreement for which the parties have bargained."<sup>359</sup> 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.<sup>360</sup> And when an arbitrator interprets a CBA as imposing a particular requirement, that the CBA is silent with respect to the requirement does not, by itself, demonstrate that the award fails to draw its essence from the CBA.<sup>361</sup> Further, an arbitrator may find that a past practice modified the terms of a CBA, and an award that enforces that past practice does not fail to draw its essence from the CBA.<sup>362</sup>

In addition, a party's exceptions to an arbitrator's factual findings in the course of applying an agreement at arbitration do not demonstrate that an award fails to draw

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<sup>356</sup> E.g., *PBGC*, [64 FLRA at 696](#).

<sup>357</sup> E.g., *U.S. DOL (OSHA)*, [34 FLRA 573](#), 575 (1990) (*OSHA*).

<sup>358</sup> [55 FLRA 179](#), 182 (1999).

<sup>359</sup> E.g., *OSHA*, [34 FLRA at 576](#).

<sup>360</sup> E.g., *AFGE, Local 2505*, [64 FLRA 689](#), 691 (2010).

<sup>361</sup> E.g., *Bremerton Metal Trades Council*, [68 FLRA 154](#), 155-56 (2014).

<sup>362</sup> E.g., *U.S. DOD, Def. Logistics Agency*, [66 FLRA 49](#), 51 (2011).

its essence from the agreement.<sup>363</sup> (Challenges to an arbitrator’s factual findings are more appropriately raised under the “nonfact” standard, [discussed above](#).)

(g) *Public Policy*

One private-sector ground for finding an arbitration award deficient is that the award is contrary to public policy. The Authority has held that this ground is “extremely narrow.”<sup>364</sup> For an award to be deficient on this basis, the alleged public policy must be “explicit,” “well-defined,” and “dominant.”<sup>365</sup> The appealing party must identify the policy “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>366</sup> In addition, the alleged violation of that public policy “must be clearly shown.”<sup>367</sup>

## 2.7 Challenges to Arbitrability Findings

Parties often challenge arbitrators’ determinations concerning the “arbitrability” of a grievance – in other words, whether a grievance may properly be taken to arbitration. There are two categories of arbitrability: procedural and substantive.

Procedural-arbitrability issues pertain to the procedural conditions to resolving a dispute on the merits.<sup>368</sup> Timeliness is a common procedural-arbitrability issue.<sup>369</sup> The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself,<sup>370</sup> such as an essence or a nonfact challenge.<sup>371</sup> However, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority.<sup>372</sup> Additionally, a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law.<sup>373</sup> In order for a procedural-arbitrability ruling to be

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<sup>363</sup> E.g., *AFGE 3354*, [64 FLRA at 333](#).

<sup>364</sup> E.g., *White Sands*, [67 FLRA at 622](#).

<sup>365</sup> E.g., *AFGE, Local 1415*, [69 FLRA 386](#), 391-92 (2016).

<sup>366</sup> E.g., *id.*

<sup>367</sup> E.g., *id.*

<sup>368</sup> E.g., *U.S. Dep’t of Transp., FAA, Portland, Me.*, [64 FLRA 772](#), 773 (2010); see also *Local 953*, [68 FLRA at 645](#).

<sup>369</sup> See, e.g., *U.S. DOJ, Fed. BOP*, [68 FLRA 728](#), 730 (2015) (*Fed. BOP*); *U.S. Dep’t of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, [68 FLRA 852](#), 853 (2015) (Member DuBester concurring, Member Pizzella dissenting) (arbitrator’s finding that circumstances of a particular case did not warrant “strict compliance” with a grievance-filing deadline) (citing *Eng’rs Memphis*, [52 FLRA at 922](#)).

<sup>370</sup> E.g., *VA Winston-Salem*, [66 FLRA at 37](#).

<sup>371</sup> E.g., *White Sands*, [67 FLRA at 624](#).

<sup>372</sup> E.g., *VA Winston-Salem*, [66 FLRA at 37](#).

<sup>373</sup> E.g., *Fed. BOP*, [68 FLRA at 730](#).

found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' NGP.<sup>374</sup>

Substantive arbitrability involves questions as to whether the subject matter of the dispute is arbitrable.<sup>375</sup> When an arbitrator bases his or her substantive-arbitrability determination on law or governing regulations, the Authority reviews that determination "de novo" – without deference to the arbitrator.<sup>376</sup> When an arbitrator's substantive-arbitrability determination is based on an interpretation of the parties' CBA, the Authority reviews that determination under the deferential "essence" standard [discussed above](#).<sup>377</sup>

## 2.8 Awards Based on Separate and Independent Grounds

When an arbitrator has based an award on separate and independent grounds, the Authority will not set aside the award unless the excepting party establishes that *all* of the grounds for the award are deficient.<sup>378</sup> For example, if an arbitrator bases an award on his or her interpretation of two CBA provisions, and the interpretation of either provision provides a sufficient basis for the award, then the Authority will not set aside the award unless the excepting party demonstrates that the arbitrator's interpretation of both provisions is deficient.<sup>379</sup> Similarly, if an arbitrator bases an award on interpretations of both a CBA and the Statute, then the Authority will not set aside the award unless the excepting party demonstrates that the arbitrator's interpretations of both the CBA and the Statute are deficient.<sup>380</sup> Further, if an arbitrator denies a remedy for more than one reason, then the Authority will not set aside the award unless the excepting party demonstrates that all of the reasons are deficient.<sup>381</sup>

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<sup>374</sup> E.g., *id.*; see also *IFPTE, Local 386*, [66 FLRA 26](#), 30-31 (2011) (award was not contrary to law where, in assessing timeliness of grievance alleging violations of FLSA, arbitrator applied time limit in CBA, rather than [29 U.S.C. § 255\(a\)](#)).

<sup>375</sup> E.g., *Overseas Private Inv. Corp.*, [68 FLRA 982](#), 984 (2015) (Member Pizzella dissenting on other grounds) (*OPIC*); *Local 953*, [68 FLRA at 645](#).

<sup>376</sup> E.g., *OPIC*, [68 FLRA at 984](#).

<sup>377</sup> E.g., *id.*

<sup>378</sup> E.g., *DHS Savannah*, [68 FLRA at 326](#). Cf. *U.S. Dep't of Transp., FAA*, [68 FLRA 905](#), 907 (2015) (arbitrator did not make separate and independent findings, because he analyzed and discussed only one CBA article, and he did not separately discuss and analyze another).

<sup>379</sup> E.g., *ODAR Region VI*, [67 FLRA at 604](#); *SSA, Fredericksburg Dist. Office*, [65 FLRA 946](#), 949 (2011).

<sup>380</sup> E.g., *U.S. Dep't of the Treasury, IRS*, [66 FLRA 325](#), 332 (2011) (Member Beck concurring). Cf. *Fed. BOP v. FLRA*, [654 F.3d 91](#), 97 (D.C. Cir. 2011), *granting pet. for review of U.S. DOJ, Fed. BOP, Wash., D.C.*, [64 FLRA 559](#) (2010) (rejecting Authority's application of "separate and independent grounds" doctrine where court found that arbitrator's award made no distinction between the "purportedly 'separate' statutory and contractual grounds for the award"), *decision on remand*, [67 FLRA 69](#) (2012).

<sup>381</sup> E.g., *AFGE, Council of Prison Locals 33, Local 3690*, [69 FLRA 127](#), 132 (2015).

## 2.9 Authority Practice with Regard to Deficient Awards

Once the Authority has found an arbitration award to be deficient, the Authority generally will set it aside or modify it to remove its deficiency.<sup>382</sup> Where the Authority sets aside an entire remedy, but does not disturb an arbitrator's finding of an underlying violation, the Authority remands the award for determination of an alternative remedy.<sup>383</sup> In addition, when the Authority is unable to determine whether the award is deficient, the Authority generally will remand the award to the parties for resubmission to the arbitrator for clarification, absent settlement.<sup>384</sup>

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<sup>382</sup> E.g., *U.S. Dep't of Energy, W. Area Power Admin., Lakewood, Colo.*, [67 FLRA 376](#), 377 (2014) (modifying award); *AFGE, Council of Prison Locals, Local 4052*, [65 FLRA 734](#), 737 (2011) (setting aside and remanding for an alternative remedy); *Oak Ridge*, [64 FLRA at 538](#) (setting aside portion of award, remanding for an alternative remedy, and directing selection of a different arbitrator if either party objects to resubmission to the arbitrator who adjudicated the case).

<sup>383</sup> E.g., *Immigration Servs.*, [68 FLRA at 1077](#) (setting aside portion of award and remanding for an alternative remedy); *U.S. DOJ, Fed. BOP, Metro Det. Ctr., Guaynabo, San Juan, P.R.*, [67 FLRA 417](#), 420 (2014) (same).

<sup>384</sup> E.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, [69 FLRA 176](#), 180 (2016).

## § 3 COMPLIANCE WITH AWARDS & JUDICIAL REVIEW

### 3.1 Compliance with Arbitration Award

Parties must comply with a final and binding arbitration award.<sup>385</sup> A party's failure to do so is a ULP under [§ 7116\(a\)\(8\)](#) (for agencies) and [§ 7116\(b\)\(8\)](#) (for unions) of the Statute. 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.<sup>386</sup> The issue of compliance with an arbitration award arises in various types of cases.

One type of case is where a party has filed timely exceptions that are pending before the Authority. An award is not final and binding, and compliance is not required, while those exceptions are pending.<sup>387</sup>

A second type of case is where neither party has filed (timely) exceptions, or exceptions have been filed but later are withdrawn. In this type of case, the award becomes final and binding – i.e., 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 and binding, the parties may not challenge the validity of the award in any ULP proceedings involving a refusal to implement the award.<sup>388</sup> Those ULP proceedings will focus solely on whether there has been compliance with a final and binding award of an arbitrator, as required by [§ 7122\(b\)](#), and not on the validity of the award. Thus, it is important for parties who wish to challenge an award to file timely exceptions; otherwise, they may not later raise their challenges to the Authority or the courts, even if their arguments otherwise might have merit.

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 binding (i.e., parties must comply). And, again, the parties may not relitigate the merits of their exceptions in a ULP proceeding before either the Authority or the courts.<sup>389</sup>

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<sup>385</sup> See [5 U.S.C. § 7122\(b\)](#).

<sup>386</sup> *Customs*, [48 FLRA at 940](#).

<sup>387</sup> *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, [56 FLRA 848](#), 851-52 (2000).

<sup>388</sup> 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).

<sup>389</sup> E.g., *Dep't of HHS, SSA v. FLRA*, [976 F.2d 1409](#), 1413 (D.C. Cir. 1992); *BOP v. FLRA*, [792 F.2d 25](#), 28-29 (2d Cir. 1986); *U.S. Marshals Serv. v. FLRA*, [778 F.2d 1432](#), 1436-37 (9th Cir. 1985).

### 3.2 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] [o]rder involves [a ULP].”<sup>390</sup> 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.”<sup>391</sup>

Consistent with that legislative history, the [D.C. Circuit](#) has stated that “[i]nsulating arbitration awards from judicial review reflects ‘a strong [c]ongressional policy favoring arbitration of labor disputes’ and furthers ‘Congress’s interest in providing arbitration [awards] substantial finality.’”<sup>392</sup> The D.C. Circuit also has stated that the “limited exception that allows . . . judicial review . . . furthers Congress’s other stated interest of ensuring a single, uniform body of case law concerning [ULPs].”<sup>393</sup>

In *Broadcasting Board of Governors, Office of Cuba Broadcasting v. FLRA (BBG Cuba)*,<sup>394</sup> the D.C. Circuit reiterated its prior holdings that, to be judicially reviewable, the Authority’s order must “involve[]” a statutory ULP, and stated:

The word “involves” is far from precise. Simplifying our task, this Court has addressed the word’s scope in a series of decisions, all of which faithfully respect Congress’s desire to limit judicial review of arbitration awards. We first considered the meaning of “involves” in *Overseas Education Association v. FLRA*,<sup>[395]</sup> in which we held that “a statutory [ULP] [must] actually be implicated to some extent in the [FLRA’s] order,” so even if certain conduct is “capable of characterization as a statutory [ULP] . . . [,] the conduct must actually be so characterized and the claim pursued, by whatever route, as a statutory [ULP], not something else.”<sup>[396]</sup> Not only that, but in *[AFGE], Local 2510 v. [FLRA]*,<sup>[397]</sup> . . . we emphasized that even when an aggrieved party argues that the other party committed a statutory [ULP], and even when the arbitrator’s award addresses that alleged [ULP], “it is the order of the [FLRA] that is the subject of the petition for judicial review,” not the arbitrator’s decision or the initial

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<sup>390</sup> [5 U.S.C. § 7123\(a\)\(1\)](#).

<sup>391</sup> [H.R. Rep. No. 95-1717](#), at 153 (1978) (Conf. Rep.), reprinted in [1978 U.S.C.C.A.N. 2860](#), 2887.

<sup>392</sup> *U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, [665 F.3d 1339](#), 1344 (D.C. Cir. 2012) (*Navy*) (quoting *Ass’n of Civilian Technicians, N.Y. State Council v. FLRA*, [507 F.3d 697](#), 699 (D.C. Cir. 2007) (*ACT N.Y.*)).

<sup>393</sup> *ACT N.Y.*, [507 F.3d at 699](#).

<sup>394</sup> [752 F.3d 453](#) (D.C. Cir. 2014).

<sup>395</sup> [824 F.2d 61](#) (D.C. Cir. 1987).

<sup>396</sup> *Id.* at 66.

<sup>397</sup> [453 F.3d 500](#) (D.C. Cir. 2006).

grievance.<sup>[398]</sup> That order, moreover, must do more than merely acknowledge a [ULP]. As we made clear in *Department of the Interior v. FLRA*,<sup>[399]</sup> a “passing reference does not satisfy the requirement that a [ULP] be an explicit ground for or necessarily implicated by the [FLRA’s] decision.”<sup>[400]</sup> We thus concluded that we lack jurisdiction where, as in that case, the FLRA describes a [ULP] claim solely to “reject the notion that a [ULP] claim is any part of the case before [it].”<sup>[401]</sup> Reinforcing this requirement, we held in *ACT*,<sup>[402]</sup> that the order must “contain a substantive discussion of a [ULP] claim”<sup>[403]</sup> – though we later clarified in *Department of the Navy v. FLRA*,<sup>[404]</sup> that the discussion need not be “explicit”<sup>[405]</sup> (holding that when an FLRA order “necessarily implicates a statutory [ULP],” we have jurisdiction even if the order never “explicitly discuss[es]” the [ULP]).<sup>406</sup>

Further, the D.C. Circuit has held that “[w]here a successful claim *could not possibly* have been upheld based on [a] contract because the contract provided no ground for the Authority’s decision, the Authority’s decision necessarily implicates” a ULP.<sup>407</sup>

Additionally, while the D.C. Circuit has entertained constitutional challenges,<sup>408</sup> the D.C. Circuit also has stated that “[r]outine statutory and regulatory questions” – such as the meaning of certain terms in the BPA – “are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity.”<sup>409</sup> Finally, other courts of appeals also have addressed § 7123 and have further elaborated on the circumstances under which court review is precluded.<sup>410</sup>

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<sup>398</sup> [Id. at 504.](#)

<sup>399</sup> [26 F.3d 179](#) (D.C. Cir. 1994).

<sup>400</sup> [Id. at 184.](#)

<sup>401</sup> [Id.](#)

<sup>402</sup> [507 F.3d 697](#) (D.C. Cir. 2007).

<sup>403</sup> [Id. at 700.](#)

<sup>404</sup> [665 F.3d 1339](#) (D.C. Cir. 2012).

<sup>405</sup> [Id. at 1345.](#)

<sup>406</sup> *BGG Cuba*, [752 F.3d at 457.](#)

<sup>407</sup> *Navy*, [665 F.3d at 1345.](#)

<sup>408</sup> See *Griffith v. FLRA*, [842 F.2d 487](#), 490 (D.C. Cir. 1988).

<sup>409</sup> *Scobey*, [754 F.3d at 823.](#)

<sup>410</sup> See, e.g., *Begay v. Dep’t of the 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 the Authority did not address any ULPs 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’s decision where there was no assertion that agency violated [§ 7116](#), and the Authority’s decision made no reference to any such violation).

## AFTERWORD

We hope that this Guide has proved helpful. Although it is not an official interpretation of the Statute and/or the Authority's Regulations, and it is not official policy of the Authority, we believe that this Guide can be helpful to litigants, neutrals, and others. As stated previously, we encourage you to visit the Authority's website, at [www.FLRA.gov](http://www.FLRA.gov), to access even more information and guidance, including the wording of the [Statute](#) and the FLRA's [Regulations](#), the Authority's published [decisions](#), and other [guidance](#) and [training materials](#) that the FLRA has developed.