Slide 1

Federal Labor Relations Authority

After Arbitration:
Filing Exceptions with the Authority

July 18, 2017

Slide 2

Introduction to Federal-Sector Arbitration & The Negotiated Grievance Procedure

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Federal Sector vs. Private Sector

What's the difference?
**Slide 4**

Private-Sector Arbitration

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

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Federal-Sector Arbitration

The Federal Service Labor-Management Relations Statute

5 U.S.C. §§ 7101-7135

**Slide 6**

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

5 U.S.C. § 7121(a)-(b)
§ 7103(a)(9)

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

AND

Any complaint by any employee, union, OR agency
concerning

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

Filing Exceptions with the Authority

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Exclusions from NGP

- Parties can negotiate matters out of coverage
- Some exclusions come from outside the Statute:
  - OMB Circular A-76
  - 5 C.F.R. § 575.311(g)
- Some exclusions are in the Statute
  - Retirement, life insurance, or health insurance
    - E.g., 51 FLRA 204, 207-08
    - But see 57 FLRA 415, 416-17
  - Suspension or removal for national security reasons
    - See 62 FLRA 391, 391 n.2
  - Examination, certification, or appointment
    - 57 FLRA 166, 168; 51 FLRA 210, 212-13; 48 FLRA 511, 513-15
  - Classification...that doesn’t result in reduction in grade/pay
    - 66 FLRA 34, 38-39

Filing Exceptions with the Authority

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What the Statute Excludes

§ 7121(c)

- Prohibited political activities (Hatch Act)
- Retirement, life insurance, or health insurance
- Suspension or removal for national-security reasons
- Examination, certification, or appointment
- Classification of any position that does not result in a reduction in grade or pay
The grade level of the duties permanently assigned to, and performed by, the grievant

Classifying currently unclassified duties

Accretion of higher-graded duties to an existing position

- Definition
  - 5 C.F.R. § 511.101(c)
    - “the analysis and identification of a position and placing it in a class under the position-classification plan established by” OPM “under chapter 51 of title 5, United States Code.”

- Grade level
  - 67 FLRA 67
  - 61 FLRA 194

- Currently unclassified duties
  - 31 FLRA 933, 936
  - See 55 FLRA 345, 347

- Accretion of duties
  - 61 FLRA 194

- Is classification the essential nature of the grievance?
  - 64 FLRA 829, 830-31

Grievances re: temporary promotion

Promotion within existing career-ladder

Failure to promote under competitive procedure

Accuracy of a PD

- Temporary promotions
  - 68 FLRA 83, 84-85
    - 64 FLRA 552, 554

- Promotion within existing career-ladder
  - 52 FLRA 217, 220-22

- Failure to promote
  - 49 FLRA 1387, 1389

- Accuracy of a PD
  - 57 FLRA 275, 277
<table>
<thead>
<tr>
<th>Slide 12</th>
<th>Election of Remedies</th>
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<tbody>
<tr>
<td>§ 7116(d): grievance or ULP</td>
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<td>§ 7121(d): grievance or EEO complaint</td>
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<td>§ 7121(e): grievance or MSPB appeal</td>
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<td>• adverse actions under § 7512</td>
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<td>• certain performance-based actions under § 4303</td>
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<tr>
<td>§ 7121(g): prohibited personnel practice</td>
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<tr>
<td>• (5 U.S.C. § 2302(b)(2)) – grievance or appeal to MSPB, or through OSC</td>
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<tr>
<th>Slide 13</th>
<th>When a Grievance Barred by a ULP?</th>
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<tbody>
<tr>
<td>Same issue</td>
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<td>• same factual predicate AND</td>
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<td>• substantially similar legal theories</td>
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<td>• Statutory claim doesn’t bar contractual claim.</td>
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<td>ULP was filed earlier</td>
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<td>• Does NOT matter if ULP wasn’t pursued or fully litigated</td>
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<td>AND</td>
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<td>Selection of ULP procedures was at discretion of aggrieved party</td>
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<td>• must be same aggrieved party</td>
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<td>• distinguish individual vs. institutional issues</td>
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<tr>
<th>Slide 14</th>
<th>When is a Grievance Barred by an EEO Complaint?</th>
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<tr>
<td>Same subject matter</td>
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<td>AND</td>
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<td>Matter was earlier raised by the employee</td>
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<td>timely initiating an action under the statutory EEO procedure</td>
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<tr>
<td>7116(d)</td>
<td>• 67 FLRA 442, 444-47</td>
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<tr>
<td>7121(d)</td>
<td>• 64 FLRA 1110, 1111</td>
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<tr>
<td>7121(e)</td>
<td>• 65 FLRA 704, 708-09</td>
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<tr>
<td>7121(g)</td>
<td>• 61 FLRA 571, 573-74</td>
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<tr>
<td>7121(g)</td>
<td>• 54 FLRA 235, 237-38</td>
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<tr>
<td>7121(g)</td>
<td>• 61 FLRA 571, 574</td>
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<tr>
<td>Statutory claim doesn’t bar contractual claim</td>
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<td>• 68 FLRA 573, 575</td>
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<td>• 67 FLRA 442, 445-46</td>
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<td>• 59 FLRA 112, 114-17</td>
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<td>ULP was filed earlier</td>
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<td>• E.g., 64 FLRA 1110, 1112</td>
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<tr>
<td>Selection of ULP procedures was at discretion of aggrieved party</td>
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<td>• E.g., 63 FLRA 677, 679-80</td>
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<td>E.g., 69 FLRA 292, 294</td>
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<td>• reprimand = personnel action</td>
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<tr>
<td>61 FLRA 571, 573-74;</td>
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<td>23 FLRA 414, 417-18</td>
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<td>• timely filing of formal written complaint under EEOC regulations, not pre-complaint process</td>
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Failure to comply is a ULP if award is FINAL AND BINDING.
- Final award – see slide 21
- Validity of award CANNOT be challenged in ULP proceeding.

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

BUT

- Compliance not required while exceptions pending
“Functus Officio”
- After arbitrator renders award regarding an issue, NO authority to take further action on that issue unless:
  - retained jurisdiction OR
  - parties jointly request

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

**Back Pay Act (5 U.S.C. § 5596)**
- At any time during arbitration
- Within a reasonable period of time after award becomes final and binding
- CBA may govern timing for requests

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

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

Filing Exceptions with the Authority 7/18/2017
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- 5 CFR § 2429.11
  - “ordinarily will not consider interlocutory appeals”
- 5 CFR § 2429.11
  - reflects judicial policy of discouraging fragmentary appeals of the same case
- 66 FLRA 688, 689-90
- 61 FLRA 355, 357

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- An exception filed before a final award has been issued
- 64 FLRA 486, 489

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- What is a Final Award?
  - An award that completely resolves all submitted issues
  - If everything is decided, award is final
  - EVEN if jurisdiction is retained to assist with implementation
- Definition
  - 64 FLRA 586, 589
- Jurisdiction for implementation
  - 66 FLRA 235, 239
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- Directs the parties to determine:
  - Amount of backpay/damages/costs? **FINAL**
  - Identification of affected individuals? **FINAL**
  - An appropriate remedy? **NOT FINAL**
  - Whether monetary remedy would be appropriate? **NOT FINAL**

- Backpay/damages/costs:
  - 67 FLRA 336, 337
  - 66 FLRA 838, 841-42

- Identification:
  - 66 FLRA 531, 534
  - 65 FLRA 252, 254

- Develop remedy:
  - 61 FLRA 173, 174

- Determine monetary remedy:
  - 58 FLRA 358, 359

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- What if the Arbitrator says the award is final?
  - DO NOT rely on arbitrator’s characterization of award

- What if the Arbitrator bifurcated the hearing?
  - Just because arbitrator resolved all issues re: 1st part of bifurcated hearing, doesn’t mean resolved all issues submitted

- What if the Arbitrator retained jurisdiction to resolve attorney fees?
  - Does NOT render exceptions to merits award interlocutory

- Arb’s characterization:
  - 65 FLRA 672, 674
  - 61 FLRA 355, 357

- Bifurcated hearings:
  - 61 FLRA at 356-57

- Attorney fees:
  - 66 FLRA 838, 841-42
  - 64 FLRA 989, 991

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

- 66 FLRA 688, 690
- 62 FLRA 344, 346-47
Plausible
- 63 FLRA 216, 217
- 55 FLRA 1230, 1232
- Advance ultimate disposition
- 59 FLRA 686, 687

NOTE: usually statutory

Exception granted
- Claim arbitrator lacked jurisdiction to resolve a classification matter under 5 U.S.C. § 7121(c)(6)

Exception dismissed
- Claim arbitrator lacked jurisdiction based only on parties' agreement
- Claim that arbitrator may not be impartial in determining arbitrability because he had "a financial interest in presiding over a prolonged merits hearing"

Granted
- 63 FLRA 216, 217-18

Dismissed
- 66 FLRA 848, 851
- 58 FLRA 745, 746
- Arbitrator not impartial
- 68 FLRA 640, 641

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

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

Address and phone numbers on the website
- Where and how: 5 CFR § 2429.24
- Number of copies: 5 CFR § 2429.25
- Statement of service: 5 CFR § 2429.27
- Who to serve: 5 CFR 2429.12(b)
- Table of Contents: 5 CFR § 2429.29
- Other requirements: 5 CFR § 2425.2
- Forms: 5 CFR 2425.4 (optional)
Exceptions and oppositions may be filed by registered users through the Authority's eFiling system.

Benefits:
- Free
- Convenient
Exceptions When to File

5 C.F.R. § 2425.2
- Exceptions due 30 calendar days from date of service of award
  - Exclude date of service of the award
  - Method of service is up to arbitrator unless parties’ agreement specifies
    - First service method controls
  - Date parties RECEIVE exceptions is irrelevant when calculating due date
- What about weekends and holidays?

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

Exceptions When to File “What ifs”

- Arbitrator uses regular mail or FedEx?
  - Calculate from postmark (mail) or date deposited (FedEx)
  - If illegible or missing, use date of the award
  - Add 5 days to the due date

- Arbitrator uses email or fax?
  - Calculate from date of transmission
  - No extra time

- Arbitrator uses personal delivery?
  - Calculate from date of delivery
  - No extra time

Filing Exceptions with the Authority

See also §§ 2429.21, 2429.22

Exceptions: How to Calculate

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<tr>
<th>Sunday</th>
<th>Monday</th>
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Filing Exceptions with the Authority 7/18/2017
**Exceptions**

**What if You Miss the Deadline?**

- 5 C.F.R. § 2425.2
  - Time limit cannot be extended or waived
    - May be equitably tolled if:
      1. some extraordinary circumstance stood in a party's way to prevent timely filing; and
      2. the party was pursuing its rights diligently

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

**Filing Exceptions with the Authority**

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

**Filing Exceptions with the Authority**

- Arbitrator’s award
  - 5 C.F.R. § 2425.4(a)(5)
- Statement of service
  - 5 CFR § 2429.27
- Table of contents
  - 5 CFR § 2429.29
- Number of copies
  - 5 CFR § 2429.25
The Authority will send a show-cause order for:

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

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

The Authority will dismiss your exceptions without regard to the nature of the deficiency.
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Exceptions
Required Content
5 C.F.R. § 2425.4
- What you must include
- What you can leave out

- Include:
  - Copy of award
  - Arbitrator’s info
  - Statement of grounds: see 5 CFR § 2425.6
  - Supporting arguments & citations
  - Copies of documents cited in arguments: E.g., CBA provisions, internal agency regulations
  - Support for expedited, abbreviated decision

- Exclude:
  - Authority and Fed. Court decisions
  - USC
  - Current CFR

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Requests for Expedited, Abbreviated Decisions
5 C.F.R. § 2425.7
- Excepting party may request
  - Authority has discretion over whether to grant request
  - Opposing party may respond to request in opposition
- Authority considers:
  - Complexity
  - Potential for precedential value
  - Similarity to other, fully detailed decisions involving same/similar issues
- Authority may issue even absent request
- Not in arbitration cases involving a ULP

- Excepting party may request
  - 67 FLRA 257, 257
- Authority discretion
  - 68 FLRA 718, 719
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**Content that is NOT PERMITTED**

Anything you should have known to, but did not, raise below
- Evidence
- Factual assertions
- Arguments (including affirmative defenses)
- Requested remedies
- Potential challenges to a requested remedy

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

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**Failure to Raise Below**

- Not raised below
  - 67 FLRA 155, 156
  - 63 FLRA 178, 179-80
  - 68 FLRA 116, 117
  - 63 FLRA 213, 214
  - 63 FLRA 70, 74
  - 68 FLRA 829, 832-33
  - 67 FLRA 609, 610-11
  - *But see* 61 FLRA 637, 639

- Raised in contrary way
  - 64 FLRA 325, 328
  - 68 FLRA 116, 118

- Opportunity to raise below
  - 67 FLRA 287, 288-89
  - 67 FLRA 715, 716-17
  - 67 FLRA 356, 357
  - 67 FLRA 257, 257
  - *But see* 67 FLRA 387, 388-89
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Exceptions
Potential Dismissal or Denial

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

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Exceptions
Potential Dismissal

• Authority has no jurisdiction over exceptions to awards that concern:
  • Reduction in grade/removal
    • 61 FLRA 476, 477-78
  • Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days
    • 62 FLRA 107, 108
  • Similar matters arising under other personnel systems
    • 59 FLRA 545, 546 (removal of non-appropriated fund employees)
    • Inextricably intertwined matters
      • 62 FLRA 505, 506-07 (claim for compensatory damages)

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Exceptions
Potential Dismissal

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

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

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

**Potential Denial**

- 5 C.F.R. § 2425.6(e)(1): Failure to support
  - Must offer sufficient argument or authority to support that ground

**Bare Assertion**

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

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

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**Oppositions**

- 5 C.F.R. § 2425.3
  - Not required
  - 30 days to file (from service of exceptions)
  - Address:
    - Arguments, including failure to raise/support issues
    - Any request for expedited, abbreviated decision
  - Include:
    - Documents relied on UNLESS provided with exceptions
    - Documents not readily accessible by the Authority

- 67 FLRA 327, 328.
  - Dismissing argument for failing to raise a ground
  - Denying another argument as raising, but not sufficiently supporting, a recognized ground

- 69 FLRA 149, 151
  - Denying a contrary to law exception for failure to support

- 67 FLRA 333, 333-34
  - Dismissing certain exceptions for failure to raise, denying others for failure to support

- 67 FLRA 378, 379
  - Denying one exceeded-authority exception for failure to support, denying another on its merits

- 67 FLRA 171, 172
  - To support a ground not currently recognized, a party must cite the legal authorities relied upon

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

5 C.F.R. § 2429.26

Authority may consider “other documents,” but filing party must:

- Request leave to file
  - 5 C.F.R. § 2429.26
- Argue why submission is necessary
  - E.g., Addresses new argument raised by opposing party
- Serve copies on other parties

Filing Exceptions with the Authority

Collaboration and Alternative Dispute Resolution Office (CADRO)

5 CFR § 2425.8
Note: Authority will toll filing for opposition if time hasn’t expired

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

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

Overview & Private-Sector Grounds

FLRA Review

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

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

- Private-sector grounds
  - 5 U.S.C. § 7122(a)(2)
  - 5 C.F.R. § 2425.6(a)(2)

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

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

- 64 FLRA 547, 550
- 65 FLRA 657, 663-64

- Arbitrator failed to resolve submitted issue
  - arbitrator not required to address every argument raised

- Resolved an issue not submitted

- Disregarded specific limitations on authority
  - a claim that the arbitrator added to/altered/modified the CBA generally will not demonstrate exceeded authority

- Awarded relief to non-grievants
  - remedy too broad
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DEFERENCE

Stipulated issue v. Framed issue

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

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

- 67 FLRA 291, 292
- 64 FLRA 713, 716-17
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Private-Sector Grounds for Review
Fair Hearing

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

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Private-Sector Grounds for Review
Essence

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

Filing Exceptions with the Authority 7/18/2017

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Private-Sector Grounds for Review
Nonfact

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

Filing Exceptions with the Authority 7/18/2017
Filing Exceptions with the Authority

Incomplete, ambiguous, or contradictory as to make implementation impossible
- 64 FLRA 622, 624
- 56 FLRA 1057, 1074

Must be explicit, well-defined, and dominant

AND

Violation of policy must be clearly shown

Must provide citations and explain how they support finding award deficient

5 C.F.R. § 2425.6
Additional Grounds for Review

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

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

Separate and Independent Grounds

When award based on separate and independent grounds, appealing party must establish that all grounds are deficient

For example:
- Award based on interpretation of two CBA provisions and interpretation of either provision provides a sufficient basis for the award
  - Must show interpretation of BOTH provisions is deficient
- Award based on interpretations of CBA and Statute
  - Must show interpretation of BOTH CBA and Statute are deficient

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

Challenges to Arbitrability Findings

Procedural arbitrability

Substantive arbitrability
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**Procedural Arbitrability**

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

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**Procedural Arbitrability**

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

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

- Bias
  - 61 FLRA 681, 682-83
  - 60 FLRA 83, 86

- Exceeded authority
  - 61 FLRA 681, 682-83
  - 60 FLRA 83, 86

- Fair hearing
  - 60 FLRA 813, 815-16

- Law that establishes procedural requirements that apply to NGP
  - 68 FLRA 728, 730-31 (filing period for ULPs established by the Statute)
  - 58 FLRA 480, 481-82
  - But see 67 FLRA 264, 264-65

- But not on essence grounds
  - 68 FLRA 852, 853-54
  - 68 FLRA at 730
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Challenges to Arbitrability Findings

Substantive Arbitrability

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

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Management Rights
(5 U.S.C. § 7106)

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Burden in Arbitration Context

- Party asserting that arbitration award is contrary to management rights must show both:
  - Award affects a management right
    AND
  - Contract provision arbitrator enforced was not negotiated under § 7106(b)

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

- 67 FLRA 597, 601-02 (then-Member Pizzella dissenting)
- 66 FLRA 426, 428 & n.5
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Management Rights
§ 7106 generally

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

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

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Management Rights
§ 7106(a)(1)

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

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Management Rights
§ 7106(a)(2)(A)

- Hire employees
  - 62 FLRA 93, 94-95
- Assign employees
  - 64 FLRA 161, 165
  - 63 FLRA 222, 225
- Direct employees
  - 64 FLRA 532, 534
  - 63 FLRA 450, 452
  - 62 FLRA 15, 16-17
- Layoff employees
  - 64 FLRA 813, 815-16
- Retain employees in the agency
  - 60 FLRA 839, 841-45
  - 58 FLRA 344, 345-46
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- Suspend employees
  - 48 FLRA 908, 911-12
- Remove employees
  - 46 FLRA 298, 319-20
- Reduce in grade or pay
  - 53 FLRA 539, 579-80
  - 40 FLRA 1181, 1200-02
- Take other disciplinary action
  - 62 FLRA 174, 180-81
  - 61 FLRA 341, 346-47

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

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- § 7106(a)(2)(C):
  - With respect to filling positions, make selections for appointments from:
    - (1) among properly ranked and certified candidates for promotion; or
    - (2) any other appropriate source
- § 7106(a)(2)(D):
  - Take whatever actions may be necessary to carry out the agency mission during emergencies
- § 7106(a)(2)(C)
  - 65 FLRA 13, 15
  - 64 FLRA 76, 77
  - 62 FLRA 419, 424
  - 61 FLRA 226, 228-29
  - 61 FLRA 618, 622
  - 59 FLRA 780, 782-83
  - 58 FLRA 411, 412
- § 7106(a)(2)(D)
  - 58 FLRA 549, 551-52
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Management Rights
What Affects Management's Rights

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

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Management Rights
What If...

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

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Management Rights
What if...

... ask whether the arbitrator was enforcing:

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

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

PERMISSIVE

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

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

- Technology, methods, & means of performing work

TECHNOLOGY
- technical method used in accomplishing or furthering performance of agency’s work

METHOD
- the way agency performs its work (the “how”)

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

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

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

- Agency must bargain the “procedures which management . . . will observe in exercising” any § 7106 management right

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

- Look to the case law
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**Management Rights – Exceptions**

### § 7106(b)(3)

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

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

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**Management Rights**

**Applicable Laws**

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

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

- 42 FLRA 1333, 1337

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**Management Rights**

**What About Regulations?**

Regulations have the “force and effect of law” where they:
- (1) Affect individual rights and obligations;
- (2) Were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress;
- (3) Were promulgated in accordance with procedural requirements imposed by Congress

- 65 FLRA 657, 661-63
- 61 FLRA 201, 206
Must provide a remedy for a violation of either an "applicable law" within the meaning of § 7106(a)(2) **OR** a contract provision that was negotiated pursuant to § 7106(b) of the Statute

No reconstruction

Filing Exceptions with the Authority
65 FLRA 102, 106-07 (Chairman Pope concurring in part)

Award must be consistent with any rule or regulation that governs the matter in dispute

Government-wide regulations treated differently than agency-specific regulations

Filing Exceptions with the Authority
37 FLRA 186, 190-96
Government-Wide Regulations

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

- Generally applicable
  - 53 FLRA 403, 416

Filing Exceptions with the Authority

Government-Wide Regulations

What Came First?

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

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

Filing Exceptions with the Authority

Agency Regulations

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

- Definition
  - 37 FLRA 186, 192-95
- Must provide copy and explain
  - 37 FLRA at 195 n.2
Only when there’s no applicable, conflicting CBA provision

- CBA, not agency regulations, governs matters to which they both apply when there is a conflict
- Reason: Statute does not prevent agency from agreeing to a CBA that alters or modifies agency regulation
- Deference to an arbitrator’s finding that CBA governs

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

An arbitrator may find that agency regulations have been incorporated into CBA

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

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

Arbitral Remedies & Backpay
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**Arbitrator Remedies**

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

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**Arbitrator Remedies Limitations**

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

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**Monetary Remedies**

- Sovereign immunity
  - May be raised at any time, even if not raised before arbitrator
  - Must be explicit statutory waiver
    - Common examples:
      - Back Pay Act, 5 U.S.C. § 5596
      - FLSA, 29 U.S.C. §§ 201-219
    - No sovereign-immunity waiver required for monetary remedies that are “equitable” in nature
- Explicit statutory waiver
  - 52 FLRA 46, 49
- Back Pay Act
  - 52 FLRA 46, 49
- FLSA
  - 63 FLRA 100, 103
- Raise anytime
  - 68 FLRA 841, 842
- No waiver for equitable remedies
  - 68 FLRA 960, 965
The Back Pay Act (5 U.S.C. § 5596(b))

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

**Filing Exceptions with the Authority**

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

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The Back Pay Act

**“Resulted in”**

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

**Filing Exceptions with the Authority**

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

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The Back Pay Act

**Recovery Period**

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

**Filing Exceptions with the Authority**

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

**STATUTORY ENTITLEMENT**

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

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

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**Attorney Fees**

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**Sources of Authority to Award**

- **Primary:** Back Pay Act, 5 U.S.C. § 5596
- **Others:**
  - FLSA
  - Privacy Act
  - Rehabilitation Act
The Back Pay Act requires that an award of fees be:

- Awarded in conjunction with backpay award;
- Reasonable and related to personnel action;
- Awarded in accordance with standards established under 5 U.S.C. § 7701(g)

Standards established under 5 U.S.C. § 7701(g)

- Prevailing party
- Incurred by the employee
- Warranted in the interest of justice
- Reasonable amount

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

Prevailing Party

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

64 FLRA 925, 928

Specific findings

- 64 FLRA 925, 928
- But see 70 FLRA 214, 215 (arbitrator adopted agency’s brief)

Enforceable judgment

- 68 FLRA 120, 122
- 65 FLRA 921, 922 (citing Buckhannon, 532 U.S. 598 (2001))

Degree of success

- 57 FLRA 784, 786
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- Relationship & services rendered
  - 53 FLRA 1688, 1691
- Non-attorney reps
  - 63 FLRA 492, 493-94
  - 5 C.F.R. § 550.807(f)
    - fees for law clerks, law students, and paralegals assisting attorneys

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- Criteria may be reexamined
  - 69 FLRA 573
- Show under the Statute:
  - Service to federal workforce or
  - Benefit to public
    - 64 FLRA 925, 928

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

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

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

Bad faith
- Action brought to “harass” the employee
- Action brought to exert improper pressure on the employee to act in certain ways
Gross procedural error

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

Filing Exceptions with the Authority

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

- Number of hours
  - 64 FLRA 1003, 1007-09
- No interest
  - 65 FLRA 54
- Degree of success matters
  - 65 FLRA 452, 454
PETITION FOR FEES AND OPPORTUNITY TO RESPOND

- May resolve in merits award, but …
- Back Pay Act jurisdiction
  - Doctrine of functus officio does not permit refusal to consider timely request
  - Arbitrator may resolve fee issue at any time during arbitration, or within reasonable period after award becomes "final and binding," or if the parties agree to a different period
- Requests for fees determined by “appropriate authority” as defined by 5 C.F.R § 808.807

REQUESTS FOR FEES DETERMINED BY “APPROPRIATE AUTHORITY” AS DEFINED BY 5 C.F.R § 808.807

WHEN ARBITRATOR CAN RESOLVE FEE ISSUE
- 67 FLRA 721, 721-22
- 67 FLRA 352, 352-53

JUDICIAL REVIEW OF AUTHORITY DECISIONS

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

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

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

THE END

Questions, Feedback, & Thank You For Participating