Federal Labor Relations Authority

After Arbitration: Filing Exceptions with the Authority

July 18, 2017
Introduction to Federal-Sector Arbitration & The Negotiated Grievance Procedure
Federal Sector vs. Private Sector

What’s the difference?
Private-Sector Arbitration

• Normally confined to the interpretation/application of CBA

• No statutory requirement to arbitrate
Federal-Sector Arbitration

The Federal Service Labor-Management Relations Statute

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

THE BACK PAY ACT

Federal Labor Relations Authority

Filing Exceptions with the Authority    7/18/2017
Every CBA MUST include a negotiated grievance procedure (NGP) and provide for binding arbitration.
What is a Grievance?

§ 7103(a)(9)

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

AND

Any complaint by any employee, union, OR agency concerning

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

Promotion within existing career-ladder

Failure to promote under competitive procedure

Accuracy of a PD
Election of Remedies

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

- **Same issue**
  - same factual predicate AND
  - substantially similar legal theories
    - Statutory claim doesn’t bar contractual claim.

- **ULP was filed earlier**
  - Does NOT matter if ULP wasn’t pursued or fully litigated

  **AND**

- **Selection of ULP procedures was at discretion of aggrieved party**
  - must be same aggrieved party
    - distinguish individual vs. institutional issues
When is a Grievance Barred by an EEO Complaint?

- Same subject matter

AND

- Matter was earlier raised by the employee timely initiating an action under the statutory EEO procedure
Compliance with Arbitration Awards, Arbitral Retention of Jurisdiction, & Interlocutory Appeals
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.
When is an Award Final & Binding?

- No timely exceptions filed
  - compliance required when period for filing exceptions expires

- FLRA denies exceptions
  - compliance required upon denial

**BUT**

- Compliance not required while exceptions pending
Arbitral Retention of Jurisdiction

“Functus Officio”

- After arbitrator renders award regarding an issue, NO authority to take further action on that issue unless:
  - retained jurisdiction OR
  - parties jointly request
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
What is an interlocutory appeal?

What is a “final award”?
  • Is this different from final and binding?
An exception filed before a final award has been issued
An award that completely resolves all submitted issues

- If everything is decided, award is final
- EVEN if jurisdiction is retained to assist with implementation
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**
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
Extraordinary circumstances warrant interlocutory review where there is a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case.
Plausible = claim is credible on its face; mere assertion not enough

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

NOTE: usually statutory
Exception granted
• Claim arbitrator lacked jurisdiction to resolve a classification matter under 5 U.S.C. § 7121(c)(5)

Exception dismissed
• Claim arbitrator lacked jurisdiction based only on parties’ agreement
• Claim that arbitrator may not be impartial in determining arbitrability because he had “a financial interest in presiding over a prolonged merits hearing”
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
Exceptions

How and Where to File

www.FLRA.gov

5 C.F.R. §§ 2425 & 2429

(it's all in there)
Exceptions and oppositions may be filed by registered users through the Authority’s eFiling system.

Benefits:

- *Free*
- *Convenient*
Welcome to the FLRA Case eFiling System.

Not a registered user? Please click here to create a user profile.
Already a registered user? Please click here to continue.
Forgot your password? Please click here.

FAQ

View FAQ
Search FAQ
Search FAQ by Question

Attachment File Types

View Allowed Attachment File Types
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?
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
## Exceptions: How to Calculate

<table>
<thead>
<tr>
<th>Sunday</th>
<th>Monday</th>
<th>Tuesday</th>
<th>Wed</th>
<th>Thursday</th>
<th>Friday</th>
<th>Saturday</th>
</tr>
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<tbody>
<tr>
<td><strong>May</strong></td>
<td>23</td>
<td>24</td>
<td>25</td>
<td>26</td>
<td>27 Date of service of award</td>
<td>28 Start counting</td>
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<tr>
<td>29</td>
<td>30</td>
<td>31</td>
<td>June 1</td>
<td>2</td>
<td>3</td>
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<td>22</td>
<td>23</td>
<td>24</td>
<td>25</td>
</tr>
<tr>
<td>26 30 days!</td>
<td>27 Due date (BUT add 5 days for mail)</td>
<td>28 Start counting</td>
<td>29</td>
<td>30</td>
<td>July 1</td>
<td>2 Fifth day</td>
</tr>
<tr>
<td>3</td>
<td>4 HOLIDAY</td>
<td>5 ACTUAL DUE DATE</td>
<td>6</td>
<td>7</td>
<td>8</td>
<td>9</td>
</tr>
</tbody>
</table>
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*
The Authority will send a deficiency order for:

- Failure to provide copy of arbitrator’s award
- Failure to provide statement of service
- Failure to provide table of contents
- Incorrect number of copies
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
THE AUTHORITY WILL DISMISS YOUR EXCEPTIONS WITHOUT REGARD TO THE NATURE OF THE DEFICIENCY
5 C.F.R. § 2425.4

- What you must include
- What you can leave out
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
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
Failure to Raise Below

5 C.F.R. §§ 2425.4, 2429.5

- Not raised below
  - Was there an opportunity to raise the issue?
    - Post-hearing brief
    - Other ways?
  - Was issue known before award issued?
  - What about arbitrator bias?

- Raised below in a contrary way

Authority will not consider arguments
Potential Dismissal or Denial

- Authority has no jurisdiction
- Exceptions do not raise a recognized ground
- Exceptions do not support a recognized ground
Authority has no jurisdiction over exceptions to awards that concern:

- Reductions in grade/removals based on unacceptable performance under 5 U.S.C. § 4303

- Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days under 5 U.S.C. § 7512

- Similar matters arising under other personnel systems

- Matters “related to” – i.e., “inextricably intertwined with” – those matters
5 C.F.R. § 2425.6(e)(1): Failure to raise

Currently recognized grounds

- The arbitrator:
  - exceeded his or her authority
  - was biased
  - denied the excepting party a fair hearing
- The award:
  - is contrary to any law, rule or regulation
  - fails to draw its essence from the parties’ agreement
  - is based on a nonfact
  - is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible
  - is contrary to public policy
5 C.F.R. § 2425.6(e)(1): Failure to support

- Must offer sufficient argument or authority to support that ground

- To support a ground not currently recognized, a party must cite the legal authorities relied upon
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
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
Collaboration and Alternative Dispute Resolution Office (CADRO)
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
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
(1) Arbitrator failed to resolve submitted issue
   • arbitrator not required to address every argument raised

(2) Resolved an issue not submitted

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

(4) Awarded relief to non-grievants
   • remedy too broad
DEFERENCE

Stipulated issue v. Framed issue
Private-Sector Grounds for Review

 Bias

- Award procured by improper means
- Arbitrator was partial or corrupt
- Arbitrator engaged in misconduct that prejudiced party’s rights
Arbitrator refused to hear or consider pertinent and material evidence

Actions so prejudiced a party as to affect fairness of proceeding as a whole
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.
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.
WHOEVER SAID NOTHING IS IMPOSSIBLE HAS OBVIOUSLY NEVER TRIED TO STAPLE WATER TO A TREE.
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
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
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
Challenges to Arbitrability Findings

- Procedural arbitrability
- Substantive arbitrability
Determined by:

- Whether procedural conditions to arbitrability have been met or excused

- Examples include:
  - Timeliness of a grievance
Challenges to Arbitrability Findings

Procedural Arbitrability

What grounds can you use to challenge it?

- Bias
- Exceeded authority
- Fair hearing
- Law that establishes procedural requirements that apply to NGP

What about essence?

What about nonfact?
Challenges to Arbitrability Findings

Substantive Arbitrability

Determined by:

- Whether subject matter of dispute is arbitrable
  - If determination is based on CBA, then \textit{essence standard}
  - If determination is based on law, then \textit{de novo standard}
Management Rights
(5 U.S.C. § 7106)
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)
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)?
Management Rights

§ 7106(a)(1)

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

§ 7106(a)(2)(A)

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

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

§ 7106(a)(2)(A) cont’d

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

Make determinations with respect to contracting out

Determine the personnel by which agency operations will be conducted
¶ 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
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
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 . . .
... 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)
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
○ 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”)

Filing Exceptions with the Authority    7/18/2017
Agency must bargain the “procedures which management . . . will observe in exercising” any § 7106 management right

Look to the case law
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
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
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
• 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
Arbitral Enforcement of, & Consistency of Awards with, Regulations
Contrary to Regulation

- Award must be consistent with any rule or regulation that governs the matter in dispute
- Government-wide regulations treated differently than agency-specific regulations
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.
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)
Rules, regulations, and official declarations of policy prescribed by an agency to govern matters within that agency.
Agency Regulations

When Do They Control?

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

- Broad remedial discretion
- Authority denies exceptions that don’t support setting aside remedy/attempt to substitute different remedy
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)
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
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 ….”
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
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
Interest on Backpay

STATUTORY ENTITLEMENT

- Begins: Date of Loss
- Ends: Date not more than 30 days before date on which paid
Attorney Fees
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
Attorney-client relationship

Legal services rendered

Under certain circumstances, attorney fees may be awarded for the services of non-attorney representatives
How can you meet § 7701(g)(1)’s standard?

ALLEN
CRITERIA

THE
STATUTE

Attorney Fees
Interest of Justice
(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”
- Clearly without merit/wholly unfounded
  - Examine competing interests of fault of employee and reasonableness of agency action

- Employee substantially innocent
  - Employee prevails on substantive rather than technical grounds on major charges

- Focal point is result of merits award
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
Agency knew or should have known would not prevail
  • Analysis of agency evidence and agency conduct of investigation

Focal point = reasonableness of agency actions in view of information available at the time of the action

Penalty an aspect of merits; if penalty mitigated on evidence available to agency, and no new info presented at hearing, then agency knew or should have known
Billing rate

Reasonable number of hours

No explicit provision for interest on attorney fees

NOTE: Degree of success IS a consideration
Petition for fees and opportunity to respond

May resolve in merits award, but …

Back Pay Act jurisdiction

- Doctrine of *functus officio* does not permit refusal to consider timely request
- Arbitrator may resolve fee issue at any time during arbitration, or within reasonable period after award becomes “final and binding,” or if the parties agree to a different period

Requests for fees determined by “appropriate authority” as defined by 5 C.F.R § 550.807
Judicial Review of Authority Decisions
§ 7123(a): FLRA decisions in arbitration cases reviewable only if the order involves a ULP

- Look at order - not award, not grievance
  - More than acknowledge ULP
  - Must necessarily implicate a statutory ULP even if no explicit discussion

- Conduct must actually have been characterized as a ULP
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.”
Furthers Congressional interest in:
- providing arbitration awards substantial finality
- ensuring a single, uniform body of case law concerning ULPs

Standard of review:
- Arbitrary/capricious
- Court will uphold remedial order for a ULP “‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’”
Questions, Feedback, &
Thank You For Participating