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Federal Union Arbitrators Frequently Misapply the Law

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TOPLINE POINTS

- ★ In disputes between federal agencies and unions, arbitrators decide whether the agency has violated the law or contract. These arbitrators typically have little firsthand experience with agency operations or federal employment law.
- ★ Arbitrators frequently misapply the law. The Federal Labor Relations Authority may overturn arbitration awards only on narrow grounds, such as the decision not being rationally grounded in the contract or being inconsistent with federal law. Nonetheless, the Authority sustained only three-fifths of arbitral awards between 2019 and 2023.
- ★ Mistaken awards can cost taxpayers millions of dollars. Congress should reform the arbitration selection process to give those responsibilities to a federal agency, such as the Federal Service Impasses Panel.

Background

The Civil Service Reform Act (CSRA, 1978) requires federal agencies to collectively bargain with their employees. It further authorizes arbitrators to decide whether agencies have violated their collective bargaining agreements (CBAs) or the laws governing federal working conditions (5 U.S.C. § 7121(b)).[1] The Civil Service Reform Act does not prescribe how these arbitrators will be selected. In practice, virtually all CBAs require the parties to jointly select an arbitrator from a list provided by the Federal Mediation and Conciliation Service (FMCS).[2]

The CSRA allows agencies and unions to appeal unfavorable arbitration awards to the Federal Labor Relations Authority (the Authority). However, the Authority can overturn arbitral awards only if they are contrary to federal law, rules, or regulations or on the narrow grounds that courts will overturn private-sector arbitration awards—including the award not even drawing its

[1] The author extends his grateful thanks to AFPI intern Sarah Rogers for her invaluable assistance reviewing Authority arbitration rulings for this report.

[2] See for example Article 44, Section 2.A of the Master CBA between the America Federation of Government Employees and the Department of Veterans Affairs (2011).

essence from the CBA, being based on incorrect facts, or arbitrators exceeding their authority (5 U.S.C. § 7122(a)). The Authority cannot overturn lawful awards based on their impracticality or on policy disagreements. As the D.C. Circuit Court of Appeals has explained "the Authority's sole inquiry under the proper standard of review [is] whether the Arbitrator was even arguably construing or applying the CBA" (*National Weather Service Employees Org. v. FLRA*, 2020).

The FMCS does not make familiarity with federal employment law or working conditions part of the criteria for inclusion on its master roster of arbitrators.[3] FMCS arbitrators primarily handle disputes between private-sector unions and employers, not those involving the federal government.

Arbitrators Frequently Misapply the Law

As a result, disputes between federal unions and agencies are often decided by arbitrators who have little experience with or expertise in federal operations. They may have little understanding of the practical consequences of their decisions. Worse, they often misapply the law—requiring costly and time-consuming appeals to rectify errors.

TABLE 1

Results of Appeals of Federal Arbitration Awards under the Trump and Biden Administrations

Arbitration Award:	Number	Percent
Upheld	213	59.8%
Overturned (in whole or part)	121	34.0%
Remanded to Arbitrator	22	6.2%

SOURCE: AFPI analysis of Federal Labor Relations Authority arbitration cases decided on the merits between Feb. 2019 and July 2023.

Table 1 presents an analysis of all exceptions to arbitration awards that the Authority decided on the merits between February 2019 and July 2023.[4] This covers two years of the Trump

[3] FMCS regulations set forth the agency's criteria for inclusion on its arbitration roster (29 C.F.R. § 1404.5(a)). These criteria include familiarity with collective bargaining generally but do not require familiarity with federal agency operations.

[4] This corresponds to all cases published in volumes 71, 72, and—through the date of publication—73 in the Decisions of the Federal Labor Relations Authority. The analysis excludes cases that the Authority decided on procedural rather than substantive grounds, such as parties filing untimely exceptions, seeking an interlocutory appeal, the Authority lacking jurisdiction, or because the case became moot.

Administration and a year-and-a-half of the Biden Administration. During this period the Authority held a Republican majority, a Democrat majority, and then has been evenly divided.[5] Over these four years the Authority overturned a significant proportion of arbitration awards to which it heard exceptions.[6] Only three-fifths of arbitration awards appealed to the Authority were upheld in full. More than a third were overturned, in whole or in part. Another 6% were remanded back to the arbitrator for reconsideration.

Arbitrators possess considerable authority over agency operations; their awards are legally binding unless the Authority overturns them. Moreover, their decisions can be overturned only on narrow grounds. The fact that their decisions are not sustained in two-fifths of cases shows that their adjudication is often problematic.

Table 2 shows the Authority's basis for overturning those arbitration awards it did not sustain.

TABLE 2

Basis for Overturning Arbitral Awards under the Trump and Biden Administrations

	Number	Percent
Did Not Draw Essence from the Contract	30	24.8%
Contrary to Law	77	63.6%
Based on a Non-Fact	6	5.0%
Arbitrator Exceeded Authority	8	6.6%

SOURCE: AFPI analysis of Federal Labor Relations Authority arbitration cases decided on the merits between Feb. 2019 and July 2023.

[5] Authority members may serve in a holdover capacity for over two years until their successor is confirmed. Republican appointees held a majority of two to one on the FLRA from December 2017 to May 2022. In May 2022 the Senate confirmed Susan Tsui Grundmann to replace Member James Abbott, who was serving in a holdover capacity. This gave Democrat appointees a majority of two to one. That majority lasted until January 2023, when Chairman Ernest DuBester's holdover appointment expired and he withdrew from consideration for renomination to another term. Between then and the date of publication of this report the FLRA has consisted of a Democrat and a Republican appointee, with one vacancy.

[6] In several cases unions asked the Authority to reconsider initial adverse decisions, and the Authority declined. Those cases were treated as a single case to avoid double-counting the same arbitration award. The D.C. Circuit Court of Appeals reversed an Authority decision overturning an arbitration award in *National Weather Service Employees Org. v. FLRA* (2020). That award was counted as being upheld.

By far the most common basis for overturning arbitral awards over this period was that the arbitrator's ruling was, in whole or part, contrary to law, rule, or regulation. Almost two-thirds of the overturned awards were voided on that basis. The next most common ground—accounting for almost one-quarter of overturned awards—was that the award did not draw its essence from the parties' CBA.

The high number of arbitral decisions overturned on the ground that the award failed to draw its "essence" from the parties' agreement is especially telling of poor arbitrator performance. For an award to be overturned under the "essence" standard, the Authority must find that it "(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." The Authority generally finds that an award failed to draw its essence from the CBA when the award expressly contravenes the CBA. (Federal Labor Relations Authority, 2016, p. 54). This is an extremely deferential standard, yet dozens of arbitral awards have failed to clear this low bar in recent years. In many instances, arbitrators simply disregard the language of the parties' contract, failing to fulfill their most basic function.

A smaller number of awards were overturned because they were based on incorrect facts or because the arbitrator exceeded his (or her) authority. Federal arbitrators frequently issue bad rulings.

TABLE 3

Results of Appeals of a Sample of Union Victories in Arbitration Awards under Prior Administrations

	George W. Bush Presidential Administration	Barack Obama Presidential Administration
Award upheld	56.7%	50.0%
Award set aside	26.7%	26.7%
Remanded to Arbitrator	6.7%	16.7%
Mixed	10.0%	20.0%

SOURCE: I. B. Helburn, "The Trump FLRA: Fair or Foul," Table 2. Available online at https://cdn.govexec.com/media/gbc/docs/pdfs_edit/060619ew1.pdf

This is not a new phenomenon. Table 3 reproduces data from a separate study of arbitration awards (Helburn, 2019, Table 2). For both the George W. Bush and Barack Obama administrations, the author examined a sample of 30 arbitration awards in which unions initially

prevailed and the agency appealed that decision to the Authority.[7] The Authority upheld those arbitration awards in 57% of cases in the Bush Administration and 50% of cases under President Obama. Federal arbitrators frequently misapply the law.

Prospective Solution

This is unsurprising. Federal employment law is a complex subject; it would be surprising if arbitrators with little experience with the federal workforce did not make a lot of mistakes—especially when they only intermittently arbitrate federal cases. However, these mistakes are expensive for taxpayers. Agencies (and unions) must spend tens of thousands of dollars to litigate appeals (formally called exceptions) before the Authority. The Authority takes more than a year to process the average arbitration appeal (Federal Labor Relations Authority, 2022, p. 38). In the interim, the agency and union remain in a state of flux, not knowing if the award should be implemented or not. In some cases, this uncertainty can last a long time.

For example, between 2004 and 2016 an arbitrator issued a series of awards ordering the U.S. Department of Housing and Urban Development to retroactively promote thousands of employees to senior positions. After extensive litigation, the Authority ultimately vacated the awards on the grounds the union's grievance involved position classifications—which the CSRA exempts from grievance proceedings (*U.S. Department of Housing and Urban Development*, 2018).

Having more experienced arbitrators to get the cases right initially would be much more effective. Congress could accomplish this by reforming the arbitration process to mirror the process for settling collective bargaining impasses. In that process, when an agency and a union cannot agree on contract terms the dispute goes to the Federal Service Impasses Panel (FSIP), a subcomponent within the Authority. FSIP is made up of members appointed by the president "from among individuals who are familiar with government operations and knowledgeable in labor-management relations" (5 U.S.C. § 7119(c)(2)). Authorizing FSIP, or a parallel body of presidential appointees, to arbitrate federal sector grievances would ensure that individuals with more experience with agency operations decided these cases. It would also ensure presidential accountability for any problematic arbitration awards that make the government less efficient.

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[7] The Helburn study picked dates at the end of the Bush and Obama administrations and examined Authority decisions going backward from those dates until it reached 30 initial union victories under both administrations. The study also examined 30 arbitration awards under the Trump Administration. It found a much lower rate of union-friendly arbitral awards being sustained under the Trump Administration (20%) than under the Bush and Obama administrations. However, the study examined arbitration awards decided in the first half of 2018, shortly after President Trump appointed a majority to the Authority. Prior to that point the Authority had been politically deadlocked for about a year. That meant the Authority could process uncontroversial cases quickly but created a backlog of controversial cases that were decided when Trump appointees took the majority. The Authority sustained arbitral awards at a much higher rate following the period the Helburn study examined. From February 2019 through May 2022, when the Authority had a majority of Trump appointees, arbitral awards were sustained in 54% of cases. Note, however, that these figures cover all arbitration awards, not just union-friendly awards as in the Helburn study.

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