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Grievance Arbitrators Lack Federal Sector Experience

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TOPLINE POINTS

- Federal labor management practitioners widely report that grievance arbitrators lack knowledge of and experience in federal employment law.
- Arbitrators often issue legally defective rulings that get overturned on appeal, wasting agency and union resources.
- Agencies, unions, and taxpayers would benefit from using arbitrators who have experience with the law they are tasked with applying.

Grievance arbitrators play a large role in federal labor relations. They decide whether an agency has violated a collective bargaining agreement or has just cause to dismiss an employee. However, arbitrators often lack knowledge of and experience with federal employment law. Inexperienced arbitrators frequently issue legally defective rulings that get overturned on appeal. This wastes both agency and union resources. Federal labor-management practitioners have repeatedly complained about arbitral ignorance of the laws they enforce. Changing the arbitrator selection process to use more competent arbitrators would make federal labor relations more efficient.

Deficient Arbitrator Qualifications

The Civil Service Reform Act (CSRA, 1978) requires federal agencies to collectively bargain. It further authorizes arbitrators to settle grievances between unions and agencies. However, the CSRA is silent as to how arbitrators should be chosen. In practice, agency collective bargaining agreements (CBAs) determine how arbitrators get selected. Typically, CBAs have the parties ask the Federal Mediation and Conciliation

Service (FMCS) to provide a list of potential arbitrators from the FMCS's master arbitration roster.[1] The agency and unions then jointly select an arbitrator from that list.[2]

This process can lead to inexperienced or unqualified arbitrators deciding federal labor disputes. FMCS arbitrators primarily handle disputes arising in the private sector. However, federal sector employment law is complicated and differs considerably from private-sector requirements.[3] Moreover, the FMCS does not include familiarity with agency operations or federal workforce policies in the criteria for inclusion on its arbitration roster (29 C.F.R. § 1404.5(a)).[4] As a result, disputes between federal unions and agencies are often decided by arbitrators with limited knowledge of and experience with the relevant law.

Practitioners Concerned with Arbitrator Quality

Federal sector labor management practitioners have long expressed concerns about arbitrator quality and competence. For example, an America First Policy Institute Freedom of Information Act request uncovered a 2010 e-mail exchange between Ernest DuBester, a former member and chair of the Federal Labor Relations Authority (FLRA), and Frank Ferris, then a vice-president of the National Treasury Employees Union. After Ferris questioned the effectiveness of arbitrator training sessions, DuBester expressed concerns with arbitrator quality:

> Probably most of the arbitrators that you deal with are established and experienced with the fed sector. But, many others deal with Arbors [arbitrators] who are assigned ad hoc and may be relatively clueless re the fed sector (E. DuBester, personal communication, May, 3, 2010).[5]

[1] Arbitrators are private contractors who register for federal assignments through the FMCS.
[2] For example, Article 44 of the collective bargaining agreement between the American Federation of Government Employees and the Department of Veterans Affairs calls for selecting an arbitrator from a list of seven names provided by the FMCS (U.S. Department of Veterans Affairs, 2011). CBAs often require that arbitrators be selected through alternating strikes by the agency and union until one name remains. This process encourages arbitrators to rule in favor of unions. Federal unions engage in arbitration frequently across the government, while any individual agency goes to arbitration much less often. Unions thus frequently see the same names from the FMCS master roster, while any individual agency sees the same arbitrators much less often. Unions also track arbitrators' rulings and avoid those who frequently rule against them. This framework incentivizes arbitrators to ensure unions are not dissatisfied with their rulings in order to avoid being struck from future cases.
[3] For example, 5 U.S.C. § 7106 sets forth elaborate management rights and exceptions to management rights that are very different from those applied under the National Labor Relations Act. Similarly, Chapter 75 of Title 5, U.S. Code, prescribes detailed procedural steps agencies must take to effectuate adverse actions that have no private-sector parallel.
[4] FMCS allows arbitrators to indicate they have experience with federal employment law if they take a two-day training course. As the FMCS has recognized, *infra*, two days is insufficient to master the intricacies of federal workforce policies.
[5] DuBester likely expressed the sense that Ferris typically dealt with knowledgeable arbitrators because NTEU contracts typically call for establishing a panel of arbitrators who repeatedly arbitrate grievances arising in the same agency, rather than selecting a new arbitrator for each grievance. Panel arbitrators develop experience with federal labor law because they repeatedly arbitrate such cases.

Similarly, in 2018 Arthur Pearlstein, the FMCS director of arbitration, sent an e-mail to arbitrators on the FMCS roster. This e-mail warned arbitrators against taking federal sector cases despite having no experience with federal operations.[6] Pearlstein explained:

> A serious concern has been brought to my attention regarding some of the arbitrators holding themselves out as having [federal sector] experience … It has been brought to my attention by parties on both sides at federal agencies, that they are receiving panels where one or more arbitrator appears to lack any meaningful experience in federal sector labor-management issues and, in some cases, they select an arbitrator who they assume was experienced but turns out to be not well versed in federal sector labor matters …
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> The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the "Code") provides that where specialized knowledge is required that is beyond the arbitrator's competence, the arbitrator should not take the case. See Code at 1.B. We consider all federal sector cases to require specialized knowledge of how federal sector labor-management disputes are handled. Although there are many commonalities, federal sector cases come under a different statute and involve major differences, including that laws, regulations, and Agency policies must be carefully considered and applied in addition to the CBA, that arbitration awards are subject to "exceptions" filed with the FLRA or court appeal depending on the kind of matter, and that arbitrators generally have much narrower discretion than in other kinds of cases. And these are just some of the differences. Parties should reasonably expect federal sector arbitrators to have at least one or more of the following: (1) Substantial experience handling federal sector labor-management issues under the Federal Service Labor Management Relations Statute ("FSLMRS") as, for example, a union or management representative; (2) Substantial experience as an arbitrator or other third party neutral handling federal sector labor-management disputes; and/or (3) Significant and comprehensive training in arbitration of federal sector cases (a 2 or 3 day course would not be sufficient) (A. Pearlstein, personal communication, August, 30, 2018).[7]

Despite this FMCS warning, arbitrator qualifications for and experience with federal sector cases remain ongoing concerns. Joseph Schimansky, a current federal arbitrator and former executive director of the FLRA's Federal Service Impasses Panel (FSIP), recently explained that arbitral ignorance of governing law remains problematic.[8] [9]

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[6] AFPI obtained this e-mail through a Freedom of Information Act request.

[7] FMCS offers a two-day federal sector arbitration course aimed at FMCS Roster arbitrators lacking federal case experience or seeking a refresher. It provides specialized knowledge for conducting federal arbitrations, with completion granting eligibility for federal sector panels (A. Pearlstein, personal communication, July 9, 2019). This two-day course is still being offered and remains unchanged (Pearlstein & Symonette, 2024).

[8] Mr. Schimansky has more than 32 years of FLRA experience. He currently consults on alternative dispute resolution program development and labor negotiations and serves on the FMCS's roster of arbitrators and as a permanent arbitrator for the Department of Labor and AFGE, Local 12 (Federal Employment Law Training Group, n.d.).

[9] Mr. Schimansky, an instructor with the Federal Employment Law Training Group, LLC expressed this view in "A Step-by-Step Guide to Arbitration Success," presented March 26, 2024. AFPI staff participated in this training, and the quotations are taken from the slide deck that accompanied the presentation.

While leading a 2024 course for agency labor relations professionals on arbitration he explained:

> There are no minimum requirements to be an arbitrator; they are often unfamiliar with Federal employment law …
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> Perhaps the most important thing that a federal sector arbitrator needs to be told is the controlling law[.] Title V of the United States Code governs most all Federal employment law cases, and it is very complicated. Private sector arbitrators usually do not know Title V law; it's your job to educate them (Schimansky, 2024, pp. 22, 25).

FELTG is not the only training provider to warn that arbitrators often do not understand federal sector operations. Dewey Publications, a publisher of civil service legal reference books and training, alerted practitioners to a new development in FLRA case law. A newly announced standard would require arbitrators to examine more frequently whether contract provisions were in fact "negotiable." The firm cautioned that many arbitrators lack the skills to do this:

> Deciding the complexities of negotiability law, in addition to figuring out whether the reprimand [or other discipline] is for just cause, is not part of the work of the arbitrator customarily chosen from an FMCS list. Complex negotiability analysis (which may require testimony on bargaining history) is going to increase in garden-variety arbitration cases the time invested by arbitrators in cases, and the resultant costs to the parties, and the chances of the arbitrator getting negotiability analysis arguably wrong will increase the number of exceptions, delaying the arbitration process (which is supposed to provide speedy relief or at least speedy awards) and undermining the deference to arbitrators' contract interpretation arguably endorsed by FLRA. On the bright side, our publisher says it may boost sales of the much beloved, critically-acclaimed FLRA Guide (Dewey Publications Inc., 2023).

Labor relations practitioners widely recognize that most arbitrators lack the skills to arbitrate federal sector cases effectively.

Impact on Arbitration Outcomes

Unsurprisingly, arbitrators often get the law wrong. The FLRA overturns a significant proportion of arbitration awards because arbitrators apply the law incorrectly or issue rulings that do not draw their essence from the collective bargaining agreement. Between February 2019 and July 2023, the FLRA overturned one-third of arbitration awards it reviewed, in whole or in part. The FLRA remanded another 6 percent to arbitrators for reconsideration. Less than three-fifths of arbitration awards were upheld in full. Of those awards the FLRA overturned, about two-thirds were set aside for incorrectly applying the law (Sherk, 2023, pp. 3-4). Unfortunately, this is a longstanding phenomenon. The FLRA overturned arbitral awards at similar rates under Presidents Barack Obama and George W. Bush (Helburn, 2019, p. 6).[10]

[10] Helburn (2019) analyzed a sample of 30 arbitration awards in both the George W. Bush and Barack Obama administrations. The FLRA upheld arbitrator decisions in full in 57 percent and 50 percent of appeals, respectively, under these administrations.

Another study compared federal arbitrators hearing removal grievances to Merit Systems Protection Board (MSPB) administrative judges. Congress told arbitrators to apply the same legal standard as the MSPB (5 U.S.C. § 7121(e)(2)). Nonetheless, arbitrators overturn dismissals in 58 percent of cases, twice the rate of the MSPB (Sherk, 2022, p. 4). Arbitrators do not appear to apply Title 5 the same way MSPB judges do.

While the FLRA can correct arbitrators' legal errors, erroneous contractual interpretations are harder to fix. The CSRA allows the FLRA to overturn contract interpretations only on narrow grounds (5 U.S.C. 7122(a)(2)). The D.C. Circuit Court of Appeals has emphasized how narrow these grounds are. In a 2020 case, the court explained that as "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the [FLRA] may not reverse the arbitrator's award even if it is convinced he committed serious error" (*National Weather Service Employees Org. v. FLRA*, 2020).

Unqualified Arbitrators Cost the Public

Arbitrators wield significant authority, and their decisions must be reviewed deferentially. Using arbitrators who lack the skills to arbitrate federal sector grievances effectively can be quite costly—both in terms of problematic rulings on the merits and subsequent appeals. When arbitrators misapply the law, the parties must spend considerable resources appealing those decisions. Those expenses could have been avoided had the arbitrators gotten the law right initially.

Appeals of legally erroneous rulings also unnecessarily delay the resolution of grievances. The FLRA takes an average of 10 months to resolve arbitration cases (Federal Labor Relations Authority, 2023, p. 41). In some cases, it takes much longer. FLRA case law is filled with examples of the FLRA unanimously overturning arbitrators who did not understand the laws they were enforcing, with agencies and unions kept in limbo for a year or more while the appeal was pending. For example:

- An arbitrator ordered the Army to pay a grievant for performing extra duties. The Army filed exceptions with the FLRA, arguing that the grievance concerned position classifications—a matter statutorily excluded from grievance arbitration. Nine months later the FLRA unanimously set aside the arbitration award on those grounds, explaining that the arbitrator never had jurisdiction to hear the case. This basic error forced the Army and the union to waste resources on an unnecessary appeal (*U.S. Department of the Army*, 2022).

- Contract negotiations between a Defense Department subcomponent and its union hit an impasse and went to FSIP. The Impasses Panel imposed several provisions that were sent to agency head review and were incorporated into the subsequent CBA. The union filed grievances over both the submission of those provisions to agency head review and the implementation of the new CBA, arguing the agency was obligated to continue bargaining. An arbitrator ruled for the union and ordered the new CBA rescinded and the agency to return to the bargaining table. The FLRA unanimously overturned the arbitrator, holding he had misapplied the relevant statutory

provisions and that FSIP's ruling concluded negotiations .[11] This error took nearly two years to correct (*U.S. Department of Defense*, 2021).

- An arbitrator ordered the Department of Veterans Affairs (VA) to reinstate a probationary employee. VA had dismissed the employee for failing to follow leave request procedures, resulting in 776 hours of absence without leave. VA filed exceptions with the FLRA, arguing that arbitrators have no authority to hear grievances concerning probationary employee terminations. A year later the FLRA unanimously agreed, overturning the award as contrary to law. In a concurring opinion, one FLRA member lamented that significant resources were expended on an obviously meritless grievance (*U.S. Department of Veterans Affairs*, 2021).

Arbitral errors produce lengthy appeals, delaying resolution and increasing costs. Correct decisions in the first instance would save time and money for all parties involved. Agencies, employees, and taxpayers would be better served by more qualified arbitrators who already know the law and who issue rulings without obvious legal defects.

Conclusion

Federal employment law is highly technical. Federal labor relations practitioners widely recognize that arbitrators often do not understand the laws they are tasked with applying. The government should reform grievance procedures to use competent arbitrators with subject matter expertise. This would better enforce federal labor policies, minimize costly appeals, and resolve disputes more quickly.

[11] The FLRA found that the award was contrary to 5 U.S.C. §§ 7114 and 7119.

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