

## **Installment 15**

### **Exceptions to Arbitration Awards (Appeals)**

Hello NWP Reps and Members;

Welcome to LR Chronicles number 16. This is part 7 and the final installment of the full and complete explanation of "The Arbitration Process." In the last LR Chronicles, I told you about the post-hearing brief as well as other things that occur after the close of the record and prior to the decision being rendered by the Arbitrator. In this version, I will explain what happens after the Arbitrator renders their decision and delivers that decision to both Parties.

Regardless of the type of grievance that is the subject of the Arbitration Hearing (Disciplinary/Adverse Action or Contract Interpretation), the Arbitrator has several choices on how he/she decides a case. Those choices include:

- Sustain the grievance in full, including the requested remedy (agree with the Union)
- Dismiss the grievance in its entirety (agree with the agency and deny any remedy requested by the Union)
- Sustain a portion of the grievance and/or provide a limited remedy (split decision)
- Remand the matter to the Parties (provide a ruling on the general principle but leave the remedy and the administration of the award to the Parties)

In a contract interpretation case, if the Arbitrator chooses a "split decision", the split decision, more often has to do with the requested remedy than it does regarding the actual issue at hand. In a contract interpretation case, it is very difficult for an arbitrator to find a mid point in order to arrive at a "split decision." Either the Union has the correct interpretation of a contractual provision or the agency does. An Arbitrator may, however "limit" or "split" the scope of the remedy.

In a disciplinary/adverse action case, the Arbitrator could "split the baby" (split decision) by mitigating the discipline or granting a modified form of back pay or even rule that there should be no back pay at all. For example, in a disciplinary action, where the agency suspended an employee for ten (10) days, the Arbitrator could:

- Mitigate the ten days down to something less than ten days
- Sustain the grievance, but award the employee only partial back pay
- Sustain the grievance, but award the employee no back pay at all
- Deny the Union Attorney fees
- Any combination of the above

When a party to an Arbitration Hearing is not the prevailing Party (the Arbitrator's decision is not in their favor), that Party is free to file "Exceptions" (appeal) to the Arbitrator's decision. The Exceptions are filed directly with the Federal Labor Relations Authority (FLRA). The FLRA, however, has limited jurisdiction for exceptions. When the Parties have a purely contractual dispute, the FLRA may weigh in. When the Arbitrator renders a decision in a case involving discipline, the Authorities' jurisdiction is limited by statute. Under 5 U.S.C. 7121(f), matters that could be raised through an alternative forum (specifically the MSPB) cannot be raised through exceptions to the FLRA. Thus, adverse actions (discipline greater than fourteen days) cannot be raised directly to the FLRA. In those cases, the Agency must seek a review from the courts.

It is important to note that the filing of exceptions by either party should not raise the expectation that the arbitrator's award will be reversed. Exceptions can only be granted for a limited number of reasons and the FLRA provides the arbitrator with a great deal of deference.

As stated above, a party that wishes to file exceptions to an Arbitrator's award must file separately and distinctly on each matter that it is excepting. For example, if a party thinks there were several different errors made by the arbitrator, it must raise an exception for each error separately.

If a party chooses to file exceptions based on one or more of the above grounds, they must do so within thirty (30) days. The 30 day clock starts on the date that the award is served on the parties. If the last day for filing an exception falls on a Saturday, Sunday or legal federal holiday, the filing period is automatically extended through the next federal workday. If the party does not meet this 30 day time frame as described above, the Arbitrator's award becomes final and binding.

Should the Agency file exceptions to an award, the Union will then file an Opposition to Exceptions. The Opposition must be filed within thirty days of receipt of the exceptions. In the Opposition, the Union will assert the appropriateness of the Arbitrator's decision and call for deference. The Union may, however, also use the Opposition as a vehicle to request the Agency provide its own gloss on the Arbitrator's award while it is upheld.

If the FLRA hears a timely and appropriately filed exception to an Arbitration award, they have five (5) choices:

- Affirm the Award
- Overturn
- Deny
- Dismiss
- Modify
- Remand

### **Affirm the Award:**

When the FLRA affirms an Arbitrator's award, it is saying that the Arbitrator did not err in any way, shape or form, and it agrees with the Arbitrator's rationale as well as his/her decision.

### **Overturn the Award:**

If the FLRA overturns an Arbitrator's award, it is saying that the Arbitrator erred in his/her decision. In other words, they are saying that the Arbitrator overstepped his/her bounds.

### **Deny the Exceptions:**

If the FLRA denies one or more of the exceptions filed, it is saying that they do not agree with the exceptions as filed.

### **Dismiss the Exceptions:**

When the FLRA dismisses an exception, they do not even consider a ruling on the exception for one or more reasons. For example, in accordance with FLRA regulation 2429.5, the FLRA will not consider issues (exceptions) that could have been raised during the Arbitration proceeding, but that were not raised at the Hearing (except in certain circumstances). Therefore, the FLRA will refuse to consider an exception when that exception is dismissed.

### **Modify an Arbitration Award:**

When the FLRA modifies an Arbitrator's award, it is saying that the Arbitrator was partially correct and partially incorrect. For example, if the Arbitrator ruled on a contract interpretation case, and ordered the agency to return to status quo ante (the way it was before the change), the FLRA could rule on an exception filed by stating that the Arbitrator was correct in his/her decision, but that they erred in their award of the remedy. The FLRA could say that the Arbitrator should have only awarded prospective relief, meaning "effective or operative in the future." In other words, from that point forward.

### **Remand:**

Should the FLRA remand the issue, the Authority will provide guidance on how to proceed. Essentially, the Parties and/or the Arbitrator will be called upon to review the case with a new perspective.

Once the FLRA makes its decision on an appropriately and timely filed exception to an Arbitrator's award, it is not appealable to any other entity. Their decision is final and binding.

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