

1992

## Remarks Before the National Academy of Arbitrators

Jean McKee

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### Recommended Citation

McKee, Jean (1992) "Remarks Before the National Academy of Arbitrators," *Hofstra Labor and Employment Law Journal*: Vol. 10: Iss. 1, Article 7.

Available at: <http://scholarlycommons.law.hofstra.edu/hlej/vol10/iss1/7>

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## REMARKS BEFORE THE NATIONAL ACADEMY OF ARBITRATORS

*Hon. Jean McKee\**

I want to thank the Academy for including a session on Federal labor arbitration. And I want to thank Ira Jaffe for asking me to join in. I am very pleased to be here.

It would be presumptuous of me to claim expertise in all the statutory issues raised by Ira. Unlike you, I'm not an arbitrator. However, like you, I am a neutral. With 22 years in the Federal Government, and as Chairman of the Authority, I do feel qualified to comment concerning Federal sector labor issues.

At the Authority, we are aware of the need to change. Like President Tony Sinicropi stated, this need is directly related to the changes in labor relations due to outside forces which alter the relationships between the parties. In the Federal sector, such forces include, for example, the recent cuts in the defense budget which are leading to lay-offs of civilian employees, the downsizing of many units, and the consolidation of various units represented by different unions.

As a result of changes in the labor relations climate, the Authority has begun a comprehensive review of the Federal sector labor-management relations program with the goal of improving our procedures. Similarly, I submit to you, the time has come for arbitrators to begin a review of their role in the Federal sector. The time has come to discuss the need to look differently at Federal sector arbitration.

The arbitration process is one of our concerns because arbitration exceptions are the highest number of cases for review by our three presidentially-appointed members. Currently, we have a case inventory of 200, and a high share of that number is arbitration cases.<sup>1</sup>

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\* Chairman, Federal Labor Relations Authority, Washington, D.C.

"Arbitration of Statutory Issues: Procedural and Substantive Considerations," by Ira Jaffe and Jean McKee, *Proceedings of the 45th Annual Meeting of the National Academy of Arbitrators*. Copyright 1993, to be published by the Bureau of National Affairs, Inc., Washington DC 20037.

1. During fiscal year 1991, the Authority received 268 exceptions to arbitration awards, 213 unfair labor practice complaints, 196 negotiability appeals, and 28 representation cases. During the same period, 7,327 unfair labor practice charges were received by the Office of the General Counsel.

Ira raises a number of significant issues concerning the differences between the role of arbitrators involved in the Federal sector and those presiding over purely private contractual disputes. He suggests a number of approaches.

I assume a majority of the arbitrators here this morning have not heard many cases in the Federal sector. I believe I would not be exaggerating if I said that of all arbitrators that practice in the country, very few have actually done Federal sector labor cases. In fact, I know of a couple of arbitrators who never even had heard of the FLRA. So, I thought they weren't doing Federal sector cases, and they hadn't heard of us. But that wasn't the fact. Maybe none of their cases were ever appealed.

Now, I thought it would be good to give you a very brief introduction to the work of the Authority, as it pertains to the review of arbitration awards. I will then share with you some thoughts you might want to consider when resolving Federal sector grievances. And, then I'll describe some of the changes going on at the Authority which I hope will help you in your work.

The Authority was created by the Federal Service Labor-Management Relations Statute in 1978. The Statute provides that all collective bargaining agreements in the Federal sector shall include procedures for binding grievance arbitration. Parties may appeal arbitration awards to the Federal Labor Relations Authority. However, the Statute clearly limits our ability to overturn awards.

We can overturn an award only if, after review, we find it deficient because it is contrary to law, rule, or regulation; or on other grounds similar to those applied in the private sector.<sup>2</sup> These limitations on our ability to overturn awards reflect the clear intent of Congress that arbitration in the Federal sector be final and binding.

However, the reality of the situation is that of all decisions issued by the arbitrators in the Federal sector, some 22 percent of the cases are excepted to the Authority. In the private sector, less than two percent of the cases are appealed. So, the number of exceptions filed with us seems extremely high.

This high number indicates to me that particular complexities face arbitrators in the Federal sector. Put differently, the high appeal rate may be due to the fact that many grievances require the applica-

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2. Of the awards reviewed by the Authority, 19 percent are modified or set aside at least in part. That is, only 4.1 percent of all Federal sector arbitration awards are found deficient to some extent by the Authority.

tion of laws and regulations.

Like Ira, I believe the role of the arbitrator in the Federal sector differs from the role of the arbitrator who handles purely contractual disputes. And different roles create different responsibilities toward the parties.

Therefore, I tend to believe that to reduce this high volume of exceptions to decisions, arbitrators presiding over statutory claims involving public law must act differently than those presiding over private sector disputes. By the very act of accepting a Federal sector case, arbitrators enter into the milieu of laws, rules, and regulations governing Federal employees. Understandably, this is a shift into unfamiliar territory, and especially when you consider that just the Office of Personnel Management Regulations take up at least five feet on a book case.

So, I want to discuss several ideas which arbitrators might want to consider when resolving Federal sector disputes.

There is no question in my mind that unions and agencies have an obligation to inform the arbitrator of laws and regulations that are relevant to a particular dispute.

However, as Stephen Hayford noted yesterday, and I also believe, arbitrators have a responsibility to familiarize themselves generally with the basic body of relevant laws and regulations. Such familiarity will help arbitrators render awards which will resolve the dispute, be acceptable to the parties and, if necessary, withstand exceptions filed with the Authority.

For example, when deciding a case involving a determination of environmental differential pay, the arbitrator must satisfy the requirements of the Federal Personnel Manual in order to establish an entitlement to the differential. If an exception is filed with the Authority, and the appropriate requirements have not been satisfied, we will set aside or remand the case to the parties. This process, however, is expensive and time consuming. It virtually assures a high degree of frustration for the parties, the arbitrator, and the Authority.

Many of the exceptions filed with the Authority involve arbitration decisions which fail to articulate and analyze specific statutory and regulatory requirements. We at the Authority must, of course, continue to ensure that the legal requirements are met.

During the proceedings of the 43rd Annual Meeting of the Academy, Tony Ingrassia, from the Office of Personnel Management, put it bluntly:

Like it or not, the burden of issuing a proper award in the federal

sector eventually rests on the arbitrators. It is their decisions, not the shortcomings of the litigants, that are subject to challenge. The parties may choose to educate the arbitrator or not; there is no legal requirement to do so. However, arbitrators should be alert to outside limits on arbitrable authority.<sup>3</sup>

It seems to me that arbitrators should request information from the parties, if in doubt about the law. Unions and agencies in the Federal sector deal, on a daily basis, with those laws and regulations that regulate their working conditions. The parties are familiar with such external laws and are usually in a better position to provide assistance to the arbitrator. However, and I know this is controversial, nothing precludes the arbitrator from doing independent research. Someday we may have our computerized case decisions on-line for you to look at should you want to. We hope in a year or two.

Now, Ira also discussed certain procedures that some arbitrators use in their practice. I believe arbitrators need to seriously examine this area and evaluate his suggestions. For example, arbitrators might request that the parties file all documents before the hearing or stipulate facts whenever possible. While this procedure makes the arbitration process more formal, it would give the arbitrators an idea of the issues, laws, and regulations involved in the dispute. If arbitrators have the benefit of information prior to the hearing, they will be forewarned about specific laws or regulations for which they might need more explanation from the parties.

I also believe the parties need to receive decisions that are clear and comprehensive. On many occasions, we are confronted with arbitration decisions which fail to articulate clearly how the arbitrator resolved the issues. And sometimes we see arbitration decisions that make me wonder if the arbitrator is charging by the page. I'm sure that doesn't apply to anyone here.

I know that an admired colleague of yours will always be remembered for championing the writing of decisions in clear and simple English. In fact, it was here in Atlanta, back in 1973, that the then-President of the Academy, Gerry Barrett, said, "A well-reasoned opinion is a thing of beauty, and when it establishes necessary and clear guidelines for the parties, it performs its highest purpose."<sup>4</sup> I

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3. INGRASSIA, FEDERAL SECTOR ARBITRATION: A MANAGEMENT VIEW IN ARBITRATION 1990: NEW PERSPECTIVES ON OLD ISSUES, PROCEEDINGS OF THE 43RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 212 (Gruenberg ed., BNA Books, 1991).

4. BARRETT, THE PRESIDENTIAL ADDRESS: THE COMMON LAW OF THE SHOP IN ARBITRATION OF INTEREST DISPUTES, PROCEEDINGS OF THE 26TH ANNUAL MEETING, NATIONAL

couldn't agree with him more.

Arbitrators should also explore alternative processes which might provide opportunities for the parties to settle their disputes. While there are different schools of thought on this issue, I believe some of these methods can be very helpful.

Pre-hearing conferences, for example, might be successful in some cases. And arbitrators may even find that the parties just really want to settle but couldn't without assistance. The prompt resolution of disputes is our paramount concern. I hope it is also a concern of the arbitrators.

These suggestions are intended to assist arbitrators in handling Federal sector work, to make the process better for unions and management, and to reduce the number of exceptions filed with the Authority. The goal is to make the decision final. That is what the parties are after. It's what the arbitrator is after. And believe me, it's what we're after.

Now, in addition, there are ways in which the Authority can assist arbitrators in their work. One is by providing more information.

The Authority recently began publishing a quarterly summary of FLRA decisions with a special emphasis on the arbitration cases decided by the Authority. A few months ago, thanks to the assistance of the Federal Mediation and Conciliation Service, we mailed the summary to more than 900 arbitrators with a form asking them if they wished to be on our mailing list.

Well, the response was overwhelming! Nearly 500 arbitrators asked to be added to the mailing list. And just as many arbitrators requested copies of the Statute and the Guide to the Statute which we also publish. So, if you are interested in signing up, let me know.

During the last year, we began what I call non-traditional assistance to the parties: training and consultation. Until recently, such ventures took a back seat role to the more traditional prosecutorial and adjudicatory roles of the FLRA, but now they will have a front row seat.

And I might add, we have piloted a few training workshops for arbitrators on various statutory requirements. For example, in cooperation with organizations such as the Society of Federal Labor Relations Professionals, we have done training for arbitrators on several occasions. Jean Savage, a counsel on my staff, has conducted training with the Society. Jean is here with us today. She has had a very

successful session dealing with the Back Pay Act, one of the laws most frequently applied by arbitrators in the Federal sector and not dealt with sufficiently.

Through these efforts, I hope that agencies and unions will create a relationship which is beneficial to the workplace and the employees. Likewise, I hope arbitrators will be better informed of the laws and regulations that relate to their Federal labor practice.

Finally, the FLRA is undertaking a comprehensive review of the labor-management relations program. We are looking to the future. How can labor-management relations in the Federal Government work more effectively? We need to find out what's working? We need to find out what's not working? We need to examine all the barriers to more cooperative labor relations. At the Authority level, we now have an experienced mediator offering guidance and assistance to the parties. At the Office of the General Counsel, there is a full-time staff person working at the facility level directly with the parties in dispute.

At the same time, we are searching for ways to improve our own internal regulations and procedures. We have filed once in the Federal Register for comments on the unfair labor practice procedures. We will probably be requesting similar comments on other procedures. We are asking how can we change to better assist labor, management, and arbitrators in the conduct of their business.

This is a challenge we're undertaking. I invite you to join us in this challenge. I request your comments, suggestions, and recommendations on improving the program. To provide an avenue for discourse, I have in mind a meeting with representatives of the arbitration community specifically designed to hear your views. This way, we can ensure your participation in this process.

Arbitrators play an essential role in the dispute resolution system in the Federal sector. As Ira stated, the differences between the role of arbitrators in the private sector and those in the newer arena of the Federal sector are significant.

Because arbitrators are such an integral part of the process, I believe they need to take a more active role in the program. Arbitrators in the Federal sector are not only interpreters of the collective bargaining agreement, but as we have seen, their roles are much more complex. Because of this, arbitrators who take cases in the Federal sector must be prepared to accept and deal with the requirements imposed by the program.

With your help, we can ensure a more effective labor relations program. A more effective program will help the parties resolve their

disputes.

Now, I want to assure you that if you disagree with what I have said, we will not hold it against you, especially if one of your cases is appealed to us.

