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CHALLENGES TO ARBITRABILITY IN FEDERAL SECTOR GRIEVANCE CASES

Dr. Mollie H. Bowers*

INTRODUCTION

Grievance arbitration is designed to equitably resolve disputes which arise during the term of a collective bargaining contract without interrupting the flow of work. This does not mean that access to the process is either automatic or unregulated. In any given case, the law, the courts, the contract, and the arbitrator can all have interdependent roles in determining whether or not the merits of a case are grievable and, if so, whether they are eligible for resolution through arbitration. This is why grievability and arbitrability are called threshold questions.

In the federal sector, the answer to whether or not an issue is grievable and, therefore, a proper subject for resolution through the negotiated grievance procedure, is found in both the Civil Service Reform Act ("CSRA") and in the contract between the parties. Section 7121 (a) (1) and (2) of the CSRA permits the parties to negotiate grievance procedures which have a broad scope but it also empowers them to "exclude any matter from the application of" this procedure. Additionally, five non-grievable items are specified:

(1) any claimed violation of subchapter III of chapter 73 of this title [5 U.S.C. §§ 7321 et seq.] (relating to prohibited political activities);
(2) retirement; life insurance or health insurance;
(3) suspension or removal under section 7532 of this title
(4) any examination, certification or appointment; or
(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

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2. Id.
Beyond this, the range of issues deemed to be grievable is set by the parties in their contract.

In addition, at the outset of a case, it is necessary for the complainant to elect whether to pursue a matter through the grievance procedure or through other administrative avenues. The one exception to this proscription is complaints involving equal employment opportunity. When these tests have been met, the reference point for determining the arbitrability of federal sector grievance cases is the scope of the contract language negotiated by the parties.

There would be little need for further discussion if the nuances of determining the arbitrability of federal sector grievances were plain. However, this is not the case. As a consequence, the parties may wrestle with their differences over arbitrability throughout the steps of the grievance procedure only to find that they are no closer to agreement than when they began. In this instance, the principles which must be applied are those set forth by the U.S. Supreme Court over twenty-five years ago in a series of cases known as the Steelworkers Trilogy. In these and related cases, it has been deemed appropriate to defer to arbitration the resolution of disputes arising over the interpretation and application of collective bargaining contracts where the parties have agreed in advance to submit such grievances to arbitration.

The purpose of this article is to attempt to provide some guidance in screening cases and in preparing for arbitration where a threshold question of arbitrability is present. While certain legal considerations are addressed, they are intended as a resource for effective use of sound counsel when needed, not as a substitute for it. The background for this discussion was gleaned from a number of sources including federal sector cases involving arbitrability published by the Bureau of National Affairs, Inc. (“BNA”) between 1978 and 1984 and decisions of the Federal Labor Relations Authority (“FLRA”) which affirmed or set aside awards based upon resolution of the arbitrability question as well as the personal experiences of the author.

THE GROUND RULES

Probably the best overall advice that can be given with respect to a challenge to arbitrability is to raise it early if there is a legiti-

mate doubt that an issue is arbitrable. Claims that the subject matter of a grievance is not arbitrable almost always will be raised by the employer. This is usually the case because unions tend to opt for a more liberal interpretation of the contract language or may be seeking, through arbitration, to expand the scope of arbitrability beyond that which was agreed to at the bargaining table. Cases do arise, however, where an employer may be seeking the opposite result by challenging the arbitrability of a grievance.

For any number of reasons, instances do occur in which notice of a challenge to substantive arbitrability is not given until the opening stages of an arbitration hearing. Invariably, the opposing party will claim surprise and ask that the challenge be overruled because it was not raised earlier in the grievance procedure. Arbitrators are loath to uphold such a request because to do so could put them in jeopardy of exceeding their authority under the collective bargaining contract, especially when that contract contains language constraining an arbitrator from adding to, subtracting from, or modifying the contract. How then does a party protect its interests when notified for the first time at arbitration that a threshold question exists? That party must be prepared to clearly state to the arbitrator how much of a surprise this notice constitutes and what kind of remedy (i.e., brief recess, extended recess, postponement of the hearing) is required to prepare an adequate defense. The arbitrator will then weigh these considerations and make a ruling. The costs in time, money and damage to the labor-management relationship caused by such late notice and by unfounded assertions of surprise are obvious and should be avoided wherever possible.

The second basis for challenging the arbitrability of a grievance is a claim that procedural defects have occurred in the way the action was handled and/or in the processing of a complaint through the steps of the grievance procedure. Examples of these types of defects include, but are not limited to, the following: failure to provide timely notice of discipline; failure to timely file a grievance; failure to properly complete the grievance form; failure to afford proper representation; failure to follow the prescribed steps of the grievance procedure; and failure to timely appeal a grievance to the next step or to provide a timely response at a given step.

It is important for advocates to observe and to monitor the procedural soundness of a case at every step in the grievance procedure. Failure to do so can have significant immediate as well as long-range consequences. For example, some contracts contain language stating, in effect, that a grievance is null and void if it is not timely appealed...
to the next step, or that a grievance is affirmed if a timely answer is not forthcoming from management. Such language is often coupled with the provision that time limits may be extended or waived by mutual agreement of the parties. In the short-run, it is incumbent upon the parties to either meet these deadlines or to obtain a waiver (preferably in writing). This will insure that a grievance remains viable until it is resolved either by the parties or through arbitration.

Prompt detection and notice to the other party of an alleged procedural defect is essential because it can constitute grounds for barring the arbitration of a case on the merits. When a challenge to procedural arbitrability is made, the burden of proof is on the moving party to show that a required procedure has not been followed. The underlying principle in such cases is that the parties negotiated the language setting forth the grievance procedure and are expected to know the requirements and to observe them. Consequently, arbitrators generally hold that a party that waits until the eleventh hour of the hearing to claim an alleged procedural defect has waived its right to do so unless it can demonstrate to the arbitrator's satisfaction that there was justification for the lapse in proper contract administration. An example of this circumstance might include the situation in which a union or management representative has not clearly stated the nature of the complaint or the response or denial of it, or the nature of the remedy sought, because of lack of education or experience through no fault of his/her own. The weight given to such circumstances is determined on a case by case basis.

In most cases, when an arbitrator finds that a matter is not arbitrable because of procedural defects, the result is that the merits of the grievance will not be considered. Where denial of consideration of the merits would have overwhelming consequences for the labor-management relationship and/or for the public, an arbitrator might agree to go forward with the merits of a case. However, no such instances were discovered in the federal sector materials which were used as background for this work. When a grievance has been found to be not arbitrable for procedural reasons, this means either that the grievance has been sustained if management was guilty of the defect or that the grievance was denied if the union was at fault.

There are some cases where arbitrability is the only question before an arbitrator, but more often than not, he/she is asked to rule on this issue as a threshold question prior to consideration of the merits. In most private sector cases, the parties have become accustomed to presenting evidence and testimony on both arbitrability and on the merits in one hearing or set of hearings. This practice is usu-
ally more economical and less time consuming than if the hearings on arbitrability and on the merits are each heard separately. Nevertheless, a separate hearing on arbitrability may be advisable because this process may prove that no further proceedings are necessary. As is aptly stated by Elkouri and Elkouri, "[i]t would seem that the choice between these two procedures should be dictated by consideration of all the circumstances of the particular case." In making determination, however, the parties should understand that no less quality or quantity of proof is required to sustain a claim that a dispute is not arbitrable than is required to prevail on the merits of the case.

The controversy over separation—or the bifurcation—of these issues in arbitration hearings has not been uncommon in the federal sector. Management has been the party most interested in holding bifurcated hearings and has made its position known variously by filing pre-hearing briefs, by arguing for bifurcation at the outset of the hearing and even by walking out if an effort is made to proceed to the case on the merits. The latter conduct is not recommended because it could put the party engaging in it at risk that an ex parte arbitration hearing will proceed on the merits.

It might be useful to summarize the outcomes of challenges to arbitrability in the federal sector. A total of sixty-six published and unpublished arbitration cases for the years 1978 through 1986 were examined. In forty-six of these cases arbitrability was affirmed, in

nineteen cases it was denied\(^8\) and one case, involving two questions of arbitrability, the decision was split.\(^9\) In four cases where arbitrability was upheld by the arbitrator, the FLRA later, either directly or by inference from other rulings, overturned the decision.\(^10\) In the thirty-two cases where the arbitrators dealt with the merits, the party challenging arbitrability lost on the merits in fifteen cases.\(^11\)


10. NAGE, Local R2-98, 74 Lab. Arb. at 144; NFFE, Local 1724, 74 Lab. Arb. at 770; AFGE, Local 12, Grievance N-ESA-82-063; AFGE, Local 1092, 75 Lab. Arb. at 197;

and won on the merits in an equal number of cases. In two cases the decision was split on the merits.

Another dimension that contributes to the interest in bifurcated hearings in the federal sector is the lack of finality in the federal grievance arbitration process. In Department of the Army, Oakland Army Base and AFGE, Local 1157, for example, Arbitrator Schubert denied as premature the employer's request that a hearing on the merits be set aside because the employer intended to file an exception to any ruling in favor of arbitrability and to seek a stay from the FLRA. Where questions of arbitrability are concerned, the FLRA appeals process seems all too frequently to have become the Russian Roulette of federal sector arbitration. At the time a case is heard, when an award is rendered, or even years later, one or both of the parties often has its finger on the trigger ready to discharge every chamber in order to delay and frustrate the dispute resolution process or to strike down an award. As we sit and listen for the click, let us turn our attention to some of the issues that have been raised in determining arbitrability in the federal sector grievance cases.

**Timeliness**

Although this subject falls under the litany of possible bases for a procedural challenge to arbitrability, it has been given special consideration because it arose in twenty of the sixty-six cases examined. The breakdown of issues raised in the cases is as follows:

1) Failure to timely file a grievance.
2) Failure to timely propose disciplinary action.
3) Failure to timely request arbitration.
4) Failure to raise objection to objection to arbitrability of the issue.
5) Failure to timely amend the grievance.
6) Failure to timely make a claim for specific relief.

Failure to Timely File a Grievance

Issue 1 will be considered in some detail. In Air Force Logistics Command and AFGE, Local 916, the complaint was mailed on the 18th day of a 20 day filing period and was received by the employer on the 21st day. Arbitrator Johannes ruled in favor of arbitrability for three reasons: (1) the act of dispatching the complaint was controlling in determining timely filing; (2) there were offsetting claims because the employer also technically failed to provide timely notice of the disciplinary action; and (3) the rights of a party should not be forfeited based upon a technicality unless the contract specifically requires it. These criteria provide sound guidance for deciding how to proceed in similar cases with emphasis on the fact that where there is proof that a complaint or a notice was dispatched, there need not be an offsetting penalty in order to sustain the same conclusion. Eight of the above cases involved challenges with respect to the time the grievant and/or the union knew or could reasonably be expected to have known that the grounds for a complaint existed. These cases suggest several pertinent considerations when determining arbitrability in a discipline or discharge case. One is that the affected employee may be considered to have had notice at the time he/she is informed of the action to be taken rather than when the written documentation is received.

If the contract language states that the “employee or the union knew or could have known” of the basis for a complaint, then a bar

17. AFGE, Local 148, 74 Lab. Arb. at 468; AFGE, Local 3690, 82 Lab. Arb. at 950.
18. AFGE, Local 12, 84 Lab. Arb. at 649.
19. AFGE, Local 2782, 75 Lab. Arb. at 1194.
20. AFGE, Council No. 214, 75 Lab. Arb. at 597. Local 916.
to arbitration may be found. Such bar is justified if a grievable offense occurs which the union has knowledge of but does not act upon until a specific employee comes forward (unless the contract precludes a union from advancing a complaint absent an aggrieved employee). Arguably, under certain circumstances, this language could be interpreted to mean that a grievance is timely if it is filed within a specified period after the grievant or union has knowledge. Given the current emphasis on individual rights in labor relations and a long history endorsing the right of grievants to go forward with or without union representation, this interpretation could prevail in some situation.

Another factor that arbitrators may consider is whether the parties pursued the resolution of a dispute through all the steps of the grievance procedure and into arbitration even though the grievance was known or was claimed to be untimely at an earlier stage in the procedure. It is reasonable to suggest that a finding in favor of arbitrability will be made in such cases where the nature of the dispute has a significant impact upon the work force, the labor-management relationship an/or the public. A grievance involving exposure to asbestos, even though the hazard had occurred several years earlier, was held to be arbitrable because the parties had pursued the grievance through all of the internal steps and strict application of the time limits was found to inappropriate at the arbitration stage.24 Historically, the fundamental principle underlying the grievance procedure has been to encourage settlement of a dispute at the lowest possible level. Certain parties have endeavored to act on this principle by including language in their contracts encouraging informal discussion before a formal complaint is filed and tolling time limits for a specified or unspecified period while such discussions are taking place. This author would never be one to discourage attempts to informally resolve differences between the parties but she wishes to offer one caveat: the party that initiates informal discussions must put the other side on notice that this is the intent of the meeting. In this way, it is assured that everyone knows the status of the grievance from the outset, as well as the options available to both parties in terms of reaching a mutually acceptable resolution.25

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24. NLRB Professional Ass'n., 86 Lab. Arb. at 689; See also AFGE, Local 2052, 85 Lab. Arb. at 553.
25. AFGE, Local 916, 75 Lab. Arb. at 597.
Failure to Timely Propose Disciplinary Action

It is ironic to find that challenges to arbitrability frequently arise because the employer failed to timely propose disciplinary action. If the action was warranted in the first place, then one would think that it would be promptly pursued. A bona fide basis for delay can exist where there is specific contract language allowing a delay when it is anticipated that the circumstances may be significantly changed within a given period of time. An example of this type of case is Department of the Air Force and AFGE Local 916 wherein the grievant was involved in a second offense five days after the first. In addition, there was no dispute that the delayed notice was a procedure that the parties had always used and the union had never challenged. It is worth noting, however, that interpreting the meaning of “anticipated” may pose a challenge to a neutral decision-maker, especially if there is no qualifying language in the contract or an established past practice.

Another significant matter with respect to this aspect of timeliness is what an arbitrator might do in a situation where the employer has a demonstrable history of failure to provide timely notice of disciplinary action and where the union has repeatedly and successfully challenged the arbitrability of such cases, and now adds “harmful error” as its defense. Resolving the question of timeliness is not difficult if the contract prescribes a specific time limit for the issuance of disciplinary notices. However, determining whether or not harmful error has resulted can be a different matter.

In discipline and discharge cases, it may be extremely difficult for an individual grievant to prove that harmful error resulted from untimely notice. In contrast, it is possible to show that an employer’s delinquency had a harmful effect upon a union. This topic has been the subject of considerable litigation in the federal sector initiated originally by Donald Devine, former Director of the Office of Personnel Management. It is difficult to determine the amount of weight an arbitrator should give to a finding that specific contractual requirements concerning the timing of disciplinary actions have been violated. The answer has varied over time. In Devine v. White the employer argued that a two-day delay did not constitute harmful error. The court disagreed emphasizing that the delay, standing alone, may not be harmful but that when the parties negotiate and agree

27. Id.
upon mandatory time limits, they determine in their judgment what is and is not harmful error. Consequently, the court held "it may be possible to find 'harmful error' even absent evidence that the violation led to a loss of evidence or other measurable adverse effects ..."

Subsequently, in *Devine v. Nutt*, one of the issues placed before the court was whether or not the arbitrator's decision to hold and enforce liability of collective bargaining agreement provisions by, in effect, penalizing the agency for disregarding them was reasonable and within the scope of his authority. The court held that:

> the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been adversely affected. The union is a major (if not the major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection . . . . In the contract here, the union and the agency agree to institute procedures that provide . . . timely notice of proposed adverse action within a reasonable period after the offense or its discovery. These procedural safeguards, established by collective agreement, effectively become union rights.

There are three premises incorporated in this ruling that are especially noteworthy: (1) harmful effect to the union is a legitimate consideration whether or not any such claim has been advanced on behalf of the grievant; (2) a union can suffer a harmful effect if "procedural safeguards" contained in the collective bargaining contract are violated; and (3) pervasive failure by an employer to comply with the due process requirements set forth in a contract "justify mitigation" but not necessarily removal of the disciplinary penalty imposed on the grievant.

This interpretation proved to be short-lived. Upon appeal to the U.S. Supreme Court, the Court in *Cornelius v. Nutt*, rejected the Federal Circuit Court's reading of the harmful error provision. The legislative history of the provision was reinterpreted by the Supreme Court to hold that:

> In the present case, if the disciplined employees had elected to appeal to the Board [MSPB], their discharges would have been sustained by the Board under its interpretation of the harmful-error rule. Because, however, they pursued the negotiated grievance and

29. *Id.* at 443.
arbitration procedures, they benefited from the different interpretation of the harmful error rule advocated by respondents and applied by the arbitrator and the Court of Appeals, and their discharges were replaced with brief suspensions. If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim that the agency violated procedures guaranteed by the collective-bargaining agreement would tend to select the forum—the grievance and arbitration procedures—that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid.\(^1\)

The Court concluded that "harmful error" constitutes an effective affirmative defense only if it pertains directly to the grievant and it is shown that the grievant, rather than the union, directly suffered from the "harmful error."

The controversy over the proper application of harmful error is far from being resolved. Like other issues in the Federal sector, the appropriateness of any decision on this matter has become embroiled in the on-going test of strength between the FLRA and the Merit Systems Protection Board ("MSPB"). The essence of the FLRA's current ruling is that harmful error does not apply to suspensions of fourteen days or less, reprimands, warnings and the like on the theory that such actions may be set aside by an arbitrator even if a procedural defect does not rise to the level of harmful error.\(^2\) According to the FLRA, therefore, consideration of harmful error is only appropriate by an arbitrator in cases involving suspensions of more than fourteen days, demotion and removal from the service. For the time being, it appears that management cannot have it both ways. If a union commits a minor procedural error under unique and nonrecurring circumstances, then an employer may not prevail in claiming harmful error in terms of fidelity to the contract if the disciplinary action is shown to be unjustified by the merits of the case.\(^3\)

In contrast, the MSPB has taken the position that staleness of disciplinary charges does not constitute an affirmative defense absent a showing of actual prejudice to the grievant.\(^4\) Making a persuasive showing is no simple task since the MSPB appears to believe that discipline that can be sustained on the merits should not be over-

\(^{32}\) 22 FLRA 195; 22 FLRA 602; 22 FLRA 607. See also AFGE, Local 2382, 85 Lab. Arb. at 985; AFGE National Council of Field Labor Councils, 85 Lab. Arb. at 841.
\(^{33}\) AFGE, Local 1733 (Bowers, Arb.).
\(^{34}\) Simmins v. Navy, 4 MSPB 413 (1980).
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turned even if the employer has failed to comply with procedural requirements set forth in the collective bargaining agreement.\textsuperscript{35}

In sum, important advice for both advocates and neutrals is to maintain a constant vigil to keep abreast of the moving hand of interpretations where harmful error is concerned. Clearly, these are uncertain times. Regardless of the timing, it appears that due process considerations negotiated by the parties in their collective bargaining agreement are being juxtaposed to the alleged propriety of discipline.

Other Procedural Defects

Undoubtedly the array of other procedural defects that could arise in federal sector grievance arbitration cases is wide. Some of these issues, gleaned from the cases used as background for this work, will be discussed subsequently:

1) Failure to comply with lower step requirements.\textsuperscript{36}
2) Failure to use the proper form.\textsuperscript{37}
3) Failure to include proper information.\textsuperscript{38}
4) Union rather than grievant filing.\textsuperscript{39}
5) Right of employer to grieve.\textsuperscript{40}

Failure to Comply with Contractual Requirements

In \textit{Utah Army National Guard and National Federation of Federal Employees, Local 1724}, the employer contended that the case was not arbitrable because the issue, pertaining to beards, involved a policy that was beyond the scope of an arbitrator's authority to determine and that there was a procedural defect at a lower step in the grievance procedure. Arbitrator Wiggins ruled that the grievance was arbitrable for three reasons: (1) the existence of a practice is always a pertinent subject of inquiry in determining the intent of the parties to a collective bargaining contract; (2) the issue involved a practice between the employer and the union rather than interpretation of any policies or regulations; and (3) sufficient information had been provided at Step One of the grievance procedure to over-

\textsuperscript{35} Support for this interpretation was provided by Sanders v. United States Postal Service, 801 F.2d 1328 (Fed. Cir. 1986), where removal of an employee for an incident involving cocaine was upheld even though the court acknowledged that a six month delay in imposing this penalty was a weakness in the government's case.
\textsuperscript{36} AFGE, Local 17, 84 Lab. Arb. at 725.
\textsuperscript{37} AFGE, Local 2151, 76 Lab. Arb. at 118.
\textsuperscript{38} NAGE, Local R5-165, 83 Lab. Arb. at 1077.
\textsuperscript{39} AFGE, Local 1138, 77 Lab. Arb. at 1159.
\textsuperscript{40} NFFE, Local 1827, 82 Lab. Arb. at 893.
come the employer's procedural objection. Ultimately, this award was set aside by the FLRA for reasons unrelated to the decision on arbitrability.\textsuperscript{41}

\textit{Failure to Use Proper Form}

Two types of cases are included in this category. The first involved a challenge to arbitrability from a union alleging that the employer had failed to use the proper contractually-specified form in meeting out the discipline.\textsuperscript{42} In his ruling on this matter, Arbitrator Avins found that if the grievant justifiably incurred the discipline, then a "temporary" error in processing the form cannot absolve him.\textsuperscript{43} Some additional guidance can be extracted from this example. Arguably, a contrary finding could have been reached if it were proven that, without a union's tacit or explicit consent, temporary errors in processing infractions were repeatedly made by an employer and/or that the documentation used made it difficult for a reasonable person to comprehend the action taken and the reasons for it.

Arbitrability was challenged in \textit{U.S. Immigration and Naturalization Service and Immigration and Naturalization Council AFGE, Local 2718} because the union failed to file a request for arbitration with the Federal Mediation and Conciliation Service ("FMCS") in accordance with custom and practice between the parties.\textsuperscript{44} While this may seem to be a minor point, readers should know that this type of issue is not uncommon in federal sector cases. Arbitrator Winton held that although a practice of union filing had been generally followed, it is not the sort of action that qualifies as a \textit{binding} past practice.\textsuperscript{45} There are both advocates and arbitrators who find this type of ruling perplexing because they believe that, once a determination has been made that a \textit{bona fide} past practice exists there is no room for asserting that it is not binding. Moreover, depending upon the circumstances in any given case, there are arbitrators who might disagree with Winton's ruling and assert that a union's lack of due diligence in the face of an established custom and practice constitutes a waiver of its right to pursue the merits of a case to arbitration.

\textsuperscript{41} NFFE, Local 1724, 74 Lab. Arb. at 770, \textit{rev'd} 77 FLRA 125.
\textsuperscript{42} AFGE, Local 2151, 76 Lab. Arb. at 118.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} AFGE, Local 2718, 77 Lab. Arb. at 1033.
\textsuperscript{45} \textit{Id.} at 1038.
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Failure to Provide Proper Information

There are numerous junctures in the discipline and grievance processes where this type of error can occur. However, problems seem to arise most frequently with respect to the content of a notice of proposed discipline or in the information submitted on a grievance form. For example, in United States Department of the Air Force and AFGE Local 987,46 the union raised the issue of arbitrability because the notice of proposed suspension did not originally contain a statement of the employee's reply rights. This matter was easily disposed of by Arbitrator Nicholas because the defect was made harmless by an amended notice and because the grievant did not reply to either the original or the amended notice, nor did he provide timely notice of the defect.47 It would be worthwhile for advocates to carefully consider the circumstances of this case since frivolous and time consuming challenges to arbitrability add nothing to the likelihood that the party advancing them will prevail under the scrutiny of an astute arbitrator. That is not to say that acts of omission or commission by an employer in preparing a notice of proposed disciplinary action should be overlooked by a union. In the subject case, the outcome might have been different if the document had not been amended and/or the union had filed a timely protest concerning the failure to communicate the employee's reply rights.

Although no specific case on point was discovered, this category should not be closed without mentioning the degree of specificity required in the statement of charges against an employee. The resolution of this issue is fairly simple to state but is sometimes difficult to interpret in a given case. The charges must be stated with sufficient specificity and clarity to enable a reasonable person to understand the date, location and nature of the offense that he/she is alleged to have committed and to prepare a proper defense. The major factors upon which each charge is based must be stated clearly but not in excruciating detail and new or unrelated charges may not be added at the arbitration hearing.

The origin and nature of the omissions in the content of a grievance form have been key factors emphasized by arbitrators in determining whether or not a bar has been erected to considering a case on its merits. For example, some latitude has been afforded, especially to grievants and to union representatives, if a supportable case can be made that information was provided to the best of the origi-

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47. Id.
nator's ability. Caution should be exercised in advancing this position since it is unlikely that it will be sustained if used as a rationalization for poor contract administration or, as is increasingly true in the federal sector, grievants and their representatives demonstrate considerable competence in their professional capacities.

There is no simple rule that can be used to foretell the outcome of allegations that a grievance form contains defects. The name of the grievant, the date of the incident and of the grievance, contract clauses alleged to have been violated, remedy sought and required signatures are all vital pieces of information for prompt and efficient grievance handling and for maintaining the integrity of both the collective bargaining contract and the negotiated grievance procedure. However, exceptions to this premise have been made.48

In some cases, serious consequences can result if the grievance form does not include information specifically required by a contract. For example, in *Tennessee Air National Guard and NAGE Local R5-165*, Arbitrator Byars held that the employee's complaint concerning a lateral transfer was not arbitrable because the grievance did not contain facts required by the contract even though that document was silent on the penalty to be imposed for such an omission.49

An approach sometimes used by union representatives is to enumerate the obvious contract clauses and then to append a catch-all phrase, such as, "all other provisions relevant to this case." In many cases, there are no objections to this practice. However, caution should be exercised, especially if there is strict contract language requiring specificity. As a word of warning, there appears to be a growing trend among federal sector employers to put unions on notice that lapses in adherence to plain contract language will no longer be tolerated regardless of the issue at stake. Furthermore, arbitrators and advocates who do their homework may readily view this type of catch-all language as a red flag and it may cause them to look for other contract clauses which may or may not work to the

48. For example, in Council of Locals 216, AFGE, 72 Lab. Arb. at 34, Arbitrator found the case to be arbitrable even though the grievance did not cite the date of the incident and the employer claimed that the time limit had been waived when the union agreed to accept a response from management which was issued after any reasonable interpretation of such limit had been exceeded. For the purposes of this discussion, the absence of an incident date is of paramount importance. This lack of information was not a bar to arbitrability because "the grievance did not arise out of one occurrence or incident, but rather because of an accumulation of occurrences and incidents at a number of different Agency offices." The principle represented by this decision is referred to as a continuing violation and arbitrators have generally waived any requirement for specification of an incident date in such cases.

49. NAGE and Local R5-165, 83 Lab. Arb. at 1077; see also National Treasury Employees Union, Chapter 217, 86-2 ARB (CCH) ¶ 8526.
This category should not be closed without some mention of the statement of remedy requested. Both advocates and arbitrators have become accustomed to utilizing, after the statement of the issue, the standard phrase, "If so, what should the remedy be?" There is nothing wrong with this phraseology but it should be pointed out that, if a specific remedy is being sought by the grievant, this information should be stated on the grievance form. Some union advocates believe that it is better to leave the question open in the hope that an arbitrator will give them the best possible solution if they prevail on the merits. No doubt there are cases where this has been accomplished. But there is another side to the coin; that is, the absence of a stated remedy may produce one or more of the following adverse results: (1) it may deprive a union representative of a clear target to aim for in preparing a case; (2) it may leave management at a loss to respond since it does not know what the grievant wants, thus complicating the processing of a complaint through the steps of the grievance procedure and potentially laying the groundwork for a challenge to arbitrability; or (3) it may make it more difficult for the parties to determine whether a basis exists for an acceptable pre-arbitration settlement.

Union Rather Than Grievant Filing

The question of whether a union can file a grievance as an institution is ordinarily addressed by the introductory language in the grievance procedure. Such language usually states that certain grievances can be filed by an employee or the union within a period of time after the employee or the union has knowledge, or could be reasonably expected to have knowledge, of the alleged basis for a complaint. As noted earlier, a union may file a grievance when it becomes aware that the rights of an employee may have been violated, regardless of whether a specific grievant has come forward. The union also has the responsibility to ensure that contract terms and conditions are fully, fairly and consistently applied and implemented. Consequently, the union may be the moving party in "class action" complaints about issues affecting the bargaining unit, allegations of discrimination or, for example, the transfer of work out of the bargaining unit through subcontracting. Additionally, unions may file grievances when the action complained of allegedly affects their rights as institutions or the rights of their officials to fulfill their functions as representatives.

These circumstances should not be confused with what is fre-
quently called a "group grievance." In a group grievance the collective bargaining agreement enables the union to consolidate two or more similarly situated grievances for the purposes of arbitration. Contract language allowing such consolidation is aimed at economizing time and other resources without sacrificing due process, and should not be construed as waiving the requirement for each affected employee to file a timely grievance.

Nevertheless, a union's right to grieve has been the subject of challenges to arbitrability. A case in point is United States Dep't of the Air Force Headquarters 2750 Air Base Wing ("AFCL") and Air Force and AFGE Local 1138.50 This case involved a charge of sex discrimination in the operation of a health club. The employer contended that the matter was not arbitrable as the union could only file a grievance pertaining to the contents of the collective bargaining contract. It also argued that the grievance procedure specifically excluded matters subject to statutory appeals and to determination by the Equal Employment Opportunity Commission ("EEOC"). Arbitrator Imundo ruled the grievance was arbitrable based on the following reasoning: (1) the union may file a grievance on behalf of employees it represents; (2) the use of EEO procedures becomes the appropriate forum only if the alleged discrimination does not pertain to interpretation of the contract; and (3) the contract requires the employer to discharge, in an optimum manner, responsibilities under the referenced EEO article.51

Right of an Employer to Grieve

This is a controversial issue even among the ranks of management. It is reasonable to state that a majority of federal sector contracts do not contain a provision enabling an employer to file grievances. Opponents of such provisions contend that it is unnecessary because management already has the right to discipline and discharge employees and to file unfair labor practice charges against a union.

Advocates of management's right to grieve assert that access to the grievance procedure should be governed by the principles of equal opportunity and that employers should not be relegated to using the lengthy unfair labor practice route when they have a specific complaint against a union. In Defense Mapping Agency Aerospace Center and National Federation of Federal Employees Local

50. 77 Lab. Arb. at 1159.
51. Id.
1827, O'Grady held that a grievance filed by management was arbitrable because both parties had a right to grieve. Furthermore, the initiating of the grievance by a management official was analogous to the past practice of union officials initiating grievances on behalf of affected employees. Finally, the complaint contained sufficient detail about the circumstances and remedy sought to allow the union to respond. In San Antonio Air Logistics Center, Kelly Air Force Base and AFGE, Local 617, Arbitrator LeBaron took another tack in resolving this question. He found that a grievance filed by management was arbitrable under the contract, but he also relied upon a portion of the Steelworkers Trilogy to conclude that, "[a]n order to arbitrate the grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should always be resolved in favor of coverage." In United States Navy Exchange and AFGE, Interdepartmental Union 3723, Arbitrator Bailer rendered a decision in 1979 in which he reasoned that where there is no explicit prohibition against employer initiated grievances and a bona fide issue on the merits exists, the case shall be deemed to be arbitrable.

There is useful reasoning by arbitrators to illustrate the final two categories in this group of procedural defects. In United States Air, Force Newark Air Force Station and AFGE Local 2221, Arbitrator Graham ruled that the union did not have the right to bring a case to arbitration after the grievant had withdrawn and so notified the union. In Harry S. Truman Memorial Veterans Hospital and AFGE, Local 3399, Arbitrator Hoffmeister held that once parties jointly request arbitration and begin the arbitration process, the process continues through to a conclusion and neither party may withdraw. Although an arbitrator cannot force a party to attend, he/she can proceed with an ex parte proceeding after giving timely notice of the hearing to both parties.

52. 82 Lab. Arb. at 873.
53. Id.
54. 73 Lab. Arb. at 455.
55. Id.
56. 73 Lab. Arb. at 1016.
57. Id.
58. 73 Lab. Arb. at 185.
59. Id.
60. 74 Lab. Arb. at 1021.
61. This award was affirmed by the FLRA in 6 FLRA No. 102.
Substantive Arbitrability

The following subjects are included in this area of consideration:

1) Arbitrator lacks authority over subject matter:
   a. management rights
   b. interpretation of regulations
   c. withdrawal of recognition

2) Contract language, law, rule or regulation excludes the matter from arbitration

3) Use of alternative appeal procedures:
   a. classification
   b. within-grade increase
   c. non-selection for position
   d. job restoration

4) Probationary Employees

5) Unsatisfactory performance

6) Contracting out

7) Free Speech

8) Past practice

This listing illuminates a number of issues that have appeared in federal sector grievance cases where arbitrability was challenged.

62. AFGE, Local 85, 82 Lab. Arb. at 901; AFGE, Local 987, CCH 86-Z ARB ¶ 8122.
63. AFGE, Local 1815, 75 Lab. Arb. at 238.
65. AFGE, Local 2382, 75 Lab. Arb. at 793; AFGE, Local 1738, 72 Lab. Arb. at 66;
AFGE, National Council of Soc. Sec. Payment Center Locals, 72 Lab. Arb. at 359; AFGE,
Council of Prison Locals, Local 1494, CCH 81-1 Arb. ¶ 8122; AFGE, Local 2250, 76 Lab.
Arb. at 581; AFGE, Local 3407, FMCS 82K/27451.
at 104; United States Dep't of Labor and Grievants, CCH 86-2 ARB ¶ 8514. Affirmation of
this type of decision making can be found in 16 FLRA No. 86, 8 FLRA No. 103, 15 FLRA,
see 86 Lab. Arb. 104 at 109 No. 77 and 16 FLRA No. 83.
68. AFGE, Local 2382, 85 Lab. Arb. at 985.
69. AFGE, Local 3637, 78 Lab. Arb. at 615.
70. AFGE, Lodge, 817, 77 Lab. Arb. at 518; AFGE, Local 1119, 77 Lab. Arb. at 725;
NFFE, Local 1827, 82 Lab. Arb. at 893; AFGE, 9th District, 82 Lab. Arb. at 939; AFGE,
Local 2382, 81 Lab. Arb. at 325; National Union of Compliance Offices, 80 Lab. Arb. at 250;
AFGE, Local 1092, 75 Lab. Arb. at 197; AFGE, Local 12, Grievance N-ESA-82-063.
71. AFGE, 9th District, 82 Lab. Arb. at 939; AFGE, Local 547, 84 Lab. Arb. at 973;
AFGE, Local 1382, 85 Lab. Arb. at 985.
72. AFGE, Local 1157, 82 Lab. Arb. at 1133.
73. AFGE, Local 1617, 73 Lab. Arb. at 969; AFGE, Local 1617, 73 Lab. Arb. at 1020.
74. NAGE Local R2-98, 74 Lab. Arb. at 144; NFFE, Local 1724, 74 Lab. Arb. at 660.
These cases were set aside by 10 FLRA No. 112 (67) and 7 FLRA No. 125 (750)
respectively.
Challenges to Arbitrability

Justifiably, the CSRA and contract negotiators have taken great care to safeguard management prerogatives. However, federal managers are not any more immune than their private sector counterparts to erosion of these rights through decisions made at the negotiating table and through the emergence of past practices. Further, management cannot exercise these rights arbitrarily or use these rights successfully to bar the arbitration of legitimate subjects raised by a union. It is not always easy for the parties or arbitrator, when a challenge to arbitrability is based upon management rights, to distinguish between a serious intent and a foundationless strategy because of the number and complexity of factors that may be brought to bear in such cases.

Management's right to determine work assignments was the basis for a request to bar arbitration in a case involving the Veterans Administration Medical Center and AFGE Local 85.75 This grievance arose because volunteers were used to provide transportation which affected the opportunity for overtime work for bargaining unit members. The employer claimed that the grievance was not arbitrable. Arbitrator Heinsz denied the claim responding that assignment of overtime affects the working conditions of employees and the language in the management rights clause did not expressly exclude such assignments from being considered by an arbitrator.76 In Warner Robins Air Logistics Center77, a union grieved the termination of two employees' details to the "owl" shift. The employer responded by claiming that the dispute was not arbitrable because it infringed upon management's right to assign work and to determine tours of duty. Arbitrability was affirmed because the employer, at its option, had negotiated language establishing procedures concerning tours of duty and assignments thereto. Further, the grievance procedure included "any matter involving working conditions," under which assignments and tours fall. Moreover, the merits of this case revealed that the union was not endeavoring to interfere with management's rights, but rather, was protesting what it believed to be the arbitrary and capricious exercise of these rights in response to a safety complaint.78

Cases involving government regulations can be difficult to de-

75. 82 Lab. Arb. at 901.
76. Id.
77. AFGE, Local 987, CCH 86-2 ARB ¶ 8122.
78. Id.
cide but the process is manifestly easier when the regulations involved are incorporated into the contract verbatim, by reference, or are specifically included within the scope of grievable items. The hierarchy of controlling documents in the federal sector is in descending order: the applicable laws controlling government-wide regulations, the collective bargaining contract, and agency regulations.

An illustration of a case in this category is United States Army Safety Center and AFGE Local 1815. The employer sought to bar arbitration because the grievance involved a claim for payment of travel time at the federal overtime rate and the contract did not grant an arbitrator authority to interpret regulations from a higher authority. This position was overruled because the contract did not preclude an arbitrator from making decisions concerning the application of this regulation. Moreover, it should be noted that the CSRA requires arbitrators to interpret and apply applicable law and regulation.

Withdrawal of recognition of the union is also an issue raised as a threshold question in arbitration. This arose in U.S. Department of Health and Human Services, SSA and National Federation of Federal Employees Council of Consolidated Social Security Administration Locals. The grievance protesting the agency's withdrawal of recognition of a certified bargaining unit was held to be arbitrable, notwithstanding the employer's contention that the determination of the appropriateness of a unit is an issue that is solely the prerogative of the FLRA and is not within the scope of an arbitrator's authority. Arbitrability was affirmed because the case involved an agency reorganization. Decertification had been attempted although there had been no change in job titles or duties and, because only the FLRA can certify a unit, so only can it decertify one.

Contract Language, Law, Rule or Regulation

There are a variety of cases in which arbitrability was challenged because the issues were not readily identifiable as proper subjects for resolution through that process. A grievance protesting an Assistant Personnel Officer's treatment of an employee was found to be arbitrable because the claim involved interpretation and application of a contract provision which pertained only to the employee's immediate supervisor, who was not the official in question. In Vet...
ers Administration Medical Center and AFGE, Local 1738, a grievance involving reserved parking spaces at a hospital was held to be arbitrable even though exceptions to the grievance procedure were listed in the contract. The contract provided that these exceptions would not preclude grievances concerning the fair and equitable application of regulations, policies or practices. Note, the above decision was reached despite a prior ruling involving the same parties that the number and location of reserved parking spaces to be a non-negotiable item.

A slightly different turn of events is represented in Social Security Admin., Bureau of Retirement and Survivors Ins., and AFGE and Nat’l Council of Social Security Payment Center Locals, where an employer’s grievance sought payment from the union for one-half of the cost of a transcript for a discharge hearing. This grievance was deemed to be arbitrable.  

Finally, in United States Department of Justice, Bureau of Prison, and AFGE Local 1494, an alleged violation of the Privacy Act was not barred from arbitration even though the employer argued that such a violation involved neither the interpretation and application of the contract nor publicized agency regulations. The arbitrator ruled that insofar as the union complaint concerned a violation of personnel policies that incorporated provisions of the Act, such legislation was a proper subject for arbitration.

In Veterans Administration Hospital and AFGE, Local 2250, a case involving a Veterans Administration hospital discussed the arbitrability of promotions. There the union’s grievance was held to be non-arbitrable because the employer had timely raised the threshold question of arbitrability and correctly asserted that the contract language provided for a different process to resolve controversies over the application of special appointment procedures.

Use of Alternative Appeal Procedures

As stated in the introduction to this article, the CSRA defines a limited number of issues as non-grievable and also places restrictions
on the choice of forum used when appealing certain complaints. An area where differences between the parties often arise is in the assignment of and compensation for duties allegedly performed at a higher grade. In the federal sector, the potential for such disagreements tends to be heightened by the frequency of reorganization in some agencies. When new job classifications are added or old ones changed, it is understandable that affected employees do not want to be disadvantaged and may believe that they are entitled to additional benefits. An example of this type of grievance occurred at the Norfolk Naval Supply Center. When a new job classification was created in the work area, certain lower graded employees grieved claiming they should have received compensation because they had actually performed the work of the higher-graded classification on a regular basis as well as on specified dates. As further background, it should be stated that at an earlier date some of these same employees had also independently initiated a classification appeal. The employer had accordingly conducted an additional job audit which did not find in the employees favor. When the instant grievance was filed, arbitrability was raised as a threshold question at the hearing. The arbitrator sustained management’s finding and held that what the union was really seeking to obtain through this proceeding had been denied in the prior forum and was beyond the authority granted to an arbitrator.

In Social Security Administration, a grievance protesting the denial of a within-grade increase after a performance appraisal, was held to be arbitrable even though a statutory appeal had been filed. The employer contended this action caused the complaint to lose its arbitrable status. Arbitrator Atelson held that because the denial of a within-grade increase was based, in part, on an adverse audit and because no statutory appeal exists for this circumstance, to deny arbitration would improperly foreclose a bona fide grievance concerning the conduct of such audits. This is a matter distinguishable from the consequences of such audits.

91. Id.
92. AFGE, Local 2382, 85 Lab. Arb. at 985.
93. Id.
94. AFGE, Lodge 817, 77 Lab. Arb. at 518; AFGE, Local 1119, 77 Lab. Arb. at 725; NFFE, Local 1827, 82 Lab. Arb. at 893; AFGE, 9th District, 82 Lab. Arb. at 939; AFGE, Local 2382, 81 Lab. Arb. at 325; National Union of Compliance Officers, 80 Lab. Arb. at 250; AFGE, Local 1092, 75 Lab. Arb. at 197; AFGE, Local 12, Grievance N-ESA-82-063.
Probationary Employees

Arbitrators and the FLRA have woven a web of case law on the right of probationers to have access to the grievance procedure and to the arbitration process. Historically, in most private sector collective bargaining relationships, one of the major benefits that has accrued to employees who successfully complete their probationary period is the right to grieve and to have discipline and discharge proceedings adjudicated by a neutral third party. In the federal sector, controversy still lingers as to whether those who promulgated the CSRA held a similar view. The FLRA has made it clear that in its current opinion, probationers are not entitled to access to arbitration regarding termination of their employment.

Other Substantive Issues

Similarly, in view of the proscriptions contained in Section 7121 of the CSRA, efforts to arbitrate cases concerning unsatisfactory performance appraisals have generally had little or no chance of succeeding. To illustrate this point, access to arbitration was denied in cases involving a U.S. penitentiary and Veterans Administration facilities. In two cases, the reason for the denial was partly because the grievants were probationers, but also because the contract and regulations specifically excluded disputes over “examination, certification or appointment” from the negotiated grievance procedure. It is important to note, however, that recent FLRA decisions have increased the scope of an arbitrator’s authority to review the legality of standards. It is also necessary to determine, when it is clear that standards do not comply with the contract, law, rule or regulation, that the appraisal should be either cancelled or a specific new appraisal rating ordered.

Contracting-out is a right accorded to management because of its need to determine the methods and means of accomplishing its mission. However, contracting-out is not an issue that is beyond the scope of arbitration. In United States Department of the Army Oakland Base and AFGE, Local 1157, Arbitrator Schubert ruled that under the language of the contract, the applicable statutes, and decisions of the FLRA, a grievance alleging that procedures followed
by the employer when contracting-out violated its own rules and regulations was arbitrable. Given the popularity of contracting-out under the current administration, this issue arises frequently in arbitral forums and before the FLRA. The FLRA has recently decided a number of these cases. Accordingly, practitioners would be well advised to carefully research this issue before proceeding to arbitration.

Two arbitration cases discussed the issue of free speech. At the San Antonio Air Logistics Center, the employer filed a grievance alleging that the union president had made false statements in a union newsletter about the employer's conduct. Arbitrator Britton found that the case was not arbitrable because: (1) the union did not divest itself of its right to conduct and carry on its own internal affairs; and (2) the contract clause pledging mutual cooperation was intended to achieve higher working standards, not to proscribe disagreements that were voiced in the union newsletter and mailed only to union members. In the same year that this award was rendered, these same parties, under similar circumstances but before a different arbitrator, received an entirely opposite ruling. This award was appealed to the FLRA and was sustained. In effect, this decision stated that where an award merely resolves a grievance, it does not necessarily violate a union's First Amendment right to free speech.

In Watervilet Arsenal and Utah Army National Guard, past practice was an issue that was held to be arbitrable. However, both cases were later set aside by the FLRA because of decisions on the merits. The rationale used in upholding the arbitrability of these cases was that each contract contained a provision pertaining to past practice and the preservation thereof. The past practices are always a pertinent subject of inquiry in determining the intent of contracting parties.

CONCLUSION

It is evident that deciding the arbitrability of federal sector grievance cases is not an easy task either for advocates or third party neutrals, especially when a bona fide threshold question has been

100. Id.
101. AFGE, Local 1617, 73 Lab. Arb. at 969; AFGE, Local 1617, 73 Lab. Arb. at 1020.
102. AFGE, Local 1617, 73 Lab. Arb. at 969.
103. AFGE, Local 1617, 73 Lab. Arb. at 1020.
104. 6 FLRA No. 74.
105. NAGE, Local R2-98, 74 Lab. Arb. at 144.
106. Id.
Challenges to Arbitrability

raised. At the outset of any grievance, the critical determinations that must be made are: (1) is the subject matter excluded from the scope of any negotiated grievance procedure, under Section 7121 of the CSRA (2) has the affected employee been precluded from pursuing his/her complaint through the grievance procedure by previously electing to appeal the claim in another forum and (3) if the parties cannot resolve the grievance, does the contract language allow the subject matter to be submitted to arbitration for a decision? In addition to the subject matter or substance of a case, a challenge to arbitrability can also be based upon an allegation that a fatal procedural defect has occurred in taking the action complained of and/or in processing the complaint through the steps of a negotiated grievance procedure. Failure to raise a timely objection to the arbitrability of a case can have dire consequences especially where procedure matters are concerned. Absent proof of mitigating circumstances, an arbitrator may rule that the party making the objection has waived its right to do so and, hence hear the case on the merits. In addition, if a timely bar to arbitration is indeed found, the arbitrator may deny such a hearing.

In the federal sector, the question of whether the hearing should be bifurcated on the issues of arbitrability and the merits has been a matter of controversy. No single answer can be provided to resolve this dilemma. If an advocate firmly believes that the non-arbitrability of a case can be readily demonstrated, then it may be prudent to request that a hearing be held and a decision rendered on the threshold question before the merits of a case are presented. As we have seen in the foregoing discussion, however, there are instances where presentation of the merits of a case has been important to the determination of arbitrability and there are circumstances where time, cost, and inconvenience can only be increased by opting for bifurcation. In any case, the way to handle this matter is not to walk out of a hearing if an arbitrator does not accede to the method of proceeding which one is advocating.

There is no ultimate wisdom that can be dispensed in closing this discussion. Every arbitrator strives to issue a decision that is fair and proper based on the evidence presented. The likelihood of success can be enhanced if one follows these guidelines:

(1) Know the law, the court decisions, the government-wide regulations, FLRA decisions, and the collective bargaining contract.

(2) Use prudent judgment with respect to a request to separate the hearing on arbitrability from that on the merits.
and be prepared to fully support your position.

(3) Have available at the hearing sufficient copies of the relevant documents for the parties, the arbitrator, and the witnesses. Be sure to have copies of any relevant case law, regulations, statutory citations, and other relevant material in support of your case.

(4) Be prepared to interpret and explain your position to the arbitrator. This may include presentation of testimony through witnesses who are experts on the regulations, the subject matter in dispute, and/or the bargaining history.

(5) Experienced arbitrators may have handled cases in which arbitrability issues are automatically raised as a defense even if frivolous. Remember, the burden of proof is on the party urging that the grievance is not arbitrable.