

Arbitration

Section 1. Invocation

- A. A notice to invoke arbitration will be made in writing by email to the other Party within thirty (30) calendar days of receipt of the written decision issued in the final step of the grievance procedure. If no written decision has been issued, the 30-day period begins the day after the written decision was due, unless the parties agree to an extension. Failure to provide a timely notice of an invocation will render the grievance not arbitrable.
- B. Only the Union or the Agency may refer to arbitration any unresolved grievance after the final step of the negotiated grievance procedure. A referral must be made only by the appropriate Union representative, or designee as identified in the Union Rights Article, or the Agency Labor Relations Director (or designee). The notice to invoke arbitration filed by the Union must be served on the Headquarters' Labor Relations Director or on any local designated management representative, such as a Labor Relations Officer, as appropriate. The notice to invoke arbitration filed by the Agency must be served on the appropriate Union representative.

Section 2. Arbitrator Selection and Site/Timing of the Hearing

- A. Within six (6) months of invoking arbitration, the invoking party will request the Federal Mediation and Conciliation Service (FMCS) to provide a list of seven (7) impartial qualified persons to act as arbitrators. The invoking party will request a preference to FMCS that the arbitrators on the list are based within 125 miles of the location in which the hearing will be held. The arbitrator shall be selected from a Washington D.C. area FMCS list based within 60 miles for national arbitrations.-The invoking party will request that the FMCS serve a copy of the panel list on both parties (Union and Management). The invoking party will pay the FMCS fee. If either Party refuses to participate in the selection of an arbitrator then the other Party may select the arbitrator.
- B. The Parties agree that virtual arbitration hearings are the default unless otherwise determined by the arbitrator or both Parties agree an in-person arbitration is appropriate. In-person hearings will be held within the commuting area of the site of the dispute. For grievances regarding individual employees, the site of the dispute is defined as the location of the Official Agency Worksite to which the grievant reports. An exception to holding the hearing at the Official Agency Worksite is if the majority of witnesses are located outside of the local commuting area. In this circumstance, the site of the dispute is where the majority of witnesses are located.
- C. If the parties agree or an arbitrator determines a hearing is in person, the Agency will secure a location for the hearing within the Agency's facilities. If this is not possible, the Agency is responsible for securing a location. Agency employees travelling to and from in-person hearings will adhere to relevant travel regulations.
- D. After both parties receive the list of arbitrators, they will meet-by telephone or by videoconference, within fourteen (14) calendar days to select an arbitrator. The parties

will use an electronic audible coin toss or other mechanism for determining which party goes first. The non-moving party will initiate the coin toss. If the coin lands “heads up,” the union strikes first; if the coin lands “tails up,” the Agency strikes first. The parties shall each strike one name from the list alternately and then repeat the procedure until only one name remains. The person whose name remains shall be selected as the arbitrator.

- E. Once an arbitrator is selected the parties will sign the FMCS arbitration form letter and the invoking party will mail or email it back to the FMCS within five (5) calendar days and provide a copy to the other party. The parties will ensure that the listed names, addresses, emails and phone numbers of the applicable Union and management representatives are correct.
- F. Subject to arbitrator availability, the hearing with the arbitrator will normally be scheduled and held within 60 days of the notice to invoke arbitration. Upon selection of an arbitrator, the arbitrator will offer dates for the hearing and then the representatives of the parties will communicate with the arbitrator and one another to select a date for the hearing.
- G. Failure by the invoking party to comply with timelines in this section shall result in the arbitration proceeding being withdrawn with no right to refile. If the non-invoking party refuses to participate in the selection of an arbitrator, then the invoking party is entitled to select the arbitrator from the FMCS list.

Section 3. Fees and Expenses.

- A. The cost of the arbitrator's fees and expenses will be shared equally by the parties, including when an arbitration matter has settled. Transcripts will be used in conventional arbitration cases unless the Parties mutually agree otherwise. The transcript will be made by an authorized court reporter. The arbitrator and each of the Parties will be provided with a copy. All costs of the transcript and court reporter will be paid by the Agency. Outside of settlement, if the invoking party withdraws its invocation of arbitration prior to an arbitrator rendering a decision, the invoking party is responsible for all arbitrator's fees and expenses incurred unless otherwise agreed to by the parties. The parties may mutually agree not to have a court reporter or transcript.
- B. If a settlement agreement is reached prior to the hearing, the parties agree to notify the arbitrator as soon as possible that the matter has been settled, to minimize the costs.

Section 4. Arbitrator's Limited Jurisdiction.

The arbitrator shall have no authority to alter, in any way, the terms and conditions of this agreement, any supplemental or other negotiated agreement, or any other condition of employment or issue not properly before the arbitrator. Issues and charges raised before the arbitrator shall only be those raised at the last stage of the applicable grievance procedure.

Section 5. Pre-Hearing Procedures

- A. These procedures apply to all arbitrations under this article (i.e., conventional or expedited) except as otherwise specifically noted.
- B. No later than 5:00 pm, five (5) workdays prior to the arbitration, the parties will identify and exchange their statement of the issue(s) and documents they intend to introduce into evidence as well as their list of witnesses. The list of witnesses shall include a brief (one or two sentences) summary of each witness' expected testimony. In addition, the parties should discuss any potential time constraints the witnesses, advocates, or others may have with regard to the hearing. Rebuttal witnesses and rebuttal evidence not previously identified may be presented to the arbitrator. The arbitrator has the authority to determine whether that information should have been previously identified and, if so, whether it shall be allowed into evidence and/or whether the other party shall be permitted a delay to present surrebuttal evidence.
- C. If one of the parties intends to object to a proposed witness or document that party may initiate a conference call with the arbitrator at least three workdays prior to the hearing to seek a ruling on the contested witnesses and/or evidence.
- D. The parties will attempt to reach agreement on joint exhibits.
- E. The above exchanges may be done in person or through email.

Section 6. Stipulations.

- A. Prior to the hearing, the parties will attempt to stipulate the issue(s) to be arbitrated and any factual matters which would expedite the arbitration. In the event no questions of fact exist, the parties may, by mutual agreement, forego a formal hearing and present the grievances directly to the arbitrator by written submission. The arbitrator is empowered to make a finding and award based on those submissions. If the parties do not agree on whether questions of fact exist to warrant a formal hearing, either party may request that the arbitrator make this determination and the arbitrator is empowered to do so. If the parties are unable to agree on a joint stipulation of the issue(s), each party shall submit its statement of the issue(s) to the arbitrator at the opening of the hearing. In that situation, the arbitrator is empowered to articulate the issue(s).

Section 7. Hearing Procedures.

- A. Arbitration hearings will normally be held virtually or on the Agency's premises by mutual agreement, or at a mutually agreeable site which will minimize the costs of the hearing for both Parties. The hearing will be held during the regularly scheduled workweek.

- B. Employees (e.g., grievants, union witnesses, union technical representatives and union representatives) otherwise in a duty status will be afforded reasonable and necessary official time to prepare for and participate in the arbitration proceedings.
- C. Each party has the responsibility and obligation to produce its witnesses on the day(s) of the hearing, as appropriate.
- D. The Union and the Agency shall each be allowed up to two representatives to present its case; additional representatives such as a technical assistant may be permitted only by the consent of the parties. The grievant shall have the right to attend the hearing after their testimony is introduced and concluded.
- E. If the arbitration hearing is not virtual and involves a single named grievant or multiple named grievants from a single duty station, and the hearing is not held at the official duty station of the grievant(s), the Agency shall pay travel expenses and per diem, as authorized by law and regulations, for the single named grievant or a representative grievant if there are multiple grievants.
- F. If the arbitration hearing is not virtual, witnesses, whose official duty stations are not in the local commuting area of the hearing location will generally participate via videoconference and the arbitrator will accept this testimony as if given in person. If a party wishes a witness to testify in person, the parties will attempt to reach agreement as to that witness. If the parties cannot agree, the Arbitrator will decide whether the witness shall testify in person. By mutual agreement witnesses shall be permitted to testify audio-only.
- G. **Arbitrability and Grievability Determinations** - The Arbitrator shall have the authority to make all arbitrability and/or grievability determinations. The arbitrator shall make grievability and/or arbitrability determinations prior to addressing the merits of the original grievance.
- H. If the arbitrator cannot issue a decision in a case due to incapacitation or death, or six (6) months has elapsed since the last day of the hearing and the arbitrator is unresponsive over 30 days to efforts to contact, the invoking party may reinvoked arbitration without prejudice. The Parties may mutually agree at any time that it is appropriate for either party to re-invoke arbitration.
- I. **Witnesses** - It is the Agency's responsibility to ensure all management witnesses approved by the arbitrator and who are currently employed by the Agency are informed of the arbitration hearing date and location. The Union may agree to a proposal by the Agency to submit an affidavit in place of the direct testimony of a management employee.

Section 8. Expedited Arbitration

- A. The parties agree that grievances that present simple and straightforward issues, such as those arising solely from the following subject matters, may be appropriate for Expedited Arbitration:
1. Travel issues (denial of claims and/or hardship requests as a result of proposed Permanent Change of Station/Temporary Duty)
 2. Denials of Leave
 3. Dues Withholding
 4. Denials of requests for Official Time;
 5. Bulletin Board postings and literature distribution; and
 6. Denials of requests to use credit hours.
- B. Expedited arbitration may be requested at any time prior to invoking arbitration.
- C. Either party may opt out of this procedure. At the meeting to select the arbitrator or prior, the parties must confirm in writing whether the expedited process will or will not be used.
- D. Procedures for Expedited Arbitration. In an effort to reduce the time and expense of some grievance arbitrations, expedited procedures shall be used to streamline processes and shorten deadlines, as follows:
1. The arbitrator must contact the parties within seven (7) calendar days.
 2. The parties and the arbitrator must attempt to schedule a hearing within 30 days of the appointment date.
 3. Either Party has the right to submit relevant precedential and non-precedential decisions to the arbitrator provided they were exchanged at the pre-hearing meeting.
 4. Absent mutual agreement, all hearings will be concluded within one day.
 5. No transcripts of the proceedings will be made, and the filing of post-hearing briefs will not be allowed.
 6. All awards must be completed within seven (7) working days from the hearing.
 7. These awards are expected to be brief and concise, and to not require extensive written opinion or research time.
 8. When the parties agree, the arbitrator may render a decision at the close of the proceedings.
- E. The same procedures identified earlier in this Article will be used for selecting the Arbitrator from a list of arbitrators.
- F. By mutual agreement, the Parties may arrange for a pre-hearing conference with or without the arbitrator, to consider means of expediting the hearing. For example, by reducing the issue(s) to writing, stipulating facts, exchanging lists of proposed witnesses, and/or authenticating proposed exhibits.

Section 9. Case Presentation and Burden of Proof.

- A. The Agency will make its presentation first in disciplinary cases. In all other cases, the party invoking arbitration will make its presentation first. For disputes presented only via briefs, rather than at a hearing, the party invoking arbitration files first, with the other party responding within a time-period set by the arbitrator.
- B. Each party is entitled to file a post-hearing brief by email within the time frame decided by the arbitrator at the hearing. During virtual or in-person arbitration hearings, the Parties shall submit their briefs simultaneously to the arbitrator. Each party shall serve the other party with its brief by email on the next business day after briefs are filed with the arbitrator.

Section 10. Decisions.

- A. Except as otherwise noted in this article, the arbitrator will render a decision as quickly as possible but not later than 30 days after the conclusion of the hearing or closing of the hearing record, including submission of briefs, unless the parties agree to extend the time limit. When the parties agree, the arbitrator may render a decision at the close of the proceedings.
- B. An arbitrator's decision, once final under FLRA procedures, is binding on the parties as to the specific facts and circumstances of the grievance. The arbitrator is authorized to make an aggrieved employee whole to the extent such remedy is not limited by law, rule, or regulation, including the authority to award back pay and interest, reinstate, promote and/or promote retroactively, and to issue an order to expunge the record of all references to a disciplinary, adverse, or unacceptable performance action.
- C. Arbitrators will ensure that their award is consistent with law, Executive Orders, government-wide rules and regulations, and Agency rules and regulations; and that the award is not contrary to grounds similar to those applied by federal courts in private sector labor-management relations.

Section 11. Exceptions.

- A. Either Party may file exceptions with the Federal Labor Relations Authority under regulations prescribed by the Authority. The filing of exceptions to the Authority will serve to automatically stay the implementation of the award. Pursuant to the Statute, an arbitration award is final when no timely exceptions have been filed with the FLRA or when timely filed exceptions have been decided by the FLRA.
- B. Once an arbitrator issues an award, the arbitrator may retain jurisdiction to oversee the implementation of remedies.
- C. If the Agency contends it is not possible to implement the arbitrator's award, the Agency must inform the arbitrator and the Union as soon as possible but no later than

the date the arbitrator relinquishes jurisdiction of the case. Nothing in this section limits the parties' rights to file exceptions.

Section 12. Time limits.

The parties may mutually agree to extend the time limits in this Article at any time. Any request for an extension(s) must be in writing, specifically identifying which time frame in this Article the requested extension is for and the reason. A denial or agreement from the opposite Party must be in writing. These requests become part of the grievance file.