

# TABLE OF CONTENTS

<b>PREFACE</b> .....	<b>I</b>
<b>PART ONE: STRUCTURE OF THIS BOOK</b> .....	<b>1</b>
<b>PART TWO: THE NATURE OF ARBITRATION</b> .....	<b>3</b>
A. ARBITRATION DISTINGUISHED FROM MEDIATION.....	3
B. RIGHTS AND INTEREST-BASED ARBITRATION.....	4
<b>PART THREE: EXTERNAL SOURCES OF GOVERNING LAW FOR ARBITRATORS</b> .....	<b>7</b>
A. DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY .....	7
B. OTHER ARBITRATION DECISIONS—PRECEDENT AND <i>STARE DECISIS</i> .....	7
<b>PART FOUR: THE COLLECTIVE BARGAINING AGREEMENT</b> .....	<b>13</b>
A. FORMATION OF THE COLLECTIVE BARGAINING AGREEMENT.....	14
B. SCOPE OF THE COLLECTIVE BARGAINING AGREEMENT.....	15
1. Letters of Understanding .....	15
C. ROLE OF EXTERNAL LAW .....	16
<b>PART FIVE: ARBITRABILITY</b> .....	<b>17</b>
A. GENERALLY.....	17
B. ARBITRABILITY AS A THRESHOLD MATTER.....	17
1. Timeliness of Arbitrability Challenge.....	18
2. Presumption of Arbitrability .....	19
3. Burden of Proof as to Arbitrability .....	22
a. Broad Scope Grievance Procedure .....	24
b. Procedural Arbitrability.....	24
4. Process for Raising Arbitrability Issues.....	26
C. ISSUES OF STATUTORY JURISDICTION .....	27
1. Election of Remedies .....	27
a. A General Theory of Contractual Exclusivity .....	28
b. Election as to Adverse Actions and Performance-Based Actions.....	33
c. Election Between Grievance and Unfair Labor Practice Charge .....	33
D. SUBSTANTIVE ARBITRABILITY ISSUES .....	34
1. Statutory Exclusions from the Grievance Process.....	34
2. Classification Disputes .....	35
3. Special Classifications of Employees.....	37
a. Probationary Employees .....	37
b. Seasonal Employees.....	38
<b>PART SIX: GRIEVANCES</b> .....	<b>39</b>
A. CONTENT AND PURPOSE .....	39
B. EXCLUSIVE REPRESENTATION.....	40
1. Control of the Grievance and Arbitration Processes.....	40
2. Bargaining Units.....	41
C. GROUP GRIEVANCES .....	41
D. STEPS OF THE GRIEVANCE PROCESS .....	44
E. SPECIFICITY OF GRIEVANCES.....	44
F. PRESENTATION OF GRIEVANCES .....	46
G. RIPENESS .....	46
H. MOOTNESS .....	47

I.	TIMELINESS OF GRIEVANCES .....	47
1.	Presumption of Timeliness .....	54
a.	Challenges to Disciplinary Actions .....	54
2.	Continuing Violations.....	54
a.	Pay Practices .....	59
3.	Exhaustion of Grievance Procedure.....	61
4.	Waiver of Timeliness Objections.....	61
5.	Laches .....	63
J.	<b>RES JUDICATA, STARE DECISIS AND COLLATERAL ESTOPPEL</b> .....	65
<b>PART SEVEN: HEARINGS .....</b>		<b>69</b>
A.	BIFURCATION OF THE HEARING TO CONSIDER PROCEDURAL OR ARBITRABILITY ISSUES.....	69
B.	ISSUES RAISED FOR THE FIRST TIME DURING THE HEARING.....	70
C.	SUMMARY JUDGMENT .....	70
D.	DISCOVERY .....	71
E.	BURDENS OF PROOF .....	71
1.	Standards of Proof.....	73
F.	EVALUATION OF EVIDENCE.....	74
1.	Circumstantial Evidence.....	75
2.	Documents.....	75
3.	Hearsay .....	76
4.	Credibility Determinations .....	77
5.	Expert Testimony.....	81
6.	Claims of Attorney/Client Privilege .....	81
<b>PART EIGHT: ARBITRATOR'S ROLE .....</b>		<b>83</b>
A.	NEUTRALITY.....	83
B.	PRIMACY OF THE CONTRACT.....	84
<b>PART NINE: THE ROLE OF MANAGEMENT RIGHTS .....</b>		<b>87</b>
A.	SUPERVISOR'S ROLE .....	90
<b>PART TEN: THE NATURE OF CONTRACT INTERPRETATION .....</b>		<b>91</b>
A.	INTERPRETATION OF STATUTES AND REGULATIONS.....	92
B.	NEGOTIABILITY ISSUES.....	92
C.	PRINCIPLES OF CONTRACT INTERPRETATION .....	93
1.	Good Faith and Fair Dealing .....	95
2.	Effectuate the Intent of the Parties.....	95
3.	All Terms Are Given Meaning.....	96
4.	Language is Given Its Ordinary Meaning.....	96
5.	Specific Provisions Over General Provisions .....	97
6.	Plain Language Controls .....	97
7.	Ambiguous Language.....	97
8.	Ordinary Meaning of Words.....	99
9.	Contextual Meaning .....	100
10.	Avoidance of Forfeiture .....	100
11.	Bargaining History as an Aid to Contract Interpretation.....	101
12.	Past Practice as an Aid to Interpretation .....	101
a.	Past Practice at Variance with Contract Provisions .....	105
13.	Avoidance of Unilateral Changes in Contract Terms.....	106
14.	Mutual Mistake .....	106
15.	Estoppel.....	107
16.	Impossibility of Performance.....	108
17.	Agency Regulations Conflict with Language of the Agreement.....	108

**PART ELEVEN: SUBSTANTIVE TOPICS COMMONLY ENCOUNTERED IN ARBITRATION 109**

- A. COMPENSATION ISSUES ..... 109
  - 1. Environmental Differential Pay ..... 109
    - a. Measure of Exposure to Asbestos ..... 109
  - 2. Standby Pay ..... 113
- B. PERFORMANCE ASSESSMENT ..... 114
  - 1. Performance Standards ..... 115
  - 2. Performance Appraisal ..... 118
  - 3. Performance Awards ..... 124
  - 4. Discipline Under Chapters 43 and 75 ..... 124
- C. PROMOTION ..... 128
  - 1. Career Ladder Promotions ..... 128
  - 2. Merit Promotion ..... 128
    - a. Crediting Plans ..... 131
  - 3. Filling of Vacancies ..... 132
  - 4. Temporary Promotions ..... 132
  - 5. Promotion Through Accretion of Duties ..... 134
  - 6. Priority Consideration ..... 134
- D. ASSIGNMENT OF WORK ..... 135
  - 1. Assignment of Duties ..... 136
    - a. Position Descriptions ..... 139
  - 2. Temporary Duty Assignments ..... 140
  - 3. Involuntary Reassignments ..... 140
  - 4. Staffing Issues ..... 141
- E. WORK SCHEDULES ..... 141
  - 1. Overtime ..... 142
  - 2. Fair Labor Standards Act–Exemptions–Classification/Position Descriptions ..... 146
  - 3. Alternative Work Schedules ..... 146
  - 4. Flexiplace ..... 147
  - 5. Official Time ..... 147
- F. LEAVE ..... 150
  - 1. Sick Leave ..... 150
  - 2. Absence Without Leave ..... 150
  - 3. Administrative Leave; Enforced Leave ..... 150
  - 4. Family and Medical Leave Act ..... 152
  - 5. Leave Procedures ..... 153
- G. REDUCTION IN FORCE ..... 154
  - 1. Contracting Out ..... 155
- H. DISCIPLINE ..... 156
  - 1. Insubordination ..... 158
  - 2. Violation of Rules ..... 159
  - 3. Absenteeism ..... 161
  - 4. Dishonesty ..... 161
    - a. Falsification ..... 162
  - 5. Discourtesy ..... 163
  - 6. Offensive Language ..... 164
  - 7. Misuse of Government Vehicle ..... 164
  - 8. Threats ..... 164
  - 9. Alcohol and Drug Offenses ..... 165
  - 10. Off Duty Conduct ..... 165
  - 11. The Concept of Just Cause ..... 166
    - a. Daugherty’s Seven Tests ..... 170
  - 12. Disciplinary Standards ..... 175
    - a. Law Enforcement Officers ..... 176

	b.	Double Jeopardy .....	177
	c.	Abuse of Management Discretion .....	177
	d.	Judgment and Motivation of Management Officials.....	178
	13.	Constructive Adverse Actions .....	178
I.		DUE PROCESS IN THE ADMINISTRATION OF DISCIPLINE .....	179
	1.	Timeliness of Discipline .....	180
	2.	Progressive and Prior Discipline .....	180
	3.	Adequacy of Investigations.....	182
	4.	Searches .....	183
J.		PENALTY ASSESSMENT.....	184
	1.	Notice of Discipline and Evidence Supporting the Disciplinary Action.....	189
	2.	Table of Penalties .....	190
	3.	Prior Discipline—Rescission, Promotions .....	191
	4.	Reassignments as Discipline.....	191
	5.	Indefinite Suspensions.....	192
K.		DISCRIMINATION .....	194
	1.	Election of Forums.....	194
	2.	Burden of Proof.....	195
	3.	Disparate Impact and Disparate Treatment .....	196
	4.	Harassment and Hostile Work Environment .....	197
	5.	Equal Pay Claims .....	197
	6.	Disability and Accommodation Requirements.....	198
L.		REPRISAL AND RETALIATION .....	203
M.		PRIVACY ACT VIOLATIONS .....	208
N.		UNFAIR LABOR PRACTICES .....	209
O.		UNION RIGHTS AND OBLIGATIONS.....	211
	1.	Union Representation .....	211
	2.	Representation at EEO Hearings .....	214
	3.	Telecommuting for Union Representatives.....	215
<b>PART TWELVE: SETTLEMENTS .....</b>			<b>219</b>
A.		LAST CHANCE AGREEMENTS .....	219
B.		GENERAL CONTRACT PRINCIPLES AS APPLIED TO SETTLEMENT AGREEMENTS .....	221
<b>PART THIRTEEN: ENFORCEMENT OF AWARDS.....</b>			<b>223</b>
<b>PART FOURTEEN: CORRECTION AND CLARIFICATION OF AWARD .....</b>			<b>225</b>
A.		RETENTION OF JURISDICTION.....	226
<b>PART FIFTEEN: REMEDIES, AWARDS, AND DAMAGES .....</b>			<b>227</b>
A.		BACK PAY .....	227
B.		ACCOUNTINGS AND INTEREST .....	231
C.		LIQUIDATED DAMAGES.....	231
D.		COMPENSATORY DAMAGES.....	232
E.		FAILURE TO NEGOTIATE; UNILATERAL CHANGES IN EMPLOYMENT CONDITIONS.....	233
F.		NON-TRADITIONAL REMEDIES.....	234
G.		COUNSEL FEE AWARDS .....	235
	1.	Statutory Entitlement Standards .....	236
	a.	Prevailing Party .....	239
	b.	Representation by Counsel .....	240
	c.	Reasonableness of the Fees .....	240
	d.	Partial Success .....	241
	2.	Time on Matters Collateral to the Merits of the Grievance.....	242
	3.	Itemization of Time .....	242
	4.	Interest of Justice .....	242

**PART SIXTEEN: SOME OBSERVATIONS ON LEGAL RESEARCH IN FEDERAL SECTOR  
ARBITRATION.....245**

**TABLE OF CASES.....247**

**INDEX OF ARBITRATORS .....255**

**ABOUT THE AUTHORS .....266**