CHAPTER 1
OVERVIEW OF THE LEGAL FRAMEWORK OF GRIEVANCE-ARBITRATION IN THE FEDERAL SECTOR

I. OVERVIEW

Arbitration is generally defined as a voluntary method of resolution in which the disputing parties agree to be bound by the decision of a jointly selected third party. There are two types of labor arbitration. Interest arbitration is a process in which an arbitrator is authorized to *prescribe* the terms and conditions of a collective bargaining agreement because the parties are unable to reach agreement through collective bargaining. Grievance arbitration, in contrast, involves the interpretation and enforcement of the terms and conditions of an *existing* collective bargaining agreement. This book focuses on grievance arbitration advocacy.

This chapter provides a background of the development of private sector labor law and the outgrowth of arbitration as a viable forum for resolving employment disputes. Don't get bogged down in the legal details, but it is helpful to understand some of the historical biases attributed to grievance-arbitration.

A. PRIVATE SECTOR LABOR LAWS: A VERY SHORT HISTORY

Federal sector grievance-arbitration has its roots in private sector labor arbitration. At the federal level, private sector labor relations are governed by section 301 of the Labor Management Relations Act (LMRA), 29 USC § 185. Section 301 grants federal courts jurisdiction over contract disputes between an employer and a labor organization. Because collective bargaining agreements were previously subject to state law, section 301 was Congress' effort to federalize labor management collective bargaining. *See* Theodore J. St. Antoine, "The Legal Framework of Labor Arbitration in the Private Sector," *Labor Arbitration: A Practical Guide for Advocates*, p. 20-21 (BNA Books 1990).

The Supreme Court confirmed the congressional effort to expand the role of federal courts in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972 (1957). Rejecting a narrow interpretation of some lower federal courts, the Supreme Court found that section 301 did more than simply grant federal courts jurisdiction over collective bargaining agreements—it also authorized the federal courts to fashion a body of federal substantive law for the enforcement of collective bargaining agreements, including promises to arbitrate grievances.

The Supreme Court outsourced much of the heavy lifting to labor arbitrators. In a series of decisions that would come to be known as the *Steelworkers Trilogy,* the Supreme Court established a strong presumption in the federal courts favoring grievance-arbitration. The Court found that: (1) an issue in dispute may be arbitrated if it is covered by the language of a collectively bargained arbitration clause, absent clear and unequivocal exclusion; (2) in a suit to enforce an agreement to arbitrate, courts should resolve all doubts in favor of arbitration; and (3) a court reviewing an arbitrator's award is to enforce the award, whether or not it agrees with the award, as long as the award draws its essence from the collective bargaining agreement. *See Steelworkers v. American Mfg. Co*., 363 U.S. 564, 80 S. Ct. 1343 (1960); *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 781–82, 80 S. Ct. 1347 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 80 S. Ct. 1358 (1960).

The Supreme Court established the preference for arbitration over litigation based on the arbitrator's superior knowledge of the shop. As stated in *Steelworker's v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 581–82, 80 S. Ct. 1347 (1960):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Supreme Court approved the role of arbitrators as interpreters of the collective bargaining agreement in *United Steelworkers v. Enterprise Wheel & Car Company*, 365 U.S. 593, 599, 80 S. Ct. 1358 (1960), in the following language:

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.

Since the *Steelworkers Trilogy*, the Supreme Court has approved the use of arbitration beyond collective bargaining agreement disputes to resolve employment disputes based on statutory rights, including laws prohibiting discrimination based on age, color, disability, national origin, religion, and sex. The development of the law in this area has not been without its twists and turns. The following cases have addressed the interplay of arbitration, collective bargaining and statutory rights.

In *Alexander v. Gardner-Denver, Co.,* 415 U.S. 36, 51–52, 94 S. Ct. 1011 (1974), a unanimous Supreme Court held that a union member who grieved his removal based on race discrimination resulting in an adverse arbitration award could still file a lawsuit alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964. The issue in *Alexander* was whether a union's agreement to arbitrate employment claims could subsume

the plaintiff's right to file a Title VII lawsuit. The Court found that it could not, citing the possibility of conflict between the interests of the union and its individual members:

> [T]here can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights conferred on employees collectively to foster the process of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits of union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

The Court went on to express its mistrust of arbitration as an adequate forum to address statutory claims, *id*. at 56–58:

> Arbitrator procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. The conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement…. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
>
> Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; the rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are often severely limited or unavailable. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. These same characteristics, however, make arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

In 1991, the Supreme Court revisited arbitration of statutory employment discrimination claims. In *Gilmer, Interstate/Johnson Lane Corp*., 500 U.S. 20, 111 S. Ct. 1647 (1991), Gilmer, a stockbroker, signed a mandatory registration form with the New York Stock Exchange that contained an agreement to arbitrate "any controversy" arising out of his employment. Gilmer was not a member of a bargaining unit, there was no collective bargaining agreement, and he signed the registration form in his individual capacity. When he was discharged from employment, Gilmer filed suit in federal court alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The employer moved to dismiss the lawsuit and compel arbitration. Relying on *Alexander*, the trial court upheld Gilmer's right to maintain his ADEA lawsuit in federal court. The Fourth Circuit reversed, citing the absence of evidence that Congress intended to preclude enforcement of arbitration agreements addressing ADEA claims. *Gilmer*, 500 U.S. at 24. The Court noted that *Alexander* was subject to a collective bargaining agreement, creating a "tension between collective representation and individual statutory rights," a tension that did not exist because Gilmer's dispute with his former employer was not controlled by a union. *Gilmer*, 500 U.S. at 35. The Court also noted that *Gilmer* involved the preclusive effect of an arbitration award on an employee's right to subsequently litigate a statutory claim, whereas the issue in *Gilmer* was whether an individual agreement to arbitrate a statutory claim could be enforced. *Id*.

The issue before the Supreme Court in *Wright v. Universal Maritime Services Corp*., 525 U.S. 70, 72, 119 S. Ct. 391 (1998), was whether a general arbitration clause in a collective bargaining agreement required an employee to use the arbitration procedures set forth in the contract rather than a civil lawsuit to pursue a remedy for an alleged violation of the Americans with Disabilities Act (ADA). In *Wright*, the CBA provided that all "matters under dispute" were to be submitted to a multi-step grievance process culminating in arbitration. *Id*. at 73–74. At the suggestion of his union, Wright filed disability discrimination charges with the Equal Employment Opportunity Commission followed by a lawsuit in federal court. *Id*. at 74–75. By unanimous decision, the Supreme Court held that the CBA's general arbitration clause did not require Wright to arbitrate his ADA claim. After noting the tension between its decisions in *Alexander* and *Gilmer*, the Court offered that a union's waiver of its members' statutory right to a judicial forum for discrimination claims must be "clear and unmistakable." *Id*. at 79–80.

Again, the general arbitration clause in the CBA at issue did not set forth a "clear and unmistakable" waiver of member statutory rights.

In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009), the Supreme Court was presented with a CBA that explicitly required union members to arbitrate all employment discrimination claims, including applicable federal statutory claims, through a specified grievance and arbitration procedure. 129 S. Ct. at 1461. The case involved claims of age discrimination as a result of the reassignment of three employees performing night watchman duties to service as night porters and cleaners. The union initially grieved the reassignment alleging age discrimination, as well as violation of seniority and overtime rules. The union subsequently withdrew from arbitrating the age discrimination claims although it offered the employees the opportunity to continue to arbitrate those claims at their own expense. Instead, the employees elected to file complaints of age discrimination with the EEOC and, subsequently, file an ADEA lawsuit in federal court. The employer moved to compel arbitration. Relying on *Alexander*, the district court denied the employer's motion to compel, and the U.S. Court of Appeals for the Second Circuit affirmed. A divided (5-4) Supreme Court reversed.

The Supreme Court decided that an arbitration agreement in a negotiated CBA that "clearly and unmistakably" waives employees' right to bring statutory discrimination claims in court is enforceable unless the statutory right itself precludes employee or union waiver—which was not the case in *Pyett*. 129 S. Ct. at 1465–66, 1474. The Court reasoned that Section 9(a) of the National Labor Relations Act (NLRA), which governs federal labor-relations law, broadly affords unions and employers the right to bargain collectively regarding the terms and conditions of employment of bargaining unit members, including statutory claims. 129. S. Ct. at 1463. Neither the NLRA nor the ADEA exempt statutory age claims from arbitration. 129 S. Ct. at 1466. The Court distinguished *Alexander* because the CBA did not expressly cover statutory claims and addressed a different issue: whether an employee waived the right to a judicial forum for the statutory claims by arbitrating contractual claims arising out of the same nucleus of operative facts. 129 S. Ct. at 1463.

More importantly, the Supreme Court in *Pyett* walked back its stated mistrust (in *Alexander)* of arbitration as an adequate forum for the adjudication of individual statutory employment rights. Characterizing its criticism of arbitration in *Alexander* as "broad *dicta*," the Court noted that its prior distrust of arbitration had been effectively satisfied. 129 S. Ct. at 1469–70. The Court explained that subsequent cases established arbitration is as effective a forum as federal courts for the enforcement of statutory discrimination statutes because arbitrators are readily capable of handling the factual and legal complexities of antitrust claims, and there is no reason to believe arbitrators will not follow the law. 129 S. Ct. at 1471. The Court found the duty of fair representation imposed by the NLRA on unions protected employees from arbitrary decisions by unions subordinating the employees' individual statutory rights to collective interests.

The *Pyett* decision permits employers and unions to bargain away individual employees' rights to pursue the resolution of statutory discrimination claims in federal court, leaving employees to prosecute their discrimination claims in arbitration. To avoid the high cost of litigation, the uncertainty of jury trials, and to maintain the confidentiality of hearing determinations, employers will likely insist that unions bargain on this mandatory subject of collective bargaining. Of course, unions are not required to agree to the arbitration of statutory discrimination claims.

When considering whether an employee waived his or her statutory rights through a CBA, a court must consider whether "(1) the arbitration provision clearly and unmistakably waives the employee's ability to vindicate his or her statutory right in a court; and (2) the federal statute does not exclude arbitration as an appropriate forum." *Jones v. Does*, 857 F.3d 508, 512 (3d Cir. 2017). The clear-and-unmistakable-waiver standard ensures that "very general" arbitration clauses cannot waive a judicial forum for vindication of statutory rights. *Darrington v. Milton Hershey Schools*, 958 F.3d 188, 193 (3d Cir. 2020). Rather, a clear and unmistakable waiver of a judicial forum for "statutory antidiscrimination claims must be 'explicitly stated' in the collective bargaining agreement." *Pyett*, 556 U.S. at 258.

In *Darrington v. Milton Hershey Schools*, 958 F.3d 188, 195 (3d Cir. 2020), the court found that the CBA language was a "clear and unmistakable" waiver of the right of a bargaining unit member to seek relief for employment discrimination in court:

> MHS and the Union agreed "that the Union, on behalf of itself and the alleged aggrieved [Union members], waives, releases [,] and discharges any right to institute or maintain any private lawsuit alleging employment discrimination in any state or federal court regarding the matters encompassed within this grievance procedure." *Id*. at 93. The CBA "sets forth the exclusive procedure for resolution of disputes arising out of the terms and conditions of [the CBA] or the discipline or discharge of" a Union member.
>
> In short, if aggrieved Union members are unsatisfied with the resolution of their disputes after discussions with MHS officials, "the Union [may seek] further consideration of the grievance" by submitted the grievance to arbitration on their behalf.

The Fourth Circuit in *Gilbert v. Donaho*e, 751 F.3d 303 (4th Cir. 2014), found a clear and unmistakable waiver of the judicial forum in the CBA for Rehabilitation Act claims. While the CBA did not expressly waive statutory rights, the court found a waiver based on language in the CBA that prohibited disability discrimination in violation of the Rehabilitation Act. Separately, the court declined to find a specific waiver of Family and Medical Leave Act claims, which were not referenced in the CBA but in separate employer rules.

In *Reed v. Girard Coll*., No. 20-2325, 2020 U.S. Dist. LEXIS 143480, at *6–9 (E.D. Pa. Aug. 11, 2020), the court found that the CBA language did not constitute a "clear and unmistakable waiver" of bargaining member rights to vindicate federal and state statutory claims of employment discrimination in court. In relevant part, the CBA provided:

> If the action in Step 3 or Step 4 above fails to resolve the grievance to the satisfaction of the [Union], the grievance may be referred by an authorized representative of the Association to binding arbitration provided in Section 903 of the Act, providing such referral is made within twenty (20) working days following the date of the decision referred to in Step 3 or 4.

Article XVIII, titled "Non-Discrimination," states, in relevant part:

> In the administration of this Agreement, the College shall not discriminate against any employee because of that employee's race, color, sex, religion, national origin, age or union membership, or against qualified individuals with a disability. Any employee who claims a violation of this Article shall, I the first instance, invoke the Grievance and Arbitration Article of this Agreement. If the grievance is not resolved within ninety (90) work days, the employee shall have the right to pursue additional remedies.

The court found that the Grievance and Arbitration Procedure and the Non-Discrimination provisions of the CBA "do not meet the standard for a clear and unmistakable waiver. According to the court, "Article XVIII simply is a general provision prohibiting Girard College from discriminating against its employees on the basis of race, sex, religion, or disability, among other grounds. Nowhere in the relevant sections of the CBA is there any mention of an employee waiving his or her statutory right to pursue a lawsuit alleging discrimination in state or federal courts."

In *Croom v. Elkhart Prods. Corp*., No. 3:15-CV-288 RLM-MGG, 2016 U.S. Dist. LEXIS 122796, at *4–6, 2016 WL 4733469 (N.D. Ind. Sept. 12, 2016), the plaintiff filed suit in federal court alleging that his employer retaliated against him for requesting and taking FMLA leave and discriminated against him based on his race in violation of Title VII. The Employer moved for a declaratory judgment arguing that the plaintiff's claims were resolved by the final decision of an arbitrator sustaining the plaintiff's termination. The court observed that plaintiff's statutory claims under Title VII and the FMLA aren't precluded by an arbitration decision unless the arbitration provision in the employer's collective bargaining agreement expressly covers both statutory and contractual discrimination claims and mandates that employment-related discrimination claims including claims brought under Title VII and the FMLA, would be resolved in arbitration. The CBA in Croom provided that "[o]nly grievances having to do with the interpretation and application of Sections of [the CBA]…may be arbitrated." According to the court, "it doesn't make arbitration mandatory, doesn't "clearly and unmistakably require[] union members to arbitrate claims arising under" federal anti-discrimination laws, and limits the arbitrator's authority to "interpret[ing] and apply[ing]" the terms of the contract. As such, the court held that "[t]he arbitrator's decision wouldn't prevent Mr. Croom from bringing suit under Title VII or the FMLA, "regardless of whether certain contractual rights are similar or duplicative of the substantive rights secured by [federal law]."

In the federal sector, *Pyett* is primarily limited to Postal employees whose labor relations are governed by the LMRA. Federal employees whose labor relations are governed by the Civil Service Reform Act of 1978 have the option to have their discrimination claims heard by an arbitrator or by the Equal Employment Opportunity Commission. 5 USC 7121(d).

B. INFLUENCE OF PRIVATE SECTOR LABOR LAW ON THE DEVELOPMENT OF FEDERAL SECTOR LABOR RELATIONS

1. Federal Sector Collective Bargaining Arbitration Provisions Introduced by Executive Order

With the exception of the U.S. Postal Service and perhaps a small minority of other federal sector entities, section 301 of the LMRA does not govern federal sector labor management relations. The right of federal employees to engage in collective bargaining was first recognized in 1962, with President Kennedy's issuance of Executive Order 10988 (Jan. 17, 1962), which granted federal employees the right to form, join, and assist a labor organization. It directed agencies to recognize labor organizations as the exclusive representative of bargaining unit members and permitted labor and management to negotiate collective bargaining agreements. It also allowed collective bargaining agreements to include provisions for the arbitration of grievances. Arbitrations, however, were merely advisory.

2. Executive Order Allowed Federal Sector to Mimic Private Sector

In 1969, President Nixon expanded federal employee collective bargaining rights through Executive Order 11491 (Oct. 29, 1969). EO 11491 sought to bring federal labor management relations in line with practices in the private sector. Incorporating six major changes into the federal labor management program, the new order:

- Established the Federal Labor Relations Council as the central authority to administer the program and make final decisions on policy;
- Established the Federal Services Impasses Panel to resolve negotiation impasses;
- Provided an election system for handling unit determinations and majority representation cases;
- Offered a binding third-party arbitration process to resolve unfair labor practices, grievances, and standards of conduct;
- Clarified the status of "supervisor" within the federal service; and
- Established government unions, election, bonding and financial reporting and disclosure requirements.

C. ENACTMENT OF THE CIVIL SERVICE REFORM ACT OF 1978 AND THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

At the urging of President Carter to reform the civil service system, Congress passed the Civil Service Reform Act of 1978 (CSRA). Title VII of the CSRA is the Federal Service Labor-Management Relations Statute (FSLMRS), 5 USC 7101 *et seq*., which governs most federal-sector labor management relations. The CSRA replaced the Federal Labor Relations Council with the Federal Labor Relations Authority, which administers the FSLMRS. The FLRA, much like the NLRB in the private sector, was given broad authority to make rules, investigate, and remedy unfair labor practices, as well as address negotiability disputes. FLRA's decisions were subject to judicial review.

The CSRA, which remains in force today, requires that collective bargaining agreements contain negotiated grievance procedures terminating in binding arbitration. 5 USC 7121. The statute broadly defines a grievance as any complaint concerning employment, the terms of a collective bargaining agreement, or the interpretation of any law, rule, or regulation affecting conditions of employment. 5 USC 7103(a)(9). Grievance procedures (5 USC 7121(a)–(c)) must:

- Be fair and simple;
- Provide for expeditious processing;
- Provide procedures for the settlement of grievances;
- Assure collective bargaining representatives the right to present a grievance on its own behalf or on behalf of a bargaining unit employee;
- Assure bargaining unit employees the right to present their own grievance provided the labor organization is afforded the right to be present at the proceeding; and
- Assure binding arbitration at the election of the agency or exclusive bargaining representative in the event the grievance is not settled.

The CSRA, 5 USC 7121(c), mandates the following five subjects be excluded from coverage by a negotiated grievance arbitration procedure:

- Claimed violations regarding the prohibition on political activities;
- Retirement, life insurance, or health insurance;
- National security suspensions or removals under 5 USC 7532;
- Any examination, certification, or appointment; or
- The classification of any position which does not result in the reduction in grade or pay of an employee.

Parties are allowed to exclude any other matter from coverage by the grievance arbitration procedure. 5 USC 7121(a)(2).

Federal-sector arbitration differs from private sector arbitration in other significant aspects. In the private sector, the grievance procedure primarily enforces terms and conditions of the parties' CBA. In the federal sector, the negotiated grievance process may enforce not only CBAs, but also laws, regulations, and agency policies. Regarding discrimination claims, bargaining unit employees have the option to file either a grievance or an equal employment opportunity complaint (EEO) through the agency's EEO process. 5 USC 7121(d). If the employee grieves a discrimination claim, the grievance is processed much like any other grievance, except the employee may request an EEOC review of the arbitrator's award. 5 USC 7121(d). The employee also retains the right to file a civil action in an appropriate U.S. District Court. 29 CFR Part 1614.

With the exception of cases involving adverse and performance-based actions that, if not adjudicated in arbitration, can be appealed to the Merit Systems Protection Board, the CSRA allows a party dissatisfied with an arbitrator's award to file exceptions with the FLRA. 5 USC 7122(a). Exceptions may be filed where the award is deficient because it is contrary to a law, rule, or regulations or on other grounds similar to those applied in the federal courts in private sector labor management relations. The FLRA is empowered to take necessary action that is consistent with applicable law, rules, or regulations. 5 USC 7122(a). If no exceptions are filed, the award becomes final and binding. 5 USC 7122(b). Exceptions to arbitration awards are addressed in Chapter 17.

The CSRA does not apply to all federal employees. Labor management relations in the U.S. Postal Service, for example, are covered by the LMRA. Labor management relations for members of the U.S. Foreign Service are governed by the Foreign Service Act of 1980. CSRA coverage has also been modified to exclude various other federal employees. While it is certainly easier to overturn an arbitrator's award in the federal sector than in the private sector, it remains a difficult undertaking.

D. TRUMP AND BIDEN EXECUTIVE ORDERS

Executive orders issued by President Donald Trump, which were largely overturned by President Biden, addressed federal sector collective bargaining. This section will give a brief overview of what the Trump Executive Orders did, how President Biden's Executive Orders repealed and changed the Trump EOs, and what remains to be done by agencies to comply with President Biden's EOs. For a thorough review of labor-management relations in the federal government, including the Trump and Biden Executive Orders, *see* Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publications, Inc.). *See also* David Vaughn, Federal Sector Arbitration Committee Report (April 26, 2021); FLRA Case Law Update, ABA Federal Sector Committee, Midwinter Meeting (Mar. 9, 2020); *Trump Executive Orders*, ABA Federal Sector Labor & Employment Law Committee, Midwinter Meeting (March 2019).

1. Trump Executive Order 13812

On September 29, 2017, Trump Executive Order 13812 revoked the Obama-era Executive Orders 15522, which created Labor-Management Forums, and Executive Order 13708, which established the National Council on Federal Labor-Management Relations and implemented labor-management forums throughout the Executive Branch. President Trump's EO 13812 directed OPM and the heads of agencies to rescind any orders, rules, regulations, guidelines, programs or policies that created labor-management forums. If CBAs contained labor-management forums, however, those forums continued.

2. Trump Executive Orders 13836, 13837, and 13839

On May 25, 2018, the Trump administration issued three executive orders addressing federal sector collective bargaining, union official time, and federal employee due process rights. A summary of the Trump Executive Orders follows:

a. Executive Order 13836: Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining

The EO purported to improve the ability of the federal government to achieve a more effective and efficient government in accord with the Federal Service Labor-Management Relations Statute. The EO:

- Established a "Labor Relations Group" that coordinated the efforts of agencies across the federal government with "sample language" and "counter-proposals" for use in bargaining with unions.
- Set deadlines for agreeing to bargaining ground rules (six weeks) and term bargaining (four to six months) after which point agencies were directed to seek FMCS assistance.
- Required notification of the President through OPM of any negotiations that lasted longer than nine months in which the assistance of the FMCS had not been requested or had not resulted in agreement or advancement to FSIP.
- Required agencies to consider filing ULP charges against unions for bad faith bargaining if negotiations lasted too long, or unilaterally implement changes.
- Required agencies to continue bargaining during pendency of ULP.
- Written proposals during bargaining required.
- Agency heads were required to review all binding agreements with unions, including grievance settlements.
- Disallowed permissive bargaining across the entire federal government.
- Disallowed any bargaining over covered-by subjects, even at the agency's discretion.

b. Executive Order 13837: Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use

This Executive Order purported to improve an effective and efficient government by accounting for federal sector union time on representational activities. The EO:

- Capped overall union official time to one hour for each bargaining unit employee per year.
- Limited union representative to 25% of their time for representative activities.
- Prohibited the use of official time to prepare and/or arbitrate grievances.
- Required advance written approval for unions to use official time.

- Subjected union representatives to disciplinary action for violating EO.
- Imposed reporting requirements for union use of official time, including names and compensation of union representatives.
- Required agencies to renegotiate CBAs on the earliest date permitted by law to bring them into compliance with the EO.

c. Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent With Merit Systems Principles

This Executive Order purported to hold federal employees accountable for performance and conduct in accord with Merit System principles. The EO:

- Sought to eliminate the use of progressive discipline.
- Limited the use of comparators.
- Gave agencies the discretion to consider an employee's entire past work record when taking disciplinary action.
- Limited advance written notice of adverse action period to 30 business days.
- Encouraged agencies to issue chapter 75 proposed removal within 15 business days of the employee reply period.
- Encouraged agencies to use chapter 75 procedures for unacceptable performance.
- Prioritized performance over seniority in a RIF.
- Called on agencies to exclude removal decisions for conduct or unacceptable performance from grievance procedures.
- Removed from grievance procedures disputes regarding any form of incentive pay.
- Prohibited agencies from negotiating a CBA that affords an employee more than a 30-day period to demonstrate acceptable performance.
- Prohibited "clean SF-50" grievance settlements.
- Imposed additional data reporting requirements on agencies.
- Required agencies to renegotiate their CBAs and reissue their policies in line with the EO.

Not surprisingly, federal labor unions were hostile to the Trump EOs. More than a dozen federal unions challenged the executive orders in federal court, asserting, among other claims, that President Trump did not have the authority to issue executive orders regarding federal labor relations. The United States District Court for the District of Columbia enjoined enforcement of nine key provisions of the three Trump Executive Orders. *See AFGE v. Trump*, 318 F. Supp.3d 370 (D.D.C. 2018). The Trump administration appealed the decision. While the litigation was pending, on July 5, 2018, the OPM issued guidance to implement the three Trump Executive Orders. *See* OPM Memorandum: *Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839* (Oct. 4, 2019). OPM noted that, during the enjoined period, agencies retained the authority to draft proposals and take positions during bargaining consistent with the EOs. And some agencies did just that. By decision of July 16, 2019, the United States Court of Appeals for the District of Columbia held that the District Court lacked subject matter jurisdiction and vacated the injunction. The court found that the plaintiff unions should have gone to the Federal Labor Relations Authority rather than file suit in federal court. *See AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019). With the injunctions lifted, OPM issued updated guidance telling agencies to implement the Trump Executive Orders. *See* OPM Memorandum: *Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839* (Oct. 4, 2019). The White House posted a similar notice in the Federal Register. *See* 84 FR 56095 (Oct. 21, 2019). Some agencies quickly complied with the Trump Executive orders, either signing or imposing new CBAs. Many agencies, however, took a wait-and-see approach saying they did not want to engage in full scale negotiations regarding the new executive orders pending further legal clarification.

On January 22, 2021, President Biden fulfilled a campaign promise and signed an executive order revoking Trump EOs 13836, 13837, and 13839. Additionally, the Biden Executive Order directed heads of agencies to review and identify existing agency actions related to or arising from the Trump EOs, and, as soon as practicable, were directed to suspend, revise, or rescind those actions. Agencies were also directed to bargain over permissible, non-mandatory subjects of bargaining when contracts come up for negotiation, and the Biden EO directs OPM to develop recommendations to pay more federal employees and contractors at least $15 per hour. Federal unions expressed great satisfaction with the Biden Executive Order. Federal agencies and unions are in the process of determining how to undo agency rules, regulations, and collective bargaining agreement provisions resulting from the Trump Executive Orders. Until they are undone (presumably through collective bargaining), the legacy of the Trump Executive Orders will live-on and be challenged by federal labor unions as issues arise.

For a thorough review of labor-management relations in the federal government, including the Trump and Biden Executive Orders, *see* Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publications, Inc.). *See also FLRA's Guide to Arbitration Under the Federal Service Labor-Management Relations Statute* (Sept. 30, 2016), which is available for download on the FLRA's website at https://www.flra.gov/system/files/webfm/Authority/AR%20Forms%2C%20Guide%2C%20Other/Arbitration%20Guide.pdf.

Chapter Takeaways

- DO NOT expend too many brain cells memorizing the legal history of grievance arbitration. The history is presented to provide a full picture of how we got to where we are now. Be here now!
- DO be aware that the rules governing federal sector grievance arbitration are not uniform. Some federal entities follow the private sector model whereas others follow a uniquely federal sector model. The rules governing these two models are sometimes identical, other times similar, and still other times very different. As the advocate, it is incumbent on you to know what labor-management rules apply to your grievance arbitration.
- DO understand that the fundamental concepts of effective grievance arbitration advocacy addressed in this book apply in whatever forum you practice.

CHAPTER 2
ADVOCATE SELECTION

I. OVERVIEW

Once the demand for arbitration is made, the parties must separately select an advocate(s) to champion their cause. The importance of selecting the right advocate cannot be overstated. As the face and voice of the party, the advocate bears the considerable burden to persuade the arbitrator that they are the reliable source of truth on the issue in dispute. Advocates who persuade arbitrators that they are the source of truth generally win; those that are unsuccessful at convincing the arbitrator that they are the reliable source of truth on the issue in contention generally lose.

Advocates come to the table with different skill sets. The key is to match the advocate's skill set to the needs of the matter in dispute to maximize the probability of success. A mismatch of skill sets—selecting a passionate and fiery orator for a case requiring calm nuance—can mean the difference between winning and losing a case.

This chapter addresses the factors that should be considered in selecting an advocate who best fits the case.

II. SELECTING THE ADVOCATE WHO WILL WIN THE CASE

Which advocate will successfully represent your party's interests? The individual making the assignment should consider: (1) the advocacy skills needed to win the case; (2) the gravity and complexity of the issue(s) in dispute; (3) the skills of the opposing advocate, if known; (4) whether the advocate will also be a witness; and (5) the known competencies of the arbitrator. Selecting an advocate because it is "their turn" or "they have the time" is rarely ideal. A brief discussion of these considerations follows.

The ascent of remote video hearings as a result of the COVID-19 pandemic may broaden the available advocate pool. With remote hearings, advocates no longer need to be located near, or incur the cost and inconvenience of travel to, the site of the grievance. Where it has been determined that the matter is appropriate for a remote hearing, the parties would be well advised to consider matching the advocate with cases that fit with their experience and expertise, wherever the advocate is physically located.

A. ASSESS THE REQUIRED SKILLS OF YOUR ADVOCATE

The objective of advocacy is persuasion. Arbitration advocacy is the ability to persuade the arbitrator to the advocate's point of view. Your objective should not be to persuade the opposing party of the validity of your claim or defense. The arbitrator has the authority to rule for or against you, not your opponent. Of course, if in the process of persuading the arbitrator you also persuade the opposing party of the correctness of your position, all the better.

Successful arbitration advocates possess qualities that help them win cases, minimize losses, and secure favorable settlements. To some, these qualities come naturally. For others, these skills may be acquired and developed through education and experience. Here are seven proven skills of successful grievance arbitration advocates:

1. Active Listening

Successful advocates understand that listening is more than passively hearing another person speak. Active listening is a process in which the advocate makes a conscious decision to fully understand the speaker's message without judgment, bias, or belief that they know what the speaker is going to say. Rather than trying to stay one step ahead of the speaker, advocates use active listening to fully understand the nuances behind the speaker's words. This skill allows advocates to deftly alter their line of questioning with witnesses before and during the hearing, to exploit the opposition's testimony during the hearing, and to better craft their argument during post-hearing briefs. Active listening is the single most important component of interpersonal communication skills.

2. Organized, Focused, and Prepared

Persuasive advocates are prepared. They do the unglamorous but necessary work of chasing down the facts, interviewing witnesses, securing exhibits, and researching the contract, the law, past precedent, and past practice. Prepared and organized, advocates are free to focus and actively listen to the evidence presented at hearing and adjust their case as needed. Focused advocates develop a persuasive case strategy and prepare the evidence and witness testimony before the hearing, not the night before or during the hearing. Persuasive advocates are self-motivated.

3. Reasoned Objectivity

Winning advocates are curious. They constantly evaluate their case and do not blindly accept what they are told without question. Successful advocates test even seemingly favorable evidence from the perspective of the opposing party to confirm strengths and identify case weaknesses. They ask whether witness testimony, favorable or unfavorable, makes logical and practical sense, and is supported by other evidence. Persuasive advocates judge the case based on what they can objectively prove with admissible evidence, not what they or the client wishes they could prove.

4. Directness and Courage

Successful advocates are direct and straightforward. They may need to be candid in order to secure necessary documents in a timely manner, or secure witness testimony during the hearing. Advocates should openly and honestly discuss the prospects of success and the need for settlement with clients and superiors. And successful advocates need courage to stand their ground when they believe strongly in their case even if it means they must respectfully but firmly disagree with the arbitrator and continue to press their position.

5. Professional Courtesy

Persuasive advocates remain courteous to opponents, witnesses, and the arbitrator. They address people by their names and correct titles and are respectful when pressing witnesses for responses or in addressing an issue in dispute with the opposing advocate. They refrain from name calling or quarreling with witnesses and the opposing advocate, particularly in front of the arbitrator. Professional courtesy means being on time, prepared and properly attired. Trust me, it matters.

6. Personal Integrity

An advocate's integrity—with clients, witnesses, the opposing advocate, and the arbitrator—is essential to successfully winning the case. Advocates who persuade the arbitrator that they are the reliable source of information generally enjoy success. This is particularly important when advocates will appear before the arbitrator in future cases. Those who mislead the arbitrator run the considerable risk of not only losing the case at hand, but doing long-term damage to their reputation, to the detriment of the client.

7. Personal Presence

Persuasive advocates show confidence in their case. Confidence is demonstrated by a thorough understanding of the facts and the standards at issue as a result of focused preparation and organization. Before and during the hearing, winning advocates execute their trial plan by actively listening, concisely posing questions, and addressing objections with poise and confidence. Presence often comes with experience.

Individual advocate skills should be considered before case assignment. This does not have to be a time consuming, soul-searching exercise. However, the assignment manager should be aware of the strengths and weaknesses of advocates on the receiving end of assignments. Rarely does one advocate possess all fully developed advocacy skills. It may be beneficial to team-up advocates to maximize the skill level. Remember that case assignments are not irreversible, at least not at first. The more time and effort an advocate invests in a case decreases the benefit of reassigning the case. You may be better off assigning another advocate with complementary skills to assist.

B. GRAVITY AND COMPLEXITY OF THE ISSUE(S)

Parties may want to assign a junior advocate when the number and complexity of issues are minimal or when the downside of a loss is limited. If resources are limited, assigning a more experienced advocate to conduct a limited, straight-forward case may not be an efficient use of their talents and your resources. As a general rule, the greater the number of procedural or substantive issues in dispute, and the greater the upside potential or downside risk, the more important it is to appoint an experienced advocate. Of course, to build advocacy skills, a more junior advocate could be paired with a more senior advocate to serve as a technical assistant to "second chair" the arbitration. Similarly, if selection of a junior advocate can't be avoided, consideration should be given to assigning a more seasoned advocate to "second chair" or serve as a mentor to the junior advocate.

C. FACTS, WITNESSES, AND TIME TO PREPARE

The complexity of the facts, the difficulty in securing evidence, the status and resistance of witnesses and clients, and the time to prepare are legitimate considerations in determining advocate selection. Generally speaking, greater factual complexity, difficulty in securing evidence, or cases involving high-level clients or witnesses requires more experienced advocates. Junior advocates can be teamed with experienced advocates to ensure they gain experience while client interests are protected.

D. SKILLS OF OPPOSING ADVOCATE

The advocate selected by the opposing party is a legitimate factor in your advocate selection. If the opposing party selects an attorney as its representative, it may be advisable to match that skill level by selecting an attorney or a senior non-attorney advocate. If the opposing party selects a senior advocate or subject matter specialist, you may want to respond in kind. Do not make assignments based solely on the advocate selected by the opposition, and do not feel obligated to match the skill level of the advocate selected by your opponent. The assignment manager must decide the right advocate for each case.

E. WILL YOUR ADVOCATE BE A WITNESS?

Consider the wisdom of appointing an advocate who may also be a fact witness. Although arbitrators generally permit advocates to testify as a fact witness in a case, they generally make notoriously bad witnesses. During cross-examination, advocates are often baited into the role of biased advocate, find it difficult to stick to the facts and answer only the questions asked. The overall effect often diminishes the weight placed on the testimony of the advocate-witness by the arbitrator. If the advocate's testimony is offered in support of a material fact in the case, the arbitrator's assignment of diminished weight to the evidence could be critical to the case outcome. State Bar disciplinary rules governing attorneys' conduct may limit or preclude their appearance as both an advocate and as a witness in arbitration.

If possible, avoid selecting an advocate who may also serve as a material fact witness, or limit the scope of the advocate's testimony to a minimum. The advocate should be reminded to stick to factual responses, specifically answer cross-examination questions, and avoid sparring with the opposing advocate. Consider having a second advocate take over the questioning of the primary advocate. As a matter of professional courtesy, such an arrangement should be disclosed to the opposing advocate and the arbitrator beforehand.

F. WHO IS THE ARBITRATOR?

The experience or expertise of the arbitrator on a particular issue may influence advocate selection. The assignment manager may want to assign an advocate with expertise in an area to ensure that an arbitrator lacking that area of expertise understands the issues.

Arbitrators, like advocates, have styles and personalities. Some personalities and styles work well together, and others do not. Given the choice between two advocates of equal ability, one with a history of getting along with the arbitrator and an advocate who has historically clashed with the arbitrator, you may be well-advised to select the former advocate.