CHAPTER 1
STRUCTURE OF THIS BOOK

Our purpose is to provide practitioners with summaries of awards by arbitrators who address significant federal sector issues. Describing the arbitration process through summaries and commentaries about published awards is a selective exercise. Many awards, also referred to as decisions, are not published at all, either because the parties do not authorize publication, or because the arbitrator does not submit the award for publication. When awards are submitted, depending on the commercial service that publishes them, it may be some time before the award makes its way through the publication process into print or digital distribution. Of the awards submitted for publication, some show up in one, but not more than one, commercial publication. The awards presented here have been accumulated over a period of years by LRP Publications, in the Cyberfeds database, in extensive use in the federal sector labor relations community. Awards discussed in the book are taken from and cited to Cyberfeds.

Arbitration awards are not precedential. Unlike appellate court decisions, often followed by or controlling the decisions of other courts, an arbitration award resolves a particular dispute that arose at a particular time, involving a particular set of parties. Similar controversies arising between different parties, at different times, involving different contracts, may well bear different results. Arbitrators may decide not to follow awards of other arbitrators applying the same contract, between the same parties, and involving identical or similar issues.

If arbitration awards are not followed by other arbitrators, why write about them? That is a reasonable question by a reasonable author. The reason for presenting the information that follows is because the reasoning presented in awards of one arbitrator may be considered persuasive by other arbitrators—a common law of arbitration. To the extent the reasoning is cogent and the result is reasonable, past awards may be predictive of the direction that arbitrators will follow in resolving the controversy you now address through arbitration. Early research of arbitration awards may assist in resolution of grievances before they reach arbitration. The awards that follow are representative resolutions by arbitrators of controversies or issues that frequently arise in the federal sector. Only federal sector awards are included. Research of resources covering private sector arbitration may unearth awards useful in a federal sector dispute.

Arbitrators differ in experience, education, and temperament from administrative judges of the Merit Systems Protection Board and the Equal Employment Opportunity Commission. The judges who are employed by the MSPB and EEOC are attorneys, they are civil servants, federal employees, and their thinking and approach to controversies within their jurisdiction is legalistic, guided by procedural rules and precedent. Many arbitrators are not attorneys. They are not federal employees. The MSPB is generally deferential to management disciplinary decisions. The EEOC has the statutory mission to find and eliminate discriminatory employment practices. The arbitrator is a neutral, with no mission other than enforcement of a contract and dispassionate resolution of factual disputes. Many MSPB and EEOC administrative judges have little, sometimes no, experience other than as government attorneys. Labor arbitrators frequently have decades of experience in private industry, labor unions, and academia before becoming professional neutrals. The difference in background and approach of administrative judges and arbitrators is telling. Arbitrators approach dispute resolution through a practical, not often legalistic, application of a contract or past practice. Administrative judges, by law school training and their experience as attorneys working within government bureaucracies (MSPB and EEOC are government agencies and they have their bureaucratic ways and means), prefer legal analysis. Collective bargaining contracts rarely figure in their deliberations.

The parties to an arbitration jointly select their arbitrator, and that arbitrator is ordinarily jointly paid by those parties. Arbitrators are responsive to the contract between the union and the employer. But arbitrators in the federal sector also must ensure that their awards maintain fidelity to the requirements of federal law. Many types of federal sector awards can be appealed through exceptions filed with the Federal Labor Relations Authority, whose responsibility it is to ensure that awards do not contravene federal statutes and regulations. The exceptions process is described in FLRA publications, available on its website, www.flra.gov, and in *A Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publications, Inc.). The necessity for arbitrators of federal sector disputes to avoid direct conflicts between their awards and federal statutes and regulations creates a level of complexity largely unknown to arbitrators of private sector disputes.

Because arbitrators resolving federal sector disputes frequently address, directly or indirectly, nuances of federal sector law, it is important that the parties address the implications of governing statutes and regulations in their submissions to arbitrators. The governing law is extensive. FLRA annually addresses through exceptions to awards, hundreds of points of civil service law. The Merit Systems Protection Board issues hundreds more decisions each year governing disposition of awards, that resolve adverse actions and performance-based actions that, instead of traversing the grievance process, could have been appealed to the Board. Were that not enough, the U.S. Court of Appeals for the Federal Circuit reviews decisions of the MSPB and frequently revises the law established by the Board. And then there is the EEOC, issuing its own federal sector decisions that, along with the Commission's management directives and orders, are supposed to guide arbitrators' awards involving civil rights issues. The purpose of this book is not, however, to catalogue federal statutes and regulations governing employment or to analyze the MSPB, FLRA, and EEOC decisions addressing issues of statutory and regulatory interpretation. That type of research is better conducted by reviewing decisions of those agencies. The point is that arbitration—a reasonably straightforward process—involves administration of many statutes, regulations, and administrative or judicial decisions limiting an arbitrator's authority under a collective bargaining contract. The effective advocate is one who recognizes the legal complexities of a case, researches the issues, and provides to the arbitrator comprehensive, candid, and comprehensible legal analysis through briefs and opening or closing statements.

We generally avoid excerpting discussions from arbitrators' awards that do no more than restate law developed by the Federal Labor Relations Authority. The best source of FLRA law is the FLRA, and the FLRA sets aside too many arbitration awards interpreting FLRA law to permit reliance on arbitrators' awards as a source of FLRA law. Similarly, when arbitrators restate MSPB or Federal Circuit decisions, their restatements may or may not be accurate or current; those summaries are not emphasized in this book. Reference should be made to *A Guide of Federal Sector Equal Employment Law* by Natania Davis and Ernest Hadley (Dewey Publications, Inc.), or to *A Guide to Merit Systems Protection Board Law and Practice*, by Peter Broida (Dewey Publications, Inc.), and to *A Guide to Federal Labor Relations Authority Law and Practice*, by Peter Broida (Dewey Publications, Inc.).

A word or two about the quality of analysis in arbitration awards. The parties need a result, not a scholarly dissertation such as might be offered by judges of an appeals court. Yet some arbitrators look beyond a result, and they seek to ensure that the parties understand—even appreciate—the reasoning leading to the result. In the federal sector, it is particularly important that an arbitrator explain how an award was derived that grants a monetary benefit. When FLRA has jurisdiction to review an award, it will ensure its compliance with the law. That compliance is best demonstrated by the analysis contained in the award. Because many arbitrators are not familiar with the intricacies of federal sector employment, labor relations, and EEO law, the parties need to educate the arbitrator through their advocacy submissions, that is, through their opening statements and closing briefs. As with other endeavors, you get out of arbitration what you put into it.

This book selects awards providing significant analysis of the principles of arbitration. Extensive citation from awards of FLRA or MSPB law is avoided; that material is better sought from decisions of those tribunals or texts analyzing those decisions. The result of FLRA review of a particular award is not provided in this book. That an award was later vacated by the FLRA generally means the arbitrator erred as to a point of law; other analytical points from the award are still useful. We avoid quoting sections of awards clearly contrary to FLRA, MSPB, or Federal Circuit decisions, and we generally avoid extensive recitation of factual background. We trust that the resulting synopsis offers guidance for parties in their ongoing labor relations and provides a resource for research, citation, or quotation when disputes cannot be settled short of arbitration. Readers should do their research, and that will include reading the complete text from any award excerpted here. Awards should be checked to determine if they were vacated, affirmed, or modified by FLRA.

CHAPTER 2
THE NATURE OF ARBITRATION

Arbitration is the product of not much more, and no less, than an agreement by the parties to permit an arbitrator, an outsider to a dispute, to resolve the dispute by a decision, known as an award, that both parties agree to follow, although the award may not become final until either party has had the opportunity to file exceptions to the award with the Federal Labor Relations Authority challenging its underlying validity (except in cases that could have been taken to the Merit Systems Protections Board, i.e., severe disciplinary or performance-based actions that, when processed through arbitration, result in awards that are not reviewable by the FLRA).

Arbitration is authorized by grievance and arbitration clauses of collective bargaining agreements between unions and federal-sector employers. Federal sector labor arbitration is not conceptually distinct from its private sector counterpart.

> Arbitration in the federal sector is almost identical to the private sector. *Police Employee Panel v. Tennessee Valley Auth.,* 731 F.2d 325, 115 LRRM 3550 (6th Cir. 1984). Generally, the "law of the shop" developed in the private sector is comparable to the public sector. Substantive and procedural issues may be resolved by the same time-tested principles developed by 50 years of arbitration in both private and public sector labor cases. *Id.* The Civil Service Reform Act of 1978 (CSRA) gave birth to the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). The OPM sets policy for federal government employees. The Federal Labor Relations Authority (FLRA) performs a variety of important functions similar to the National Labor Relations Board (NLRB). The FLRA also has the responsibility of resolving exceptions to arbitration awards.

AFGE, Local 507 and VAMC West Palm Beach, 106 LRP 1976 (2005 Holland)

Grievance arbitration has limitations. One significant limitation on the substantive and remedial scope of arbitration is the contract itself.

> [G]rievance arbitration is not an unlimited forum to address any workplace issue. Instead, this Arbitrator is limited to determining whether certain conduct does or does not violate the collective bargaining agreement between labor and management as well as any applicable law or federal regulation.

SSA and AFGE, Local 3438, 109 LRP 37141 (2009 Feinstein)

Arbitration is supposed to be a relatively informal means of dispute resolution. Whether it is or whether it bears hallmarks of traditional litigation practice depends on the arbitrator, the parties, and the contract that defines their relationship. Most arbitrators encourage a degree of informality.

> First, the arbitrator cannot help but urge the parties to remember that arbitration was and is supposed to be expedited and economical. This relatively limited issue did not necessitate two attorneys on each side, a stenographer, two sessions, voluminous exhibits, and posthearing briefs. Much as the arbitrator appreciated a courtroom-like setting and being addressed as "Your Honor," he would have welcomed a much more streamlined procedure, where the excess resources that were spen[t] in the preparation and implementation of this case could have been redirected to reducing the perennial office backlog and, perhaps at the same time, providing coverage during the last hour on Friday afternoons. In any event, effective mutual efforts to return closer to the original purpose of arbitration would appear to be of potential benefit to the parties and their constituents.

NLRB Union and NLRB, 101 FLRR 2-1114 (1999 Zirkel)

Arbitrators bring their personal experience to the bear.

> It goes without saying that a good arbitrator or judge is neutral and fair. However, it is inevitable that every arbitrator or judge brings his or her background, experiences and philosophies to the bench or conference table. Those personal factors embellish or contribute to the efforts of the trier of fact to make the most reasoned and even-handed decision.

Nat'l Border Patrol Council, AFGE Local 2595 and DHS, C&BP, 112 LRP 39475 (2011 Andres)

An arbitrator considers the context of a dispute.

> It is a well-accepted principle of adjudication that the job of the Arbitrator is to look at cases "as a whole."

Broadcasting Bd. of Governors and AFGE Local 1812, 118 LRP 31135 (2018 Butler)

> Classically, of course, arbitrators achieve effective binding solutions to a grievance based upon the evidence, testimony, and arguments presented by both parties and derived from a "contract" or consensually derived collective bargaining agreement—essentially a *de facto* "body of law" upon which sound arbitration judgments are based.

AFGE Council 252 and Dept. of Educ., 118 LRP 43449 (2018 Pastore)

I. ARBITRATION IS NOT MEDIATION

Arbitration is dispute resolution by a third party neutral appointed by the parties under their contract. Although arbitrators may attempt to fashion a remedy that meets competing interests, the award of the arbitrator—for one party or the other, or split between them—controls the resolution of the dispute. When one places a grievance before an arbitrator, the parties are paying the arbitrator to make a decision on a dispute. The arbitrator is judge and jury.

Distinguished from arbitration, mediation is a process that seeks bilateral settlement, rather than unilateral resolution, of a dispute. The mediator, who

may be an arbitrator, attempts to aid the parties by exploring with each party, separately and with the parties together, approaches to a dispute that may result in a compromise meeting the parties' interests. Mediation is a means of voluntary, cooperative settlement. Mediators do not decide cases. They help the parties to resolve their differences. If mediation fails, arbitration may not be far away. Arbitration resolves unsettled differences.

> Mediation is different from those forms of dispute resolution which operated solely by way of determinations of fact and law. Processes such as arbitration seek truth, even if it is not always found. An arbitrator will, rightly or wrongly, review and weigh the evidence and decide who is telling the truth, what happened when, what arbitral authority should apply and what it means, and who wins and who loses. Arbitrators resolve the dispute, in the truest sense available to fallible and imperfect humans. A mediator can help the parties find a mutually satisfactory way to abandon their quest for that kind of resolution. The issues which define the particular dispute need not be resolved at all. In mediation, the parties get a chance to escape their dispute and get back onto a more productive track.…
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> …Mediation provides the opportunity to search for a nonpunitive, workable solution to a conflict. Agreeing to voluntarily meet sets an immediate tone that both parties are interested in finding a solution to the conflict.
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> ADR can provide a safe environment for individuals in conflict to express their views of the dispute and their ideas on how to best reach a resolution. Having a venue where disputants are actually listening to each other, instead of contradicting and discounting one another, is a powerful way to bring about an understanding of how each person sees the situation and the conflict. ADR can be very advantageous to the workplace since the mediator does not render a decision but facilitates the parties to reach an agreement on their own.
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> …Mediation is especially useful in dealing with interpersonal conflict and works best when the parties involved must have a continuing work relationship.

VAMC and AFGE AFL-CIO, Local 446, 103 LRP 2485, 103 FLRR-2 71 (2002 Donald)

> The whole reason for requiring mediation is a belief that a mediator can facilitate a resolution of problems in cases where the parties themselves could not do it alone. Even relatively frivolous cases can be resolved. After hearing what the dispute is all about, the mediator can step in and tell a complaining employee that they do not have a very good case. The mediator may also be able to suggest resolutions that are acceptable to both sides, in this case, for example, while it may not have necessarily resolved the case, it would have gone a long way towards satisfying [name]'s and the Union's concerns if the Chief had simply been able to convince them that he did take allegations of violence in the workplace seriously. They could have talked about why [name] felt that the Chief had not taken his complaint seriously and did not investigate it properly. The Chief could have then explained what he did and why he did it. He could have also explained that, if an "incident report" had been filed, or some other form of formal complaint, he would have conducted a more thorough investigation but, without a formal complaint, he did not think that was required. In any event, the point is that meaningful dialogue can lead to resolutions even where no resolution is immediately apparent to the parties at the start of the mediation.
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> It also needs to be said that, of course, there are many cases that cannot be resolved through mediation. But no one can know for sure which cases those are until a good faith attempt at mediation has been made. If, after some reasonable amount of time, the mediator is out of ideas and feels that there is nothing to be gained from continuing, then he or she will adjourn the mediation. But that point clearly has not been reached when one side has not yet even had a chance to state their position and the mediator also has not had a chance to try to move the parties toward a resolution.

Lindsey and U.S. Mint, Denver, 104 LRP 38267, 105 FLRR-2 19 (2004 Sass)

That arbitration is available to resolve a dispute does not mean it will do so.

> Unfortunately, some confluence of factors such as organizational politics, personal intransigence or the principal of sunk costs ultimately thwarted an optimal approach to resolving this dispute. But whatever the reasons, the marginally useful, residual task for this Arbitrator was to declare a winner in a controversy that was very unlikely to be put to rest by his Award. He believes this because it is his opinion that this matter will not really be put behind the Parties until they work through the thorny labor relations issues that lie at the heart of this dispute.

AFGE, Local 2437 and VA, 110 LRP 20515 (2008 Sherman, M.)

II. RIGHTS AND INTEREST-BASED ARBITRATION

There are two types of arbitration. The more common, traditional, arbitration is rights arbitration: the arbitrator resolves a grievance of an individual, individuals, or the union, under a particular provision of the collective bargaining contract involving a claim to a particular condition or benefit of employment, e.g., overtime entitlement or the requirement that a disciplinary action be imposed only for just cause. Rights arbitration may also be pursued by management by a grievance against the union, e.g., abuse of contractual official time privileges for union officials. The other, less common, type of arbitration is interest arbitration: the arbitrator resolves a dispute between the union, as a representative organization, and management, over a broad working condition, e.g., the types of procedural protections available in disciplinary actions. Interest arbitration often sets contract terms. It can be used in impasse resolution.

> At the outset I will assume the liberty of reminding the parties of an interest arbitrator's function and role in disputes such as this one. In "*How Arbitration Works*," BNA, 3rd. Ed. by Elkouri & Elkouri it reveals that:
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> > The task is more nearly legislative than judicial. The answers are not to be found within the "four corners" of an existing document which the parties have agreed shall govern their relationship. Lacking guidance of such a document which confines and limits the authority of arbitrators to a determination of what the parties had agreed to when they drew up their basic agreement. Our task here is to search for what would be, in light of all relevant factors and circumstances, a fair and equitable answer to a problem which the parties have not been able to resolve by themselves. (Pg. 53)

Metal Trades Council and Panama Canal Comm'n, 99 FLRR 2-1085 (1999 Anderson, D.)

An arbitrator who resolves a dispute over competing interests attempts to find a resolution that will meet the needs of the parties and avoids providing the palm of victory to one side, unless the interest arbitration takes the form of an arbitrator's choice of either party's last and best offer.

> It is recognized that the parties are aware of the above recited principles and acknowledge the basic litigation charter of "interest" third party neutrals to attempt to make practical as well as contractual sense of their dispute and to render an award accordingly. In this instance the parties Agreement and/or, applicable employer policies and procedures forces an award based on their respective "last best offer." This is not unlike major league baseball's player salary arbitration rules. Consequently, there is no personal legislative or judicial wiggle room afforded the neutral to fashion selected issue(s) in ways which he/she may feel would be more appropriate.

Metal Trades Council and Panama Canal Comm'n, 99 FLRR 2-1085 (1999 Anderson, D.)

Interest arbitration extends interest-based negotiations.

> …The difference between traditional negotiations and interest based negotiations is one of process. The parties focus on the interests that underlie their respective positions thereby greatly expanding the possible options that can be included in any agreement that would resolve a dispute. This process is less adversarial than traditional negotiations and more conducive to collegial long term relationships between two parties to a dispute because they have worked together in an attempt to craft an agreement that addresses both of their interests. However, as with traditional negotiations, interest based negotiations may be in good faith (on the part of both parties) but not result in an agreement.

GSA and AFGE, Council 236, 102 LRP 34213, 103 FLRR-2 61 (2002 Goodfriend)

CHAPTER 3
SOURCES OF GOVERNING LAW FOR ARBITRATORS

The arbitration process is a creation of the collective bargaining agreement, and the arbitrator pledges his or her fidelity to that agreement. Yet, particularly in the federal sector, arbitration awards are constrained by the application of innumerable federal statutes and regulations that indirectly or directly govern the employment relationship and working conditions of bargaining unit members. Arbitrators are also required to consider decisions of the Federal Labor Relations Authority and Merit Systems Protection Board that interpret and apply federal sector law. Arbitrators may rely on the reasoning of decisions of other arbitrators, involving other parties and other contracts. Arbitrators may also decline to follow other arbitration awards or other sources of law, including the courts, one award noting in a challenge to a ten-day suspension:

> An arbitrator can refuse to follow decisions of Courts that he disagrees with when it is not a decision of the Court of last resort; the Supreme Court.

AFGE District 14 and NIH, 117 LRP 21942 (2017 Peck)

I. DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

To be distinguished from the issue of the precedential weight of arbitrators' awards discussed below in "Other Arbitration Awards as Precedent" is the weight of Federal Labor Relations Authority decisions interpreting federal law. The parties should come to arbitration with a healthy regard for FLRA decisions, as well as for the decisions of federal courts that review FLRA decisions—particularly court decisions evaluating unfair labor practice issues. That level of attention is required, because arbitrators' awards are reviewable by the FLRA through the exceptions process (for cases other than those that could have been brought to MSPB):

> An arbitrator in the federal sector must take a ruling of the FLRA as gospel, even if it may not yet be the final word on the issues involved.

DHS, C&BP and NTEU Chapter 137, 104 LRP 23356, n.6 (2004 Abrams)

> Decisions of the Federal Labor Relations Act (which by the way, concur with the parties' longstanding past practice) "are entitled to special deference when they reflect policy choices." (*U.S. I.N.S. v. Federal Labor Relations Authority,* C.A.4 1993, 4 F.3d 268) "FLRA interpretations are given significant deference if reasonable and coherent and constitute reasonable interpretations of Federal service labor/management statute." (*National Treasury Employees Union v. Federal Labor Relations Authority,* D.A.D.C. 1983, 721 F.2d 1402, 232 U.S. App. D.C. 241) "FLRA conclusions as to the negotiability of employment issues will be upheld when the conclusions are 'reasonable and defensible.'" (*U.S. Dept. of Air Force v. Federal Labor Relations Authority,* C.A.D.C. 1991, 949 F.2d 475, 292 U.S. App. D.C. 300.)

AFGE, Local 3028 and VA Anchorage, 104 LRP 57673, 105 FLRR-2 32 (2004 Swanson)

An arbitrator declined to follow a dissent arguing for grievability of a pay dispute when the FLRA majority determined that the agency's pay-setting discretion was unreviewable.

> I have been given no compelling reason by the Union to set aside long-established precedent and adopt Member Pope's analysis and reasoning in *NIMA*. Accordingly, for the reasons given above, I find the Union's grievance to be neither grievable nor arbitrable.

NTEU, Chapter 302 and Office of the Comptroller of the Currency, 111 LRP 7408, 111 FLRR-2 49 (2010 Ross, J.)

II. OTHER ARBITRATION AWARDS AS PRECEDENT

The MSPB, EEOC, and FLRA view their final administrative decisions as precedential, except when a decision of one of these agencies is specifically denominated as nonprecedential (a situation often occurring with the MSPB). Law developed by the adjudicative agencies and by the courts is viewed as dispositive or precedential for a set of similar circumstances and issues until the agencies or reviewing courts depart from or overrule precedent, usually by a decision that recognizes the existence of precedent and then explains the reasons for departure from the rule earlier established.

Arbitrators will likely consider that their selection is an appointment requiring *de novo* review of the relationship of the grievance, the contract, and the facts. That said, creating a common law of arbitration, awards frequently quote or refer to awards by other arbitrators. An arbitrator's reference or the quotation to another arbitrator's award is generally by way of illustration or explanation, but it is not a determination to reach a particular result because another arbitrator reached that result. Some arbitrators ignore other awards, or they do not know of them and do not cite them because the parties did reference them. Arbitrators will likely—but not always—follow awards of other arbitrators involving the same parties before them, involving the same contract articles, and presenting similar issues.

Arbitrator Roger Abrams commented on the precedential value of awards:

> Everything else being equal, there is a value in having issues settled once and for all. In general, arbitrators have not adopted the view that prior arbitration decisions are binding precedent, even between the same parties to the same contract. Of course, it is good practice for an arbitrator to follow a carefully reasoned prior decision, but the parties seek correct decisions, not simply consistent ones.

DHS, C&BP and NTEU Chapter 137, 104 LRP 23356 (2004 Abrams)

A tad more directly:

> With all due respect to the parties, this is an *ad hoc* arbitration; what people have written in other cases is not particularly important to me. The collective bargaining agreement is the source of my authority, and the record of this hearing is the source of my wisdom.

SSA and AFGE, 111 LRP 76954 (2011 Sherman, Jeffery)

> It is almost routine for either party to submit to an arbitrator copies of other arbitration awards. It is also commonly understood that other arbitration awards do not constitute either precedential value or primary authority, unless the parties' collective bargaining agreement expresses otherwise.

IBEW, Local 1759 and Dept. of Interior, Bureau of Reclamation, Great Plains Region, Wyoming-Eastern Colorado Area Offices, 114 LRP 12478 (2014 Eisenmenger)

Comments about decisional independence aside, weight—even controlling weight—may be applied to awards in prior arbitrations between the parties. It all depends. Awards involving the same parties, contracts, and issues are especially significant.

> While labor arbitration decisions are not deemed binding precedence, arbitrators have often followed these concepts in giving deference to prior decisions in order to maintain internal consistency of interpretation and finality to issues deemed "final and binding" as agreed by the parties in most collective bargaining agreements. The concept of *res judicata* is used to deny any further consideration of a claim that has been previously decided involving the same issue(s), same parties, and same contract provisions. It is a matter that has already been adjudged. The concept of *stare decisis*, on the other hand, is a concept that once a case is decided on an issue, any subsequent case on the same issue should be decided in the same manner.

AFGE, Council of Prison Locals 33, Local 817 and DOJ, Fed. Bureau of Prisons, Fed. Med. Ctr., Lexington, Ky., 115 LRP 14016 (2015 Sellman)

> Arbitrators normally consider a number of factors when faced with relevant prior decisions so that a well-reasoned and well-written prior arbitration opinion has persuasive qualities where that award is on point with the subject matter of the current grievance. In the vital interest of maintaining Industrial Peace these same arbitrators usually leave the prior award firmly in place without change where the same issue arises between the same parties; where the relevant contract language is clear; where the fact situation remains materially unchanged; and, where there are not extraordinary and compelling reasons why the initial decision should be overturned.

DHS, C&BP and NTEU, 112 LRP 33247 (2012 Hauck)

> In deciding whether to follow a previous arbitrator's interpretation of a labor agreement, an arbitrator should first consider what the parties' CBA says about the effect of arbitration awards. Here, the CBA provides that an "arbitrator's award shall be binding on the parties." Art. 31, § 3108. That seems to mean that I must accept Arbitrator Lindauer's award as final and binding. This is especially so where, as here, the present and former disputes involve the same contract language and the same issue. A central purpose of labor arbitration is to decide disputes over the meaning of the parties' contract. It would defeat this central purpose of labor arbitration if the losing party could prevail upon a subsequent arbitrator to ignore a prior decision regarding the same contract language. "Like an extra-innings baseball game, the dispute could potentially go on indefinitely and never be resolved if each subsequent arbitrator felt free to go his own way with the issue." *Monarch Tile, Inc*., 102 LA 585, 587 (Hooper 1993). Locking the parties into such a vicious cycle of endless arbitration would deprive the parties of the benefit of the bargain they reached when they agreed to resolve disputes over contractual meaning through arbitration.

Puget Sound Naval Shipyard and Intermediate Maintenance Facility and Bremerton Metal Trades Council, 119 LRP 14138 (2019 Bonney)

> There is no dispute that an arbitrator should, when another arbitrator's award relating to the same or similar subject matter is placed before him, consider the decision and award as part of his deliberations. However, the law is clear in that an arbitrator's award must draw its essence from the collective bargaining agreement and thereby refrain from imposing his own or any other arbitrator's brand of justice.

NAGE, Local R12-135 and EPA, 103 LRP 2451 (2002 Riker)

> It is generally accepted that an arbitrator is not bound by the findings of other arbitrators even when they ruled on similar issues. It is a different situation when considering a prior award that involves the same parties and the same language, or as in this case, quite similar language:
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> > Views differ on the degree to which prior awards are controlling. If a decision has interpreted a contract provision prior to its renewal without change in a subsequent agreement it is considered to be binding on the parties as part of what they intended by continuing the same language. If the decision was rendered during the current term of the agreement, deference will probably be paid to the prior decision on the grounds that the parties should not be forced to litigate the same issue over and over again when they have adopted final and binding arbitration as their method of determining their disputes. But if arbitrators, after hearing the evidence, truly believe the prior decision on the same issue during the contract term was wrongly decided, they may choose not to follow it.[4]
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> > [4] *The Common Law of the Workplace*, 2d. Ed., St. Antoine, Ed., BNA 2005, p. 53.

SSA, Baltimore and Council 220, AFGE, 111 LRP 54399 (2011 Feigenbaum)

> As the Elkouris noted in their respected text, *How Arbitration Works,* BNA, 5[th] Ed. (1985), regarding the effect of decisions of temporary arbitrators such as the undersigned:
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> > Prior awards also may have authoritative force where temporary arbitrators are used. An award interpreting a collective agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.
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> > This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision."

AFGE, Council of Prison Locals #33, Local 171 and DOJ, Fed. Bureau of Prisons, FTC, Oklahoma City, OK, 101 FLRR 2-1193 (2001 Lumbley)

> Arbitrators generally agree that, absent limited exceptions, where a prior arbitrator has rendered a decision involving a contract issue between the same parties at the same facility it is desirable to apply the prior interpretation and maintain stable labor-management relations.

Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga. and AFGE, Local 987, 108 LRP 26275 (2008 Milinski)

> To be given preclusive effect an arbitration award "must be between the same parties, must invoke the same fact situation, must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator."[9] This dispute meets all these conditions and there are no "materially changed circumstances."[10] In addition, the issue in the *Hauck* award is the same.
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> [9] Elkouri & Elkouri, *How Arbitration Works* 577 (Alan Miles Ruben 6th ed. 2003) (footnotes omitted).
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> [10] *Id*. at 578.

Army Corps of Eng'rs, Northwestern Div. and UPTO, 110 LRP 29559 (2010 Savage)

Avoiding relitigation of the same issue under a contract promotes stability of relations among the parties by leaving an issue resolved, at least until that resolution is reversed or modified through subsequent negotiations.

> As a general rule arbitrators are not bound by general arbitration precedent, although similar cases may serve a useful purpose by suggesting certain guidelines and principles. However, prior cases of the same parties where the same issue has been decided establish binding precedents with few exceptions. The Agency and the Union have recognized that principle by distinguishing between expedited arbitration cases identified as non-prejudicial, and regular arbitration cases identified as precedent setting.
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> …
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> A prior decision involving the same parties and the same issue has long been held to have the same effect as a modification of the contract, and remains in effect during the current contract or until such time as a change has been negotiated. A binding precedent was established as a result of the *Quinn* award. The Agency needs no other defense.

AFGE, Local 916 and Dept. of Air Force, 72d Support Group, Tinker AFB, 100 FLRR 2-1152 (2000 Neas)

The value of past arbitration awards, particularly those not involving the same parties to a contract, depends upon the arbitrator, the parties, the facts, and the language of their contract.

> Whether a prior decision written for another agency is "controlling" in a given case depends in large part on how similar the facts and circumstances may be.

AFGE, Local 3134 and SBA, 101 FLRR 2-1013 (2000 Stark)

> The precedent value of prior awards has been discussed extensively by Arbitrators. The value of prior awards in making new awards is often dependent on the relationship of the prior award to the current dispute, whether the agreements contain the same or similar language and dispute. The comments by Arbitrator David A. Wolfe (*Chrysler Umpire*) in considering an award of Arbitrator Harry Shulman (*Ford Umpire*) appear[ ] to be on target in our current dispute:
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> > "The Chairman realizes that, despite the great similarity of contract provisions and their apparent common origin and despite the tact of similarity of parties, location and type of business, there are distinctions which exist and must be observed. The parties are not the same parties." *How Arbitration Works,* p. 620. Fifth Edition.
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> This Arbitrator's practice in looking at prior awards is that if the prior award is based on the same contract language, with the same parties and the same or very similar dispute, and the prior Arbitrator made sense in his opinion, the award is regarded as authoritative. To change any one of these factors which led to the prior award and as it is applied in the current dispute, lessens the prior Awards' precedent value. While the awards submitted by the Employer in this case have background in common with the grievance of the parties to this dispute; they were not the same parties, neither the Employers nor the Unions.
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> Another factor to take into consideration when contract language is unclear or as in this case non-existent is how have the Parties resolved similar disputes in the past? Was the past practice mandated to the parties by an outside source, be it an arbitrator, judge or administrative panel? Was the resolution made unilaterally by either the Employer or the Union? Did the parties work together to resolve the situation? In those instances where the parties working together have resolved similar disputes in the past and established a record of those resolutions, Arbitrators are reluctant to set aside those decisions. This is true even in some instances where the arbitrator may not necessarily agree with the parties' work, it is their work.

Puget Sound Naval Shipyard, Bremerton and Bremerton Metal Trades Council, 104 LRP 359 (2003 Croll)

Variations in the material facts may result in little deference to awards involving the same parties.

> Prior awards [are] not generally regarded as binding precedent to the same degree as court decisions. However, it is recognized that in the interest of sound labor relations and the avoidance of repetitious litigation, due respect be accorded to a well-reasoned award concerning the same parties and the same contract language. In *Pan American Refining Corp.*, 9 LA 731, Arbitrator McCoy stated:
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> > "Where the prior decision involves the same company and union, but is essentially a decision on facts rather than on the interpretation of a contract clause, it is entitled to no weight whatever under a different set of facts, though general statements of principle may or may not be persuasive. But where, as here, the prior decision involves the interpretation of the identical contract provision, between the company and union, every principle of common sense, policy, and, labor relations demands that it stand until the parties annul it by a newly worded contract Provision." [9 LA at 732][22]
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> > [22] To the same effect is *Scott Air Force Base*, 35 FLRA 978 (1990):
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> > > "(1) the same issue must be involved in both cases, (2) the issue must have been actually litigated in the first case; (3) the resolution of the issue must have been necessary to the decision in the first case; (4) the prior decision on the