

## CHAPTER 11: REMEDIES

Arbitrators, like their counterparts at the Merit Systems Protection Board and Equal Employment Opportunity Commission are bound, to a large degree, by statutorily prescribed remedies. But, unlike their MSPB and EEOC counterparts, they are not wholly bound by such remedies. Arbitrators have a greater freedom to fashion remedies that are tailored to the wide variety of contractual violations that come before them. With that greater freedom, however, comes a greater responsibility.

As noted many times previously in this book, the negotiated grievance procedure and arbitration are part of the overall collective bargaining process. The ultimate aim of that process is to permit the parties, as much as possible, to determine their own work rules. As a result, in fashioning a particular remedy, the arbitrator may look as much to prevent future violations as to correct past violations. Preventing future violations is one way to foster good labor-management relations.

In most instances, it is the union or the employee who is the recipient of a remedy when one is required. Does this mean that agencies engage in far more contractual and statutory violations than unions or employees? Probably not. It is merely a reflection of the fact that agencies, as management, are free, in the first instance, to act unilaterally. That simple fact dictates that, most of the time, agency violations are corrected through remedies and union or employee violations are corrected by upholding the agency's unilateral action.

### I. FASHIONING REMEDIES

"In labor arbitration the underlying principle in fashioning an effective remedy is to make the employee whole." *Federal Metal Trades Council of Vallejo and Mare Island Naval Shipyard, Vallejo*, No. 81K12552, LAIRS 14108 (Scolnik, 1982). An arbitrator should be guided by this principle and not by what the parties have requested in the way of relief. Restoring the status quo often requires that the employer take some "affirmative action." *Id.* As Arbitrator Scolnik explained in *Mare Island Shipyard*:

The policy of "affirmative action" type remedies, originating in the field of racial discrimination, has also been applied in the field of labor relations, in the public sector as well as the private sector. Indeed, it might be said that such principles developed out of the National Labor Relations Act (29 USC 141, et seq.) to remedy employment discrimination based upon union membership and/or union activities. Thus, the typical and standard remedy for a wrongful termination of employment is reinstatement and back pay. The same principle applies to a wrongful denial of promotion, whether based upon race, color, religion, sex, age, union activity, etc.

That doctrine is also embodied in the CSRA, sections 7122(b) and 702 (amending 5 USC 5595(b), as well as 7701 et seq., with respect to "adverse actions" under section 7501 et seq., and 7511 et seq. Thus, if an employee were terminated because of discrimination of the kinds mentioned above (or any other kinds specified in the statute) or for any other "prohibited personnel practices" listed in section 2302, the remedy of reinstatement and back pay would be appropriate. . . .

This "make whole" concept of relief sometimes is described as placing the employee in the position where he or she would have been but for the wrongful agency action.

However it is described, there are some limits on the ability of arbitrators to fashion a remedy that truly makes a wronged union or employee whole. Arbitrators lack the inherent authority to award compensatory damages for such things as mental anguish. *See, e.g., San Antonio Air Logistics Command and AFGE, Local 1617*, No. 81K20591, LAIRS 14130 (Ainsworth, 1982). They likewise have no authority to impose penalties on offending management officials. *Id.* *See also Panama Canal Commission and International Organization of Masters/Mates & Pilots*, ARBIHS07398 (Cohen, 1995) (arbitrators lack authority to issue monetary remedies in absence of actual monetary loss).

Since the opinion of Arbitrator Ainsworth, Congress has enacted some specific exceptions to the above rules. As discussed in Ch. 10, under the Whistleblower Protection Act, arbitrators have been given the authority to award consequential damages and order disciplinary action against offending agency

officials in a limited range of cases. Moreover, as discussed below, in the Civil Rights Act of 1991, Congress authorized the payment of compensatory damages in intentional discrimination cases under Title VII and the Rehabilitation Act. Still, such remedies remain the exception.

In fashioning a remedy, arbitrators must be cognizant of resolutions that are "historically obsolete." In other words, some contractual violations cannot effectively be remedied by retroactive measures. The arbitrator must, instead, fashion prospective remedies. For example, in *NTEU, Chapter 91 and Internal Revenue Service, Southwest Region*, No. 210000, LAIRS 11760 (Kagel, 1978), the agency had denied the union the right to post an article on an agency bulletin board on the basis that it reflected adversely on the motives of agency officials. Arbitrator Kagel found that there were three objectionable words or phrases in the article, but that overall management had arbitrarily prohibited its posting. Noting that the remedy of ordering the article posted was of limited value because of the passage of time and that the union's demand for an apology was inappropriate, he ordered that, in the future, management inform the union of the specific language that is objectionable so the union could have the option of posting articles with that language deleted. Arbitrator Kagel, citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), rejected a contention by the agency that he had no authority to order such relief, stating "such is the only meaningful remedy that can be granted and is warranted under the facts and circumstances of this case and the Agreement." *NTEU, Chapter 91, supra*.

Although arbitrators have latitude in fashioning a remedy for a contract violation, they do not have unfettered discretion. "[T]he remedy need not be specifically authorized by statute or regulation, but must not be barred by, or inconsistent with, either . . ." *Small Business Administration, Denver, CO and National Federation of Federal Employees, Local 1851*, No. 82K13020, LAIRS 14478 (Fogel, 1982).

#### A. Settlement Agreements

As in all other forms of litigation, settlement of grievances is appropriate and encouraged. In fact, in the grievance and arbitration process, settlement is an expeditious remedy of a dispute that keeps that matter entirely within the control of the parties. In essence, settlement agreements negate the necessity of having the arbitrator fashion a remedy.

Arbitrators, like other adjudicators, encourage settlement. They also encourage the free discussion of settlement and, as such, adhere to the general rule that statements made during settlement discussions may not be introduced as evidence. Further, the fact that one party was willing to compromise at an earlier stage of the process has no effect on the remedy to be granted in the event of arbitration. As noted in *Federal Aviation Administration and National Air Traffic Controllers Association*, LAIRS 19626 (McCausland, 1990):

. . . The fact that the grievant was willing to settle for this reduction in penalty at one stage in the grievance process is not now binding on the grievant. Many solutions may be put forth by either Party to settle a grievance. The arbitration process should not inhibit the Parties from attempting to remedy grievances prior to arbitration. If the arbitration process bound the Parties by various solutions put forth at different stages of the grievance process then the arbitration process would work to inhibit the Parties from working to settle grievances. . . .

Unfortunately, settlement is not always the end of a dispute. Questions arise as to compliance. Technically, a failure to resolve the issues in the grievance procedure is a prerequisite to arbitration. When a grievance is settled, the prerequisite to arbitration is not fulfilled. However, arbitrators have an obligation to preserve the integrity of settlement agreements. *AFGE, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base*, No. 78K19468, LAIRS 11844 (Anderson, 1978). The issue of whether a party has complied with a settlement agreement is grievable and, ultimately, subject to arbitration. *Id.*

#### 1. Last Chance Agreements

Championed largely by the Merit Systems Protection Board, so-called last chance settlement agreements call upon employees to waive prospective appeal rights. The agreements are most often

used in removal cases where the employee is reinstated subject to acceptable performance and conduct for a specified period of time. If the employee has any performance or conduct infractions during that period, he or she can be summarily removed and waives all right to appeal that removal through the MSPB, arbitration or the EEO process. Such agreements have been repeatedly attacked on the basis that they violate public policy. The MSPB has rejected those attacks.

In *NTEU and Department of Health and Human Services, Region IX*, LAIRS 19663 (Vitaro, 1990), a public policy attack on the waiver of prospective grievance and arbitration rights was rejected. However, in the same case, Arbitrator Vitaro upheld the union's public policy objections to the prospective waiver of EEO rights:

Concerning the substantive issues, and addressing the easiest of those first, I do not find that the LCA waiver provision is void because it violated the public policy favoring collective bargaining. This argument is founded on claims that the Employer individually (i.e., without the Union) negotiated the LCA with the grievant and, moreover, coerced her into signing away collective bargaining agreement rights (i.e., the right to challenge an adverse action). While the Union was not ultimately a party to the agreement, the Grievant designated "NTEU as my representative in the matter of the adverse action" which the parties sought to resolve in the LCA. . . .

A similar result has been obtained before the EEOC in *Royal v. Secretary of Health and Human Services*, EEOC Appeal No. 01903626 (1990).

In *NTEU and Region IX*, Arbitrator Vitaro found the agreement was negotiated by an NTEU steward with the advice of union counsel. While the union was not a party to the agreement, it was not negotiated without participation from the union. He also found the union representation overcame any arguments that the agreement was not entered into knowingly and voluntarily by the grievant. Despite the union representation and the finding of a knowing and voluntary waiver, Arbitrator Vitaro found that the prospective waiver of EEO appeals rights violated public policy. As he explained in *NTEU and Region IX*:

Generally, prospective waivers of substantive EEO claims are disfavored. *Nicholson v. CPC International, Inc.*, 877 F.2d 221, 230 (3d Cir. 1989). While I could find no court decisions other than *Calicotte v. Carlucci*, 698 F.Supp. 944 (D.D.C. 1988)] concerning the prospective waiver of handicap discrimination claims, prospective waivers under the Age Discrimination in Employment Act (ADEA) have been addressed in case law, regulations, legislation and proposed legislation. Because the considerations which underlie the ADEA are substantially similar to those which inform the Rehabilitation Act, these authorities are particularly instructive.

For example, in *Nicholson v. CPC International, Inc.*, the defendant moved to compel arbitration of a former employee's lawsuit under the ADEA. The defendant argued that the former employee had entered into an employment contract whereby he agreed to arbitrate disputes and thereby waived his right to go to court. *Id.* at 222. The court examined the legislative history and objectives of the ADEA; noted that cases approving retroactive waivers of ADEA claims were not persuasive because the "prospective waiver at issue here involves relinquishment of the employee's rights with respect to potential future disputes which the employee may not have fully anticipated"; and concluded that "the right to a judicial forum under the ADEA is not subject to displacement by a prospective agreement to arbitrate disputes contained in individual employment contracts." *Id.* at 230.

The instant arbitration dispute provides circumstances even more compelling than those which lead the *Nicholson* court to conclude that the prospective waiver of an EEO right to a judicial forum was invalid. In *Nicholson*, the plaintiff/former employee had waived a judicial forum in favor of arbitration. The waiver in this arbitration would prevent the Grievant from pursuing her claim altogether—in arbitration, administratively as well as in court. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (waiver of an individual's procedural rights which are equivalent to waiver of Title VII substantive rights cannot be entered into by union prospectively).

In addition to case law, the Equal Employment Opportunity Commission—the agency designated by Congress to enforce and interpret EEO laws—has recognized the invalidity of

prospective waivers of ADEA claims. *See* 29 CFR Section 1627.16(c)(1)(1987). These now suspended regulations had approved knowing and voluntary releases of ADEA claims but had specifically prohibited waiver of prospective rights. The regulations had provided that waivers or releases under the ADEA were not permissible if they allowed for "the release of prospective rights or claims." *Ibid*.

And while these EEOC regulations have been suspended by Congress each fiscal year since 1987, they were suspended not because they were too strict but because they were too lenient in permitting even non-prospective waivers. *See, e.g.*, 135 Cong.Rec. E816 (daily ed. Jan. 25, 1989) (statement of Rep. Hawkins introducing Age Discrimination in Employment Waiver Protection Act).

Consequently, even though recent proposed legislation in the Senate, co-sponsored by sixteen Senators, allows unsupervised waivers under the ADEA when the parties are truly in an adversarial position, it would continue to bar prospective waivers entirely. S. 54, 101st Cong., 1st Sess., Section (f)(2)(B), 135 Cong.Rec. S357 (daily ed. Jan. 25, 1989)(In certain circumstances, ADEA rights may be waived as long as "the agreement does not waive rights or claims that may arise after the date the agreement is entered into.") The House measure, H.R. 1432, mirrors the Senate Bill in most respects, particularly in forbidding prospective waivers under the ADEA. H.R. 1432, 101st Cong., 1st Sess., 135 Cong.Rec. E816 (daily ed. Mar. 15, 1989). These proposed actions by Congress represent additional public policy authority weighing against the validity of a prospective waiver of EEO rights such as that involved in this grievance.

Arbitrator Vitaro ruled the agency must give the grievant the opportunity to pursue her EEO complaint either through the grievance procedures or the agency's EEO administrative process.

## B. Violations without Remedy

Determining the correct remedy for a contract violation is not always an easy proposition. But, for most arbitrators finding a contract violation without a remedy is a foreign notion. In some cases, the search for a remedy can include giving an agency a choice as to how to best remedy its own violation. *See, e.g.*, *U.S. Department of Transportation, Federal Railroad Administration and AFGE, Local 2814*, No. 81K25875, LAIRS 13951 (Reel, 1982); *see also Overseas Education Association and Department of Defense Dependent Schools*, No. 78K25137, LAIRS 11913 (Klaus, 1979) (where committee meetings are determined to be on "official time," agency has option of holding meetings during regular work week, or compensating members for meetings held after regular work hours). However, when a technical contract violation is unintentional and it is unclear that any specific employee has suffered actual harm, the only remedy may be to point out the violation and caution the employer against repeating the offense. *Veterans Administration Medical Center, Wood, WI and National Federation of Federal Employees, Local 3*, LAIRS 16164 (Seitz, 1984).

For some arbitrators, awarding costs to the prevailing party is appropriate where no other remedy is possible. *See* section below on Costs of Arbitration.

### 1. Cease and Desist Orders

The fact that the union establishes a violation of the contract does not necessarily mean that someone has sustained a personal injury as a result of the violation. In *National Federation of Federal Employees, Local 405 and U.S. Army Troop Support and Aviation Material Readiness Command*, No. 81K28128, LAIRS 13901 (Bernstein, 1982), the union established that certain promotions had been made on the basis of non-job related criteria in contravention of the contract. However, the union could not demonstrate that the grievant had been injured by the use of non-job related criteria; *i.e.*, the union could not show that the grievant would have been selected. Ordering a promotion would not have been an appropriate remedy. Also, the arbitrator found that priority consideration was not appropriate since it would only "begin another round of introducing non-job-related considerations." *Id*. An award was issued with a cease and desist order to the agency requiring it to refrain from injecting non-job related criteria into future selections.

## C. Back Pay

Perhaps the most traditional form of remedy for an unwarranted personnel action is an award of back pay. Back pay is authorized by several statutes, including the Back Pay Act, the Civil Rights of 1991, and the Whistleblower Protection Act. In addition, many contracts contain provisions relating to back pay.

Most remedies involving back pay are governed by the Back Pay Act. The 1991 Civil Rights Act governs back pay awards under Title VII and the Rehabilitation Act, *see* 42 USC 1981a, and the WPA governs back pay awards when employees are subjected to a prohibited personnel practice under 5 USC 2302(b)(8), *see* 5 USC 1221(g)(A)(1).

### 1. Back Pay Act

The primary statutory authorization for awards of back pay is the Back Pay Act. 5 USC 5596. Subsection (b) provides:

(1) An employee of an agency who, on the basis of a timely appeal or an administrative decision (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorneys fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of Title I of the Foreign Service Act of 1980, shall be awarded in accordance with the standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 and 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

Under the Back Pay Act, in order to establish the right to back pay as the result of an unwarranted personnel action, the grievant must meet the requirements of the "but for" test. As noted in *AFGE, Local 1897 and Air Force Assistant Command, Elgin AFB, FL*, No. 81K10682 (Berkman, 1982):

Federal Personnel Manual Supplement, 990-2, Book 550, Pay Administration (General), Subchapter 8, Paragraph S8-4b, sets forth the "but for" test to be applied under Section