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Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?

By Justin C. Smith*
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Title VII of the Civil Service Reform Act of 1978 (Reform Act), passed by Congress on October 13, 1978, provides federal employees with significantly greater access to final and binding arbitration than they have ever known. In the preamble to Title VII of the Reform Act, Congress acknowledged the importance of protecting "the right of federal employees to organize, to bargain collectively, and to participate through labor organizations of their own choosing in decisions which affect them" while "safeguard[ing] the public interest [and] contribute[ing] to the effective conduct of public business . . . ." Thus,
Congress recognized that advances taken to enhance working conditions are necessarily limited by the need for government to serve its citizens. As finally written, the Reform Act serves labor and management interests equally well.

Prior to the enactment of the Reform Act, federal sector labor-management relations were governed by executive order. The Reform Act serves to codify "policies, regulations, and procedures established under and decisions issued under" the executive orders, except as modified or revoked either by the Reform Act itself or by orders and decisions issued under its authority. The Reform Act therefore represents the culmination of eighteen years of experience during which arbitration rose in importance both as a means of resolving disputes and as a tool of collective bargaining.

This Article reviews federal sector arbitration, focusing on several aspects of arbitration. First, developments that occurred under the executive orders are discussed as an aid to understanding the effect of the Reform Act, with an emphasis on the increased accessibility of arbitration. Second, the Article discusses the arbitration process itself, including necessary qualities of an arbitrator, arbitration procedures, standards of contract interpretation, and the precedential or authoritative value of arbitration awards. Third, administrative and judicial review of arbitration awards as practiced under the executive orders and as incorporated by the Reform Act are discussed to determine the true scope of "final and binding" arbitration.

Finally, by an analysis of the Reform Act itself, this Article seeks to demonstrate that the Act is not free from flaws. Thus, while this Article does not propose changes that the Reform Act could have instituted, it does identify certain questions that remain unanswered and proposes answers to those questions.

**History and Scope of Arbitration Under the Executive Orders**

A basic principle of both labor law and labor relations holds that one may grieve only what one may bargain. This principle derives from the limitation on the scope of an arbitrator's authority to interpret and apply a collective bargaining agreement. What may be bargained is in turn limited by those rights expressly reserved to management.

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7. *Id.* § 7135.
8. For a discussion of the scope of the arbitrator's authority, see text accompanying notes 72-77 *infra.*
9. 5 U.S.C. § 7106(a) (Supp. II 1978) sets out those rights that are specifically reserved
Throughout the history of grievance arbitration in the federal sector, the executive orders and presently the Reform Act have expressly excepted certain matters from the negotiation of the agreement. Most notably, and in direct contrast to public state and local sectors and the private sector, the reservation to management of the right to determine an agency's budget serves to preclude labor organizations from negotiating employee wages. Thus, what remains for negotiation in the federal sector are "conditions of employment," which the Reform Act...


12. 5 U.S.C. § 7103(a)(14) (Supp. II 1978) defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices and matters—"

(A) relating to political activities prohibited under subchapter III of Chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute." Most
restricts to working conditions.\textsuperscript{13}

In the past, in addition to restrictions on what one may grieve created by exclusive management rights, two further limitations served to restrict access to a negotiated grievance procedure. First, unlike the current practice in which a grievance resolution procedure is a mandatory feature of collective bargaining,\textsuperscript{14} a negotiated grievance procedure was merely an alternative to agency procedures under Executive Order 10,988, issued in 1962. Under this policy, the grievant was subject to a procedure unilaterally created and carried out by the agency unless a grievance procedure was both negotiated through bargaining and affirmatively selected in a particular dispute.\textsuperscript{15} The elimination of this “dual” grievance system in favor of the present “single” system accounts in part for the increased accessibility and more final and binding character of present federal grievance arbitration procedures.\textsuperscript{16} The second limitation on access to a negotiated grievance procedure occurred if a statutory appeals procedure existed for a particular dispute. Such an appeals procedure precluded use of the negotiated grievance procedure as a means of dispute resolution.\textsuperscript{17} Although many statutory appeals provisions existed,\textsuperscript{18} the primary exclusion from the negotiated procedure was for adverse, or disciplinary, personnel actions.\textsuperscript{19} Thus, during the early development of federal sector arbitration, access to a negotiated procedure was restricted by exclusive management rights, by the use of “dual” grievance systems, and by the exclusion of matters subject to statutory appeal. These historical limitations and union efforts to remove them are understood more readily notable is the exclusion of matters relating to classification. See text accompanying notes \textsuperscript{154-59 infra} for a discussion of § 7121 of the Reform Act, 5 U.S.C. § 7121 (Supp. II 1978), which erroneously appears to entitle grievants to arbitrate certain matters relating to classification, although this subject is excluded from negotiations of the collective bargaining agreement.

\begin{itemize}
\item \textsuperscript{13} 5 U.S.C. § 7103(a)(14) (Supp. II 1978).
\item \textsuperscript{14} See id. § 7121(a)(1), which provides that “any collective bargaining agreement shall provide procedures for the settlement of grievances,” subject to exceptions.
\item \textsuperscript{15} For a discussion of union agitation in the years directly preceding the issuance of Exec. Order No. 11,491, to limit grievance resolution to the negotiated procedure and thus to terminate the “dual” system, see M. Nesbitt, Labor Relations in the Federal Government Service 257-58, 260-61 (1976).
\item \textsuperscript{16} Id. at 260-61.
\item \textsuperscript{17} See notes 152-53 & accompanying text infra for a discussion of appeal procedures established by statute in the federal sector to provide an employee with a forum in which to seek redress for certain alleged wrongs.
\item \textsuperscript{18} See notes 152-53 & accompanying text infra.
\item \textsuperscript{19} Under the Reform Act, adverse actions include a removal, a reduction in grade or pay, a suspension for more than 14 days, or a furlough of less than 30 days. 5 U.S.C. § 7152 (Supp. II 1978).
\end{itemize}
when the executive orders governing negotiated grievance procedures are considered.

Executive Order 10,988

In 1961, President Kennedy appointed a Task Force on Employee-Management Relations in the Federal Service both in recognition of the strong need for a comprehensive government policy on federal sector labor-management relations and to prevent the enactment of unduly restrictive legislation. The Task Force's report recommended the issuance of an executive order granting federal employees limited bargaining rights. On January 17, 1962, President Kennedy issued Executive Order 10,988, establishing the ground rules for labor-management cooperation in the federal sector.

Section 8 of the Executive Order provided for a negotiated grievance procedure. Although section 8(a) provided that collective bargaining agreements could contain provisions designating procedures for the consideration of grievances, the language did not require that there be a negotiated procedure and thus nothing constrained resort to agency procedures. Therefore, while Executive Order 10,988 was in force, "dual" procedures existed for the consideration and resolution of grievances.

In addition, section 8(b) of Executive Order 10,988 set forth the limits of arbitration. First, arbitration could only be advisory; all determinations of the arbitrator effectively were conditioned upon approval by the agency head. Second, arbitration could extend no further than the interpretation or application of the collective bargaining agreement or an agency policy, where the latter was incorporated into

20. For example, "the [Rhodes-Johnson] bill as it evolved contained some questionably extreme positions, such as mandatory suspension, demotion, or removal for any administratively official violating certain parts of the law, regardless of knowledge, intent, or other circumstances." Davies, Grievance Arbitration Within Department of the Army Under Executive Order 10988, 46 MIL. L. REV. 1, 4 (1969).
24. Id. § 8(a).
25. Id. § 8(b).
the agreement.\textsuperscript{26} The arbitrator was not permitted to alter or modify the agreement. Moreover, arbitration could be invoked only by the individual employee or employees with grievances.\textsuperscript{27} Finally, section 14 of the Order provided that adverse actions could be appealed to the Civil Service Commission if the decision of the administrative officer was adverse to the interest of the employee.\textsuperscript{28}

Executive Order 11,491

The ensuing years of development under Executive Order 10,988 saw extensive union agitation aimed at eliminating agency procedures by limiting grievance resolution solely to the negotiated procedure.\textsuperscript{29} Although it fell short of union hopes,\textsuperscript{30} Executive Order 11,491 did serve to strengthen arbitration as a means of grievance resolution. Section 13 of the Order provided that the negotiated procedure would be the exclusive procedure available to grievants when the bargaining agreement so specified.\textsuperscript{31} Once a grievance procedure had been negotiated and had become a part of the agreement, the grievant could no longer elect to utilize the agency procedure. In addition, Executive Order 11,491 removed the requirement that arbitration be advisory; an arbitration award was made final and binding subject to review by the Federal Labor Relations Council.\textsuperscript{32}

Despite these significant changes, Executive Order 11,491 retained certain provisions of Executive Order 10,988; adverse actions continued to be subject to a statutory appeals procedure,\textsuperscript{33} the negotiated proce-
dure still had to conform to Civil Service Commission requirements, and, in the case of an employee grievance, arbitration could be invoked only with the approval of the employee. A slight change was brought about, however, insofar as all other grievances required only the approval of the exclusive union.

Executive Orders 11,616 and 11,838

Executive Order 11,616, issued in 1971, amended Executive Order 11,491 while generally maintaining the policies instituted under earlier orders. The "dual" system of negotiated agency grievance procedures remained the same, with the negotiated grievance procedure still restricted to the resolution of disputes involving the interpretation and application of the collective bargaining agreement. In contrast to Executive Order 11,491, Executive Order 11,616 specified that the negotiated grievance procedure would be the exclusive procedure for the resolution of disputes over collective bargaining agreements, eliminating the requirement that the parties make that election in each case.

Executive Order 11,616 further amended Executive Order 11,491 to provide that, for the first time, grievance procedures were to be negotiated entirely by the parties without being subject to Civil Service Commission requirements. Furthermore, whereas under Executive Order 11,491 any union could represent an employee in the presentation of a grievance, under Executive Order 11,616 the employee was to be represented by the exclusive union or someone approved by the

34. Id. § 13, at 870.
35. Id. § 14, at 870. The exclusive union is that labor organization that has attained exclusive recognition in keeping with the requirements of Exec. Order No. 11,491, § 7, 3 C.F.R. at 856-66, and has maintained the exclusive right of representation of employees in any unit or subdivision of an agency.
37. Id. § 8, at 607.
38. Compare Exec. Order No. 11,491, § 13, 3 C.F.R. 861, 870 (1966-1970 Compilation), where it is provided that the negotiated grievance procedure is "the exclusive procedure available to employees in the unit when the agreement so provides," with Exec. Order No. 11,616, § 8, 3 C.F.R. 605, 606-07 (1971-1975 Compilation) (current version at 5 U.S.C. § 7301 (1976)), where similar provision is made for exclusivity absent the qualification that there be a provision in the collective bargaining agreement to that effect.
exclusive union, unless the employee chose to represent him or her-
self. Finally, Executive Order 11,616 expanded the role of the Assis-
tant Secretary of Labor for Labor-Management Relations to include
the determination of questions of arbitrability.

The policy of excluding matters from the negotiated procedure for
which a statutory appeals procedure existed remained under Executive
Order 11,616. Section 8(a) provided: "A negotiated grievance proce-
dure may not cover any other matters, including matters for which stat-
utory appeals procedures exist . . . ." Substantial confusion arose,
however, over the meaning of the phrase "any other matters." This
confusion was not erased until 1975 when Executive Order 11,838 was
issued, specifying simply that the negotiated grievance procedure
could not cover matters for which a statutory appeals procedure ex-
isted. In all other respects Executive Order 11,838 maintained the
policies of Executive Order 11,491. Not until 1979 did grievance arbi-
tration in the federal sector experience further change.

Arbitration Under the Executive Orders

In many respects federal sector arbitration does not differ appreci-
ably from arbitration in the private sector; the necessary qualities of an
arbitrator, arbitration procedures, standards of contract interpret-
tation, and the precedential or authoritative value of arbitration awards
in both sectors are similar. The scope of the arbitrator's authority,
however, represents a feature unique to the federal sector. Although
the following discussion considers these aspects of arbitration solely in
terms of experience under the executive orders, the Reform Act makes
no changes affecting either arbitration procedures or contract interpret-
tation principles; hence the discussion is still relevant and current.

version at 5 U.S.C. § 7301 (1976)).
43. Id. This subdivision provides: "Questions that cannot be resolved by the parties as
to whether or not a grievance is on a matter subject to the grievance procedure in an existing
agreement, or is subject to arbitration under that agreement, may be referred to the Assistant
Secretary for decision."
44. Id.
46. Id. § 14, at 960-61.
47. See generally F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 90-96 (3d ed.
1976) [hereinafter cited as ELKOURI].
Qualities of the Arbitrator

An arbitrator need not represent any particular professional or educational background. Although a legal background may be helpful, it is not indispensable. An on the other hand, the arbitrator must be impartial, of the highest integrity, and particularly responsive to the dispute between the parties. At the arbitration level, the parties select the arbitrator. Initially, upon request of the parties, a panel of suggested arbitrators is submitted to the party representatives, from which an arbitrator is selected. If the parties fail to agree on an arbitrator, a request for an additional panel may be made.

Arbitration Procedures and Techniques

Arbitration procedures and techniques in the federal sector also are comparable to those in the private sector. Grievance processing generally involves several stages prior to arbitration. Initially, redress is sought at the lowest appropriate supervisory level. If redress is unavailing there, the grievance normally proceeds to the second, formal stage, where the grievant files a written grievance. Often the grievance proceeds to a third or even a fourth stage, with review by progres-

48. Id. at 94-95.
49. Id. at 92.
50. Id. at 92-93.
51. Id. at 93-94.
56. For a general discussion of procedures and techniques as a prelude to arbitration in the private sector, see ELKOURI, supra note 47, ch. 5. For a discussion of procedures and techniques most often provided for in federal sector collective bargaining agreements, see OFFICE OF LABOR MANAGEMENT RELATIONS, U.S. CIVIL SERVICE COMMISSION, NEGOTIATED GRIEVANCE PROCEDURES AND ARBITRATION IN THE FEDERAL GOVERNMENT 13-21 (1975).
58. Id. at 14.
sively higher levels of management. If the grievant is still dissatisfied, resort to arbitration will ensue.

Certain streamlining procedures are available to the parties prior to the arbitration proceeding itself. For example, although the procedure is rarely used the parties may request a preliminary conference when the arbitrator faces a complex procedure or issue. As another alternative, a party may submit a preliminary brief if that party believes a brief would provide greater clarification than an opening statement. On occasion, parties enter into a stipulation of facts. Finally, although the grievance statement generally will identify the issue or issues to be decided, the arbitrator may request a preliminary determination requiring the parties to set forth the issue or issues in writing.

Arbitration proceedings resemble a case at law. Generally, the moving party presents its case first, although circumstances may demand a reversal of this general practice. The parties also may present opening statements and closing arguments; transcripts may be utilized at the discretion of the arbitrator. In particularly complex cases, the arbitrator may call for the submission of post-hearing briefs. Just as in default proceedings conducted in a case at law, an arbitration proceeding may be conducted in the absence of a party if that party received notice of the proceeding and had ample time to obtain an adjournment. In the event an ex parte proceeding should occur, the party appearing nonetheless will be required to set forth its evidence and, if appropriate, to sustain its burden of proof.

While procedures set forth by the collective bargaining agreement or by stipulation of the parties are generally complied with, they have been disregarded where their application would have placed form over substance. Arbitrators recognize that the arbitration hearing is not a

59. Id. at 14-15.
60. COMMITTEE ON COLLECTIVE BARGAINING IN THE FEDERAL SERVICE, FEDERAL BAR ASSOCIATION, LABOR RELATIONS IN THE FEDERAL GOVERNMENT 94-95 (1976).
61. Id. at 95.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id. at 96.
67. Id. Transcripts generally are used only when the issues are complex or procedural difficulties are anticipated. Id.
68. Id.
69. Id. at 97. See also 29 C.F.R. § 1404.14(c) (1978).
case at law and that therefore they are not bound by stringent procedural considerations; hence, for instance, a technically valid dismissal of a case may be refused if dismissal of the case would leave the problem unresolved.\textsuperscript{71} Moreover, the arbitrator's jurisdiction, whether in the private or federal sector, is strictly confined to the issues stipulated by the parties or to the interpretation of the collective bargaining agreement, as "[f]requently the arbitrator is forbidden to change or modify the agreement."\textsuperscript{72} Labor arbitration awards have affirmed these limitations.\textsuperscript{73}

Arbitration in the federal sector, while similar to private sector arbitration in many ways, does differ in one important respect. The scope of authority of the arbitrator is broader in the federal sector because the arbitrator not only must interpret the provisions of the specific collective bargaining agreement under which the dispute arose, but must do so in light of applicable federal laws and regulations.\textsuperscript{74}

In regard to the broader scope of authority of the federal arbitrator, Henry B. Frazier III, former Executive Director of the Federal Labor Relations Council,\textsuperscript{75} stated that

\textsuperscript{71} Hill Air Force Base v. American Fed'n of Gov't Employees, Local 1592, L.A.I.R.S. 10483, at 6 (1975) (Rentfro, Arb.); see also Marine Corps Logistics Support Base v. American Fed'n of Gov't Employees, Local 2317, L.A.I.R.S. 10939, at 6 (1977) (Goodman, Arb.), where Arbitrator Goodman found that "a technical application of the procedures should not be permitted to deprive the Grievant, innocent in the procedural matter, of her right to have her grievance processed fully." For a contrary view, see United States Army v. American Fed'n of Gov't Employees, Local 2197, L.A.I.R.S. 10335, at 8 (1975) (Grether, Arb.), where Arbitrator Grether found: "However, procedural rights are important. The provisions of the agreement which were not followed strictly in this instance undoubtedly were intended to safeguard the union's rights and the employee's rights. To disregard them would invite the undermining of the collective bargaining process as well as violate contractual rights."


\textsuperscript{74} Regulations in this context refers to both government-wide regulations and internal agency regulations. See notes 113-14 & accompanying text infra for a discussion of the two enumerated circumstances set forth in Federal Labor Relations Council decisions in which it is within the scope of the arbitrator's authority to interpret internal agency regulations.

the Council has consistently stressed that an arbitrator considering a grievance alleging a violation of a contract provision cannot consider the pertinent agreement provision in a vacuum. That is, the arbitrator's consideration of the matter can not be limited to the negotiated agreement itself. He or she must turn to any provisions of statute and regulations which govern the matter as well as the contract provisions.\(^\text{76}\)

Frazier noted that if the arbitrator failed to consider properly applicable laws or regulations the award would be more susceptible to being overturned on review. In this respect, "final and binding" arbitration would be undermined to as serious an extent as it is by the review machinery itself.\(^\text{77}\) Thus, while arbitrators may not modify collective bargaining agreements, they have at their disposal the vast body of applicable federal laws and regulations to aid in interpretation. Consequently, the scope of the arbitrator's authority necessarily is expanded.

**Standards of Contract Interpretation**

Federal sector arbitration awards, which form the basis of an emerging federal sector common law, provide a unique opportunity to analyze the standards applied in interpreting contract language of bargaining agreements.\(^\text{78}\) While many of the standards applied in the interpretation of labor contracts are substantially the same as those applied in cases of general contract interpretation, the labor relations context presents an area sufficiently specialized to generate unique theories of interpretation. Furthermore, federal sector contract interpretation must expressly recognize the impact of management's retained rights,\(^\text{79}\) an element not present in the private sector.

Standards of interpretation of contract language are relevant only if that language is ambiguous, necessitating the introduction of external evidence to explain the meaning of the language.\(^\text{80}\) Although contract

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\(^77\) *Id.* at 2-3.

\(^{78}\) Unfortunately, the L.A.I.R.S. file, discussed at note 70 *supra*, is not regularly accessible, nor has it been indexed according to the varying standards for interpreting contract language.

\(^{79}\) The specific rights reserved to management are codified at 5 U.S.C. § 7106(a)(1) (Supp. II 1978), cited in full at note 9 *supra*.

\(^{80}\) Thus, where the contract language is unambiguous, the arbitrator will interpret it as meaning what it clearly expresses. *Office of Labor Management Relations, U.S. Civil Service Commission, Grievance Arbitration in the Federal Service* 14 (1977) [hereinafter cited as *Grievance Arbitration*]. *See* Internal Revenue Serv. v. National Treasury Employees Union, Local 97, L.A.I.R.S. 10208, at 5 (1974) (Seligson, Arb.); *see also* Tooele Army Depot v. International Ass'n of Machinists & Aerospace Workers, Local 2261, L.A.I.R.S. 10731 (1976) (Richardson, Arb.) (citing Elkouri, *supra* note 47, at 204). In addi-
language itself is regarded as the best indicator of the mutual intent of the parties,\textsuperscript{81} in the face of an ambiguity\textsuperscript{82} the arbitrator will seek to reconstruct that intent on the basis of evidence not contained in the agreement.\textsuperscript{83} Given the particular circumstances, the arbitrator will apply a standard strongly linked to either labor relations or contract law, or both.

In applying standards tied to labor relations, arbitrators refer first to the record of negotiations or bargaining history between the parties, then to the past practice of the parties\textsuperscript{84} and finally to the general practice in the agency.\textsuperscript{85} The record of negotiations and the bargaining history are referred to initially, when available, because they are the most specific representation of the parties' intent at the time of the negotiation and consummation of the collective bargaining agreement. The past practice of the parties and the general practice in the agency provide progressively less specific representations of intent. When there is an ambiguity, bargaining history indicates not only what the drafters intended, but in many cases what they did not intend; for example, management may reject a union proposal of certain specific contract language in the last negotiation between the parties.\textsuperscript{86} On the other
hand, the union may make a particular proposal at the outset of negotiations, but fail to revive it as negotiations proceed, leading to the conclusion that the union did not intend that it be implemented.\textsuperscript{87}

Past practice helps to explain ambiguous contract language by referring the arbitrator to the history of the daily operations of the parties under a prior collective bargaining agreement or series of agreements.\textsuperscript{88} Generally, a past practice is a practice in which both parties have concurred and which they tacitly have assumed would continue through the life of the contract.\textsuperscript{89} Although a binding past practice may have been established, changed circumstances may dissipate the underlying purpose of the practice, rendering it unenforceable.\textsuperscript{90} A past practice thus must encompass the same basis or need that led to its establishment to remain binding.\textsuperscript{91} Finally, if the past practice of the parties fails to clarify the ambiguous language, the practices of the particular agency (industry) may be considered for the purpose of interpretation.\textsuperscript{92}

Arbitrators also may apply two subsidiary standards that are similarly tied to the labor relations context. First, contract interpretation by necessity is subject to the retained rights of management. Typically, conflicts over management rights arise over the interpretation of the terms of the agreement relating to work assignment.\textsuperscript{93} In this context,
although cases generally have found that work assignments must reasonably relate to the employee’s primary function, arbitrators hold strongly to the language of the agreement to the extent that such a rigid interpretation will not defeat management’s need for efficient operation. Second, arbitrators readily reject “any move by either of the parties to gain through arbitration an objective not achieved in negotiations.” Arbitrators have found that modifying or supplementing the collective bargaining agreement is not within their authority and that the parties should resolve these sorts of differences through negotiations.

Contract interpretation in the labor relations context also incorporates the standards of interpretation applied in contract law. Generally, arbitrators have found that the language of the contract should be construed more harshly against the maker. In one case, the arbitrator noted that “[i]t is a fixed rule of interpretation of collective bargaining agreements that a party who proffers language has the burden of explaining any unusual meaning which it assigns to this language.”


95. Charleston Naval Shipyard v. Metal Trades Council, L.A.I.R.S. 10153, at 13 (1975 (Lynch, Arb.). Arbitrator Lynch noted, however, that “proper consideration should be given to the rights and privileges of the individuals involved.” Id.


97. GRIEVANCE ARBITRATION, supra note 80, at 12-13.


understood and inequity avoided. Further, management decisions in matters involving application of agreement language or regulations frequently are overturned on the ground of lax enforcement and inequity. This inconsistency in application acts as a waiver and estops management from applying either the agreement language or the regulations. One case pointed out, however, that an agency nonetheless might return to its original application upon notifying the employees of its intent to do so; but thereafter the agency must apply equal standards to avoid having its decisions overturned in arbitration once again.

Furthermore, arbitrators generally will overlook violations of or departures from the agreement regarded as "de minimis" or which occurred to avoid a forfeiture.

As the body of arbitration awards grows larger, further standards of interpretation most probably will be adopted. In the meantime, the standards operate as the basis for contract interpretation in federal sector grievance arbitration.

The Precedential Value of Arbitration Awards

Once an arbitration award has been issued, it may or may not influence subsequent awards. In the federal sector, as in the private sector, labor arbitration awards do not have the same binding effect as legal decisions. Generally, arbitrators in the federal sector accord varying weight to previous awards, according greater weight when there is a close relationship of issues. The increased accessibility to arbitration brought about by the Reform Act should serve to expand the existing

100. See, e.g., Internal Revenue Serv. v. National Treasury Employees Union, Local 12, L.A.I.R.S. 10182, at 4 (1973) (Seitz, Arb.).


104. See, e.g., Naval Ordnance Station v. International Ass'n of Machinists & Aerospace Workers, Local 830, L.A.I.R.S. 20097 (1974) (Beckman, Arb.). In this case Arbitrator Beckman found "that a party would quickly lose faith in its negotiated system of resolving disputes if that system itself was responsible for forfeiting the right of a grievant to a full and fair presentation of his grievance. . . ." GRIEVANCE ARBITRATION, supra note 80, at 19-20.

105. See, e.g., Department of Treasury v. National Treasury Employees Union, L.A.I.R.S. 10306 (1975) (White, Arb.). For an analysis of federal sector practice, see GRIEV-
body of law. As these decisions become better known to federal arbitrators, an increased reliance upon prior awards may be anticipated. As any award turns upon the particular provision of the agreement in question, however, perhaps arbitration awards will never provide binding precedent in the same fashion as do legal decisions. Rather, arbitrators may well continue to let fairness be their guide.

Administrative Review

The Federal Labor Relations Council, established pursuant to section 4 of Executive Order 11,491, was empowered to review arbitration awards under certain limited circumstances.\textsuperscript{106} Section 2411.32 of the Council’s rules of procedure outlined in general terms the grounds for granting a petition for review: “The Council will grant a petition for review of an arbitration award only where it appears . . . that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations.”\textsuperscript{107}

The practical bases for granting or denying petitions for review are set out in the considerable body of Council decisions. These decisions have been analyzed in a comprehensive article by Henry B. Frazier III, entitled \textit{Labor Arbitration in the Federal Service}.

\textsuperscript{108} Frazier noted that generally where a petition for review was granted on the ground that the award violated applicable law, either “a statute preclude[d] relief granted by the award or . . . a statutory condition precedent to such relief [was not] met.”\textsuperscript{109} He further noted that section 12 of Executive Order 11,491, which sets out mandatory requirements for collective bargaining agreements, was usually at issue on appeals arguing a viola-
The Council's rules provided that an award could not violate appropriate regulation. There was, however, some confusion over what constituted an "appropriate regulation." Civil Service Commission regulations undoubtedly were "appropriate regulations"; the Council had so held. The Council never held, however, that an internal agency regulation was an "appropriate regulation" within the meaning of the Council's rules, although the issue was presented in two Council cases.

The Council's rules further provided that a petition for review could be granted on "grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations." Frazier stated that the Council recognized six such grounds for granting review. First, review would be granted when the arbitrator exceeded his or her authority by deciding an issue not submitted to arbitration. If an award extended to all matters necessarily arising from issues included in the question submitted,


111. Frazier, supra note 108, at 726.

112. Id. An illustrative case is cited at id. at 726 n.96.

113. Frazier defines "internal agency regulations" as "regulations issued by an agency for application only within that agency . . . ." Id. at 730.

114. Frazier points out that in Federal Aviation Administration, Department of Transportation, Rep. No. 78, F.L.R.C. No. 74A-88 (1975) (Schedler, Arb.), the Council held that "when an agency agrees, during contract negotiations, to incorporate in the contract an agency policy or regulation concerning a matter within agency discretion, the agency thereby agrees to allow the union to use contract grievance procedures to dispute the agency's interpretation and application of the policy or regulation." Frazier, supra note 108, at 730-31. In American Federation of Government Employees, Local 2616 (Griffiss Air Force Base), Rep. No. 94, F.L.R.C. No. 75A-45 (1976) (Gross, Arb.), the Council held: "While it is recognized that under section 12(a) of the Order an agency's regulations are binding in the administration of a negotiated agreement, the Council is of the opinion that where, as in this case, an arbitrator, in the course of rendering his award, considers an agency regulation which deals with the same subject matter as the provision in the negotiated agreement and which was introduced by the parties to the dispute, and thereafter considers and applies that regulation in reaching his judgment in the case, the agency may not challenge the application of that regulation before the Council." Id. at 828 (footnotes omitted). For a discussion of this decision, see Frazier, supra note 108, at 731-32.


117. See id. at 739-43 for a discussion of this ground for review.

118. Id. at 739-40 (citing American Fed'n of Gov't Employees, Local, 12 Rep. No. 42, F.L.R.C. No. 72A-3, at 6 (1973) (Jaffee, Arb.)).

however, or if an imprecise issue had been submitted for arbitration, the arbitrator would not have exceeded his or her authority in passing on the dispute as long as the issue was within the confines of the collective bargaining agreement. Second, review would be granted when "the award [did] not draw its essence from the collective bargaining agreement." In this regard, the Council stated that it would uphold an award unless, by way of either gross error or utter irrationality, the award evidenced "a manifest disregard of the agreement," or on its face represented an implausible interpretation thereof. Third, the Council would grant review if "the award [was] incomplete, ambiguous, or contradictory, making implementation of the award impossible." Fourth, review would be granted if "the award [was] based on a nonfact." Fifth, the Council could grant review if "the arbitrator was biased or partial." Sixth, although the Council never did so, it stated it would grant review where an "arbitrator refused to hear pertinent and material evidence." These standards of review, particularly those based upon private sector standards, reflect the Council's intention to restrict dispute resolution to the arbitration process by generally rejecting petitions for review absent exceptional circumstances. To this extent arbitration awards are in fact "final and binding."

Under the executive orders there existed one further avenue of appeal in matters involving the disbursement of government funds. The Office of the Comptroller General is charged "with assuring that public funds [were] disbursed in accordance with law" and is "em-
powered to issue decisions on legal questions asked by agency disbursing officers as well as to audit their accounts.” In past practice, arbitration awards of back pay could be appealed to the Comptroller General on the ground that a disbursement of public funds was required. The Office of the Comptroller General thus placed an additional limitation on the extent to which arbitration awards under the executive orders actually were final and binding.

Judicial Review

Judicial review of actions arising under the executive orders traditionally was denied on the ground that there was no statutory basis for finding federal question subject matter jurisdiction. In Manhattan-Bronx Postal Union v. Gronouski the court of appeals stated: “Executive Order 10,988 does not, in its recitals, refer to any statute other than the Act of March 3, 1871, 5 U.S.C. § 631,” which empowered the President to regulate the conduct of employees in the executive branch. The court concluded that it lacked jurisdiction over the case because Executive Order 10,988 “had no specific foundation in Congressional action, nor was it required to effectuate any statute.” Thus, an executive order did not constitute a law of the United States within the meaning of the federal jurisdictional statute.

Judicial review was granted, however, by the district court in National Broiler Council, Inc. v. Federal Labor Relations Council. The case arose under Executive Order 11,491 and challenged a determination by the Council. Here, a federal district court found that although the Council was created by Executive Order 11,491 it was an “agency” within the meaning of 5 U.S.C. § 701(b)(1) and therefore a Council decision was subject to review as a “final agency action”

131. Id.
132. 28 U.S.C. § 1331(a) (1976) provides: “The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States.”
135. 350 F.2d at 452.
136. Id. at 456.
139. A Council determination, the last step of administrative review, was regarded as constituting final agency action.
140. 5 U.S.C. § 701(b)(1) (1976) provides that “‘agency’ means each authority of the
within the meaning of 5 U.S.C. § 704.\textsuperscript{141}

Judicial review has always been available, even absent final agency action, for claims arising under the Constitution. In \textit{National Association of Government Employees v. White},\textsuperscript{142} the union brought an action alleging interference with its right to assemble, to speak freely, to petition Congress, and to due process.\textsuperscript{143} While the court recognized that a federal employee's right to organize, as set forth in Executive Order 10,988, was capable of revocation by the executive, it held that the power of revocation could not be exercised in a manner conflicting with basic constitutional safeguards.\textsuperscript{144} Thus, judicial relief could be obtained even where no statutory basis for the action existed.\textsuperscript{145}

The limitations on access to both administrative and judicial review have operated to confine such access to circumstances in which fundamental notions of justice have been offended. The standards of review of the Council were a product of a controlled judicial evolution that emphasized the need to preserve the final and binding nature of arbitration awards. The bases for judicial review were not exceptional, reserving the remedy for instances in which independent grounds of subject matter jurisdiction existed. Thus, because review of any sort limits the extent to which arbitration is final and binding, there has been a general recognition that absent exceptional circumstances the arbitrator's award should not be disturbed.

\textsuperscript{141} 382 F. Supp. at 325. 5 U.S.C. § 704 (1976) provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

\textsuperscript{142} 418 F.2d 1126 (D.C. Cir. 1969).


\textsuperscript{144} 418 F.2d at 1130.

\textsuperscript{145} \textit{Id.}
The Reform Act

The Reform Act makes significant advances in the field of federal sector labor-management relations, dramatically increasing both the potential grievant's access to arbitration, the scope of arbitrable issues, and the extent to which the arbitrator's award is truly "final and binding." Incorporated within these advances are two essential characteristics of grievance procedures negotiated under the executive orders. First, the negotiated grievance procedure remains the exclusive forum on matters covered by the bargaining agreement, and second, binding arbitration still may be invoked by either the exclusive representative or the agency. But the Reform Act is not free from flaws. For example, certain omissions render uncertain the extent to which particular practices which occurred under the executive orders will be maintained. In addition, the question of whether an internal agency regulation is an "appropriate regulation" for the purposes of overturning an arbitrator's award on appeal remains unanswered. Finally, the Reform Act would appear to create a loophole by permitting parties to arbitrate a particular matter that they may not bargain, contrary to the basic principle that one may grieve only what one may bargain.

As stated previously, the scope of the negotiated grievance procedure under the executive orders was subject to two mandatory exclusions: management's retained rights could neither be bargained nor arbitrated and matters for which a statutory appeals procedure existed could not be arbitrated. Management's retained rights remain outside the scope of the collective bargaining agreement and thus continue not to be subject to arbitration. The Reform Act, however, has reduced to five the number of matters for which a statutory appeals procedure exists, thus greatly eroding the scope of that formerly broad

147. Id. § 7121(b)(3)(C).
148. See text accompanying note 167 infra.
149. For a discussion of what constitutes an "appropriate regulation" within the meaning of the Council's rules, see notes 111-14 & accompanying text supra.
150. For a discussion of the limitation which restricts the arbitrator to the interpretation and application of the collective bargaining agreement, see text accompanying notes 72-73 supra.
151. For a discussion of the exclusion of management's retained rights, see notes 9-11 & accompanying text supra. 5 U.S.C. § 7106 (Supp. II 1978) sets out those rights specifically reserved to management and is cited in part at note 9 supra.
152. For a discussion of statutory appeals procedures see notes 17-18 & accompanying text supra.
exclusion while broadening the scope of arbitrable issues. Moreover, under the executive orders a grievant could grieve only what had been expressly bargained for. Under the Reform Act the parties must exclude all issues not to be grieved. The presumption, therefore, has been reversed, presuming all matters included within the negotiated procedure, rather than excluded. Finally, whereas under Executive Order 11,616 the role of the Assistant Secretary of Labor for Labor-Management Relations was expanded to include the determination of questions of arbitrability, the Reform Act appears to leave these determinations to the arbitrator.

Despite the greater access to arbitration available to grievants under the Reform Act, the new legislation apparently may have afforded a grievant one subject of arbitration excluded from bargaining. As noted, the parties to a collective bargaining agreement may negotiate only “conditions of employment.” Conditions of employment are defined to include working conditions, but expressly exclude matters “relating to the classification of any position.” Matters relating to classification accordingly should be excluded from arbitration, as

153. Section 7121(c) of the Reform Act provides that negotiated grievance procedures shall not apply to “(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities); (2) retirement, life insurance, or health insurance; (3) a suspension or removal under section 7532 of this title; (4) any examination, certification, or appointment; or (5) the classification of any position which does not result in the reduction in grade or pay of an employee.” 5 U.S.C. § 7121(c) (Supp. II 1978).

154. After Exec. Order No. 11,616, § 8, 3 C.F.R. 605, 606-07 (1971-1975 Compilation) (current version at 5 U.S.C. § 7301 (1976)), removed the requirement that the negotiated grievance procedure be subject to Civil Service Commission requirements, the scope of the grievance procedure was subject to negotiation by the parties. It therefore was incumbent upon them to bargain in those matters they wished to be within the scope of the negotiated procedure, subject to the mandatory exclusions, of course. See notes 39-40 & accompanying text supra.

155. Section 7121(a)(2) of the Reform Act provides: “Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.” 5 U.S.C. § 7121(a)(2) (Supp. II 1978). The legislative history of § 7121 makes clear Congress’ intent: “All matters that under the provisions of law could be submitted to the grievance procedures shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as a part of the collective bargaining process that certain matters shall not be covered by the grievance procedures.” H.R. CONF. REP. No. 95-1717, 95th Cong., 2d Sess. 127, 157, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2860, 2891.


158. Id. § 7103(a)(14). See note 12 & accompanying text supra.

one may grieve only what one may bargain. Surprisingly, however, the express exclusions from the negotiated grievance procedure set forth in section 7121\textsuperscript{160} merely exclude "the classification of any position which does not result in the reduction in grade or pay of an employee."\textsuperscript{161} As this particular exclusion is drawn in such narrow terms, it appears that a grievant may grieve other matters which relate to classification, thus obtaining through arbitration what may not be gained through bargaining.

The Reform Act should be amended to preclude the arbitrator from making any determinations on matters relating to classification. Historically, the Classification Act\textsuperscript{162} has been administered by the Civil Service Commission.\textsuperscript{163} With the enactment of the Reform Act, and with the changes made under its authority, the task of classifying positions will now fall on the Office of Personnel Management. Preferably, the problem of classification should be left to the exclusive discretion of the government, as arbitrators have no experience, background, or knowledge to enable them to cope with a matter of such complexity. Thus, section 7121\textsuperscript{164} should be amended to exclude all matters relating to classification.

Scope of Review Under the Reform Act

The scope of administrative review which existed under the executive orders has not been changed by the Reform Act. In fact, the Reform Act incorporates practically to the word the standards of review contained in the Council's rules.\textsuperscript{165} The sole difference is that the Council is now known as the Federal Labor Relations Authority.\textsuperscript{166}

The Reform Act appears, however, to have removed one existing

160. See note 153 & accompanying text supra.
163. Id. § 5112.
165. Id. § 7122(a) provides: "Either party to arbitration under this chapter may file with the authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the authority finds that the award is deficient—
(1) because it is contrary to any law, rule, or regulation; or
(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
the authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations." Compare the Council's standards of review cited in the text accompanying note 107 supra.
166. For a discussion of the scope of administrative review under the Council, see notes 106-28 & accompanying text supra.
avenue of appeal in that no mention is made of the Comptroller General. The absence is interesting in view of the Comptroller General’s significant role under the executive orders. The Reform Act does not prescribe any role for the Comptroller General but, insofar as section 7122(b) provides that an arbitration award may include the payment of back pay and that such an award will be final and binding, it must be presumed that Congress intended to preclude the Comptroller General from reviewing arbitration awards pursuant to its former capacity under the executive orders. The exclusion of the Comptroller General is significant in two ways. First, the exclusion reflects Congress’ understanding that in disciplinary actions subject to arbitration, an award of back pay follows necessarily from the determination that the grievant is to be reinstated. Second, and more importantly, Congress has recognized the importance of minimizing the occasions when the arbitrator’s award should be subject to review, thus bolstering the extent to which an arbitration award is in fact final and binding.

Unresolved is the question of whether an internal agency regulation is an “appropriate regulation,” which if violated would be a basis for upsetting an arbitration award. Although under the executive orders the Council never so ruled, the opportunity for such a ruling was built into the language of the Council’s rules. Under the Reform Act, review may be granted where the award appears to be contrary to “any . . . regulation.” The context of the statement in the Reform Act appears, however, to restrict application of this ground of review to those regulations that previously were designated “appropriate.” Thus, apparently, the violation of no regulations other than Civil Service Commission regulations may overturn an arbitration award.

Added perspective on this question may be gained by comparing the impact of internal agency regulations on the negotiation and arbitration processes. Section 7117 of the Reform Act sets forth the duty to bargain in good faith, providing initially that the duty shall not be

168. See notes 111-14 & accompanying text supra.
169. See note 107 & accompanying text supra.
172. 5 U.S.C. § 7117(a) (Supp. II 1978) provides:
“(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
(2) The duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation extend to matters which are the
imposed when inconsistent with either federal law or government-wide rules or regulations. The duty to bargain in good faith does extend, however, to internal agency regulations unless there exists a compelling need for such regulation. Thus, absent a determination by the Federal Labor Relations Authority that a compelling need exists to preclude a certain internal agency regulation from the negotiation process, that regulation may become not only a subject of negotiation but also a subject of arbitration. Consequently, federal law, government-wide rules and regulations, and internal agency regulations for which there exists a compelling need all operate to limit the duty to bargain in good faith and the scope of the matters subject to negotiation. On the other hand, the Reform Act provides that only a violation of federal law or government-wide regulation is a ground for review of an arbitration award. To harmonize the negotiation and arbitration processes, internal agency regulations for which a compelling need exists should be included within the larger category of regulations, the violation of which may present a ground for review. Consistency between the two processes would no doubt aid the administration of the Reform Act. Moreover, adoption of this proposal by the Federal Labor Relations Authority would greatly simplify the labor relations system. Not only could one grieve, and hence arbitrate, only what one could bargain, but a matter not the subject of both negotiation and arbitration could not upset an arbitrator’s award absent consideration of the judicially developed standards of review set forth in the Reform Act. In this way, the negotiation and arbitration processes would be harmonized.

Judicial Review

Under the Reform Act, judicial review of an arbitration award is subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency. . . .”

173. Id. § 7117(a)(1).
174. Id. § 7117(a)(2).
175. See note 165 supra.
strictly limited. Final orders of the Federal Labor Relations Authority (involving an appeal of an arbitration award) are not reviewable unless the order involves an unfair labor practice. No statutory basis is provided for review within the meaning of 28 U.S.C. § 1331(a), which establishes the rule for federal question subject matter jurisdiction. Therefore, if a grievant seeks judicial review on the basis of a wrong arising from a final adverse disposition of an arbitration award, a constitutional question must be presented. The Reform Act thus reflects the current policy in federal sector labor-management relations of restricting determinations in dispute resolution to a neutral third party and balances the need for universal, mandated, final, and binding arbitration against the right to a fair adjudication of a grievance.

Conclusion

Federal sector grievance arbitration is a familiar character on an unfamiliar stage. To a large extent, the qualities desired of an arbitrator, arbitration procedures, standards of contract interpretation, the precedential or authoritative value accorded arbitration awards, and the mode of review in the federal sector directly reflect like practices in the private and public state and local sectors. Certain other features, however, are unique to federal sector grievance arbitration. Such features include statutory limitations on bargaining, which correspondingly restrict arbitration, and the role of federal regulations, which expand the scope of the arbitrator's authority and potentially undercut the extent to which the arbitration award in fact will be final and binding.

Federal sector grievance arbitration has developed considerably in recent years, not only in securing for grievants a dramatically increased access to arbitration, but by establishing arbitration proceedings leading to an award that approximates universal, mandated, final and binding arbitration. As labor-management relations in the federal sector mature, it will become clearer whether the Reform Act represents a "perfect order" or whether further inroads will—or should—be made

177. 5 U.S.C. § 7123(a) (Supp. II 1978) provides: "Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may . . . institute an action for judicial review . . . ."

178. Id. § 7123(a)(1).

179. For a discussion of judicial review under the executive orders see notes 132-45 & accompanying text supra.
by labor as, for example, in the erosion of management's retained rights. Until such time as practice under the Reform Act can be evaluated meaningfully, however, we are left with its bare provisions and the past practice of grievance arbitration under the executive orders to serve as aids in improving current federal sector labor-management relations.