A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE

by Peter B. Broida

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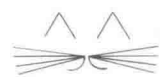

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PREFACE

1987 was a productive year for the Authority. Its backlog was trimmed to the point that its docket is current; a decision on a case can be expected within six months. Once again the decisions of the FLRA ALJs serve as models of trial adjudication under the Reform Act.

Although the volume of FLRA decisions has increased, the substance of federal sector labor relations remains limited. Of course the greatest limitation on federal sector bargaining is statutory: the Authority can do nothing to make issues of real importance, pay and retirement benefits, negotiable for any but a few federal employees. The Authority goes beyond the plain statutory limitations, however, and continues to find most proposals nonnegotiable that touch upon assignments of work. Because employment conditions generally involve some aspect of work assignments, the Authority's philosophy of collateral exclusion limits negotiations to a very narrow and generally insignificant range of proposals. The Authority is also narrowly interpreting the appropriate arrangements test – a bargaining test that should permit more flexibility in negotiations on matters of substance absent proof by agencies that proposals will excessively interfere with their operations. The problem is that to understand when there is excessive interference, one must really be a subject matter expert in workplace practices. The Authority essentially conducts pre-negotiation factfinding on excessive interference without expertise and with a very poorly developed record often consisting of no more than conclusory and speculative assertions of the parties' representatives. If factfinding is to control the arrangements bargaining, it should be done properly and not through submission of unsworn, self-serving, and conclusory position statements.

Moving beyond the Authority's production and criticism of the results, it is clear that many of the negotiability decisions issued by the Authority are unnecessary. Either the proposals are barred under well-established precedent or the proposals are rejected by reason of minor distinctions between them and proposals that have been held negotiable – distinctions so minor that the parties would have readily settled rather than litigated their differences had governing caselaw been brought to their attention. Negotiability appeal procedures trigger full scale administrative litigation with no realistic possibility for settlement. As we go to press, an editorial in the April 5, 1988, Washington Post reports of the "Federal Labor Relations: Administrative Maze," that "It is as if the machinery of the United Nations were invoked to resolve a fender bender." To permit the Authority to concentrate on issues of significance in the federal sector program, and to enhance negotiation rather than litigation as the means of dispute resolution, it is suggested that the Authority delegate to the regional offices at least some of the responsibility for negotiability determinations, as representation cases were redirected to the regional level several years ago. The Authority should require parties to file negotiability appeals regionally, and require the regions to decide the issues quickly, perhaps sixty days after receipt of the parties' submissions. The parties could appeal the regional decision to the Authority, and from there to court. It is expected that the regions would settle most negotiability disputes involving proposals either clearly unlawful or readily rewritten to conform to the law. If this procedure or some variant of it were adopted, the Authority would retain the ability to shape the caselaw, reduce the number of unnecessary appeals filed at the Authority level, and likely speed up the process of federal sector bargaining without a significant increase in budget. This procedure was first suggested to the author during a 1988 meeting of the Society of Federal Labor Relations Professionals by David Feder, FLRA Assistant General Counsel for Field Management and Legal Policy.

Shifting our attention from FLRA decisions to its public relations, the Authority's

Chairman, Jerry Calhoun, has been generous with his time and frank in his comments during his numerous public appearances. He has done much to explain Authority practice and decisions to the agency's constituency. It is likely that the perception and understanding of the Authority will be further enhanced through the recent appointment of Dennis M. Devaney as its General Counsel. Mr. Devaney, formerly a member of the Merit Systems Protection Board, frequently spoke to professional groups to explain MSPB practice and procedure. His remarks were tempered with sufficient institutional criticism to display his own recognition of the problems besetting the MSPB and civilian personnel law. It is expected his fresh and energetic approach toward adjudication of personnel cases will continue at the Authority.

The Authority has enhanced public awareness of its procedures through its 1988 publication of "A Guide to the Federal Service Labor-Management Relations Statute," a booklet about 70 pages long, summarizing the principal statutory provisions governing Authority procedures, providing some information about Authority organization, and including some information about the statutory provisions governing labor relations in the agencies within the foreign service. The booklet is available from the Government Printing Office, Washington, D.C., and doubtless through the FLRA as well. The document is indexed by the Authority as "FLRA Doc. 1213."

Digressing from the substance and procedure of Authority practice, we take a moment to thank those of you who have supported this Guide through your purchases and comments to the author. Given the strength of the sales of the 1987 edition, the Guide will be published annually. It will be completely republished each year to permit reorganization of text. Pocket parts are difficult to use, they are difficult to write, and they complicate sale and distribution of the book.

We reemphasize that the Guide is a point of departure for research. The full text of any Authority or court decision should be read before it is cited to make or attack an argument. Each case relied upon should be reviewed to determine whether it has been overruled, distinguished, or followed by other cases. Many cases decided by the Authority simply repeat what has been held before. To save both time and space, there is no attempt made to list each in a series of repetitive cases. Many decisions have dissents and concurrences. We omit discussion of those sections of Authority decisions. We also omit lengthy decisional discussions of legislative history. We do not suggest that concurrences, dissents, or legislative history should be ignored by the advocate or researcher.

The Guide is written to provide timely caselaw and procedural information. There are some compromises that occur when a law text is published only a few months out of date. The text cannot be cite-checked or professionally proofed. A case table and index cannot be prepared, without substantial delay. The use of decorative graphics and fancy textual formatting would also delay publication without substantive enhancement. There are occasional typographical errors and grammatical lapses that occur or escape notice during the editing process. We still do not include commentary on unexcepted ALJ decisions, FSIP decisions, and General Counsel advice memoranda. There is insufficient time to incoporate those materials into an already verbose text. For all these and other, unmentioned, sins, we apologize. Nonetheless, we welcome your criticisms and comments. Production of the Guide is made more interesting by the involvement of its readers.

Peter B. Broida
Washington, D.C.

April 5, 1988

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