THE TRUMP FLRA: FAIR OR FOUL?

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Introduction

This paper reports on an investigation focusing on the Trump Federal Labor Relations Authority (FLRA) and more specifically the response of the Trump FLRA in cases where arbitrators have ruled in favor of unions and the losing agencies have filed exceptions as provided for in The Federal Service Labor-Management Relations Statute (The Statute), 5 U.S.C. Chapter 71, Section 7122. While private sector challenges to arbitration awards are pursued through the federal court system, provided that the union-management relationship is governed by the National Labor Relations Act, as amended, 29 U.S.C. Sections 151-169, in the federal sector such challenges, referred to in The Statute as exceptions, are pursued through the FLRA.

The Statute, Section 7104(a) states that the FLRA "is composed of three members, not more than 2 of whom may be adherents of the same political party." Authority members are appointed by the President for five-year terms "by and with the advice and consent of the Senate" and may be reappointed.

The motivation to study this particular set of FLRA decisions arose from a 2018 Trump FLRA decision, discussed in some detail below, to set aside one of my arbitration awards. While I cannot claim to be unbiased in the matter, aspects of the Authority's reasoning struck me as a far stretch, raising questions of how the Authority treated other arbitration awards in the unions' favor where agency exceptions have been filed.

The Study Design

Thirty decisions each from the Trump, Obama and George W. Bush administrations' FLRAs are considered, as all decisions are accessible on the Authority website. With the exception of my own arbitration award and one other, none of the arbitration awards that generated exceptions have been read, so that information about all but two of the 90 awards comes only from

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Authority decisions, including dissenting opinions where a dissent accompanied the majority decision. The 30 Trump FLRA decisions encompass the first 30 cases on the website where the Authority was at three-member full strength and responded to agency exceptions filed after receipt of an unfavorable arbitration award. The period covered is from December 27, 2017 – July 5, 2018.[2] For the Obama and Bush administrations, I started with decisions issued during the last December the respective Presidents were in office and worked backward until I had 30 decisions where the respective FLRAs responded to agency exceptions lodged against unfavorable arbitration awards. For the Obama FLRA, the period covered is from May 20, 2016 – October 12, 2016. For the Bush FLRA, the period covered is March 23, 2017 – December 23, 2008. FLRA decisions from the two administrations preceding that of President Trump are included so that Trump FLRA decisions are not considered in a void. Some decisions required a judgment about how to categorize the FLRA responses. For example, if an arbitrator ruled for the union, but did not award the requested attorney fees[3] and the agency exceptions addressed only that part of the award in the union's favor, the arbitration award was categorized as a union win because the Authority's decision to confirm or set aside the arbitration award addressed only the that part of the award favorable to the union. In some instances it was impossible to categorize the FLRA response, so it is shown as "mixed."

The Bush FLRA

Eighteen of the 30 Bush FLRA decisions were rendered when there was a vacancy on the Authority, leaving Republican Thomas M. Beck and Democrat Carol Waller Pope, on the first four decisions and member Pope and Republican Wayne C. Beyer on the next 14 decisions. The last 12 decisions were issued by the full Authority consisting of members Pope and Beyer and Republican Dale Cabiness. Table 1 shows the dispersion of decisions for the two-person and three-person Bush Authority.

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[2] The specific cases read for all three administrations are listed in Appendix A.

[3] While attorney fees requests are virtually unknown in the private sector, such fees may be awarded in federal sector cases where certain criteria are met .

Table 1

Bush FLRA Decisions

	Two Members	Three Members	Total
	No. %	No. %	No. %
Arbitration Awards Confirmed in favor of the union	11 61.1%	6 50.0%	17 56.7%
Arbitration Awards Set Aside	5 27.8%	3 25.0%	8 26.7%
Remanded to the Arbitrator	1 5.6%	1 8.3%	2 6.7%
Mixed Decision	1 5.6%	2 16.6%	3 10%
Total	18 60%	12 40%	30 100%

Seventeen of the 30 decisions (56.7%) confirmed the arbitration awards, eight decisions (26.7%) set aside arbitration awards, two decisions (6.7%) remanded the awards to the arbitrators for further consideration provided the parties were unable to resolve the grievance themselves and three decisions (10%) are categorized as mixed. None of the eight Authority decisions to set aside arbitration awards involved overturning precedent, essentially writing new Authority law. The six cases in which the full Authority confirmed an arbitration award brought unanimous decisions. Table 2, comparing the decisions of the FLRA across the three administrations, includes the information in this paragraph. The Chi-squared test is used to determine whether there is a significant difference between expected frequencies when results across categories are compared for 2-member vs. 3-member Authorities. For the above table, the Chi-square p-value is 7.65, which means that there is a 76.5% likelihood that results are due to chance and only a 33.5% likelihood that results are due to "real" differences in the ratio of confirmed, set aside, remanded or mixed decisions by the partial-strength and full-strength Authorities. Thus, the test determines the likelihood that such differences are due to chance.[4]

[4] The above test is conservative, in that more than 20% of the cells have expected frequencies of less than 5 (due to the limited number of decisions), which tends to overstate the likelihood of finding "statistically significant" differences. But in these results the p-value, while downward biased, is still nowhere near significant. Thus, it was deemed unnecessary to combine smaller categories or to run the Fisher exact test instead of the possibly "too sensitive" Chi-square test.

The Obama FLRA

The Obama FLRA consisted of member Pope, Democrat Ernest DuBester and Republican Patrick Pizzella. As shown in Table 2 below, 15 of the Obama FLRA decisions (50%) confirmed arbitration awards, with member Pizzella dissenting from eight. Eight decisions (26.7%) set aside arbitration awards, all with unanimous decisions. Five decisions (16.7%) involved remands to the arbitrator if the grievances were not voluntarily resolved. Member Pizzella dissented from four of these decisions and member DuBester dissented from the fifth. Two of the decisions are categorized as mixed.

The Trump FLRA – Motivation for the Study

The Trump FLRA consists of Republicans Colleen Duffy Kiko and James T. Abbott and member DuBester, reappointed. They issued the decision that provided the impetus for this study. Significant detail is provided about the case. An employee of a federal agency, driving her own car with her daughter and granddaughter as passengers while off duty, was involved in an at-fault one-car accident that resulted in the granddaughter's death. The employee pleaded guilty to the charge of manslaughter (recklessly causing the death of an individual), was fined and sentenced to 10 years confinement, with the sentence probated. The agency indefinitely suspended and then removed the employee, with 24 years of government service, solely because of the off-duty incident. The union grieved the suspension and the removal and moved the grievances to arbitration, where they were consolidated. That arbitrator sustained both grievances in full, finding no nexus between the off-duty incident and employment with the agency. The arbitrator ordered that the grievant be restored "to duty pay and status, and with all benefits, at the grade and step she would have been if she had not been suspended and removed" (70 FLRA No. 135 (2018) at p. 9). Thereafter the parties negotiated a comprehensive settlement agreement covering pecuniary and non-pecuniary issues that had arisen from the agency's two disciplinary actions. The settlement agreement excluded four matters, including "annual appraisal grievances covering all years between and including 2010 and 2014" (70 FLRA No. 135 (2018) at p. 10). The grievant had received 4.60 Exceeds annual appraisals for 2007, 2008 and 2009, each appraisal bringing a mandatory cash award. Thereafter she received Not Ratable (NR) annual appraisals for the years excluded from the settlement agreement. Each NR annual appraisal was grieved, with the 2013 NR appraisal assigned to me as a long-time member of the parties' arbitration panel. On May 26, 2016 I issued an award in the grievant's favor, finding that the agency had discriminated against the grievant and had violated the labor agreement by issuing the NR rating. Among the remedies ordered were $150,000 in non-pecuniary damages and the revalidation of the 2009 4.60 annual appraisal and the mandatory cash award with interest. The agency filed timely exceptions to my award and in 70 FLRA No. 135 (2018), a 2-1 decision, member DuBester dissenting, the Authority set aside the award.

Aspects of the Authority decision motivated this inquiry. In the Background and Arbitrator's Award section of the majority's decision it was noted that "the grievant pleaded guilty to a second-degree felony charge of manslaughter, for which she was sentenced to ten years' confinement, probated for ten years, and fined $2,000" (70 FLRA No. 135 at p. 3). While some of the details of the grievant's sentence were included in the award that sustained the grievances over the suspension and discharge and returned the grievant to work with a make-whole remedy, details related to the manslaughter charge and the resulting sentence were not included in my award and were not argued by the agency as a reason for denying the grievance. Since the reinstatement award found no nexus, the details of the grievant's sentence were irrelevant, yet it is possible that they, in part, drove the majority response.

Rather than frame the issues myself, I set forth in my award the two issues framed by the union and the two issues framed by the agency, as the parties' formulations differed. The Authority decision sets forth the union issues, but not the agency's issues, although I believe that my extensive, 50-page, Opinion and Award speaks to all of the formulations. The majority found that I exceeded my authority by not confining myself to the NR rating and no other matters although the submitted issue statements went beyond the narrow question of the NR rating. Whether I was right or wrong, I found this troubling.

Finally, "the Authority does not have jurisdiction over exceptions to an award that 'resolves or is inextricably intertwined with' a removal action" (70 FLRA No. 135 at p. 5). The majority found that the grievance I heard was not "inextricably intertwined" with the grievant's prior removal, although the earlier award, reinstated the grievant and ordered her made whole. In his dissent, member DuBester found that the grievance I heard was "inextricably intertwined" with the removal. The majority wrote that the dissent "relies upon a bald misrepresentation of the facts" (70 FLRA No. 135 at p.6). I find the majority's logic hard to fathom and believe that the characterization of member DuBester's dissent is better aimed at the majority decision. Again, whether I am correct or incorrect, this element of the majority decision, like those above, was one of the triggers of the inquiry.

The Trump FLRA Decisions

As shown in Table 2, the response of the Trump FLRA to arbitrators' awards favoring unions departs markedly from that of the Obama and even the Bush FLRAs. Of the 30 FLRA decisions reviewed, only six were confirmed and of the six, four involved instances where the agency failed to file exceptions within the 30-day time limit set forth in The Statute, Section 7122. The FLRA decisions in these four cases concerned only the question of whether the time limits should be waived and did not reach the merits of the untimely exceptions. A fifth case considered and rejected the agency exceptions to an arbitrator's award that reduced a 14-day suspension to one of seven days. The sixth decision sustained the arbitrator's award finding that the Agency violated the collective bargaining agreement when it denied travel time. All of these decisions were unanimous.

Table 2

Comparison of 30 FLRA decisions across the Trump, Obama, and Bush administrations

	Trump FLRA	Obama FLRA	Bush FLRA
Arbitration Awards Confirmed	6[1] 20.0%	15 50.0%	17 56.7%
Arbitration Awards Set Aside	23[2] 76.7%	8 26.7%	8 26.7%
Remanded to the Arbitrator	1 3.3%	5 16.7 %	2 6.7%
Mixed Decision	-	2 6.7%	3 10.0%
	Number	Number	Number
Precedent Overturned	5	-	-
Dissent from Awards Set Aside	21	7	1

1. Four were 3-0 as the agency filed exemptions late so that the FLRA did not consider them.
2. Member DuBester dissented from 21 of these decisions.

Twenty-three of the Trump FLRA decisions (76.7%) set aside arbitration awards. Twenty-one of these 23 decisions were 2-1 with member DuBester dissenting in all 21. The thirtieth decision, also 2-1 with member DuBester dissenting, remanded the case to the arbitrator, absent the parties' voluntary settlement, as the majority wrote that the arbitrator provided insufficient findings and unsupported conclusions. Member DuBester found support for the arbitrator's legal conclusions and sufficient information in the award to allow the Authority to assess the agency's exceptions. The "eyeball" conclusion reached by viewing the comparisons in Table 2, that the Trump FLRA reaction to arbitration awards favoring unions represents an abrupt departure from the Obama and Bush FLRAs, is confirmed statistically. Use of the Chi-square statistical test comparing the ratio of awards confirmed to awards set aside for the Trump FLRA vs. the combined Obama and Bush FLRAs yields a critical value of 6.635 with $p = .01$. In other words, the odds are above 99% that the difference is not due to chance. Use of the Chi-square test to compare proportions of confirmed, set aside and combined mixed-remanded decisions across the three FLRAs also shows less than a 1% likelihood that differences are due to chance.

The review and comparison of FLRA decisions across the three administrations must be considered an introductory inquiry. A deeper, more sophisticated analysis would factor in the types of cases considered by the FLRA. For example, was the Authority concerned only with an award of attorney fees, with a case involving the distinction between a classification issue and a promotion issue[5] or with a case where the award, if not the case itself, touched on the management rights clause contained in The Statute, Section 7106. A deeper analysis would also consider the case law relied on by the majority and dissenting opinions and reach conclusions about the intellectual honesty and reasonableness of the competing opinions.

With the above-noted caveat, several observations are in order. The reaction of the Trump FLRA to arbitration awards favoring the union is strikingly different than FLRA reactions to arbitration awards adverse to agencies that were considered by the Bush and Obama FLRAs. If an obvious difference between the two-Republican Authority of President Trump and the two-Democrat Authority of President Obama might be expected, the difference between the Bush and Trump FLRAs is more surprising but may heighten concerns about the current FLRA. The numbers themselves, the dissents in all but two of the 23 "set aside" decisions, the use of information not in the record in my own arbitration case as well as logical lapses (at least to me) in the decision setting aside my award, raise serious questions, which should be further investigated, of unreasonable bias and the substitution of the Trump majority's opinion for that of

[5] A classification issue may not be the subject of an arbitration decision; a promotion issue is grist for the arbitration mill.

the arbitrator. Four of the Trump Authority "asset aside" awards were grounded on a revision of long-standing precedent, while none of the Bush or Obama "set aside" awards arose out of reversed precedent. All of the eight Obama FLRA "set aside" awards were unanimous. Both Bush "set aside" awards issued when the Authority was at full strength were unanimous.

In what may be symptomatic of the current, dysfunctional political climate in the United States, the Trump FLRA appears less collegial than the FLRAs in the two previous administrations. The above-noted dissents alone are suggestive. Recall that in 70 FLRA No. 135 that set aside my arbitration award, the majority wrote that member DuBester had relied on a "bald misrepresentation of facts." Even when member DuBester joined the majority he has often written his own brief concurrence, seemingly wishing to stand apart from fellow Authority members. As a further example, in 70 FLRA No. 83, a case in which the majority overturned precedent, member DuBester wrote that the majority had abandoned "the special deference . . . afforded to choices the parties make in . . .negotiations" by substituting its judgment for the parties' assessment during bargaining of the value of negotiated provisions and limited, if not possibly abandoned to the Authority's judgment, an arbitrator's discretion to formulate a remedy.

Additional examples may sharpen the differences within the Trump FLRA. Several cases involving federal prisons involved portal-to-portal issues where various locals belonging to the American Federation of Government Employees (AFGE) challenged the failure of the Bureau of Prisons to pay for pre- and post-shift travel from the control center to the assigned post and for pre-shift briefing time at the assigned post. Invariably, the majority set aside arbitration awards where arbitrators had ruled in the unions' favor and awarded overtime pay to affected grievants. In 70 FLRA No. 140 an arbitrator found that the agency improperly had failed to pay overtime and subsequently, in addition to ordering overtime pay, ordered the payment of liquidated damages and attorney fees. The Trump majority set aside the awards, finding that pre-shift briefing or exchange of information was prepatory but not the principal activity and that the award of 1-5 minutes of overtime pay per shift did not meet the 10-minute overtime minimum rule. Dissenting, member DuBester found the information exchange to be a principal activity and wrote that the majority misinterpreted the arbitrator's findings, ignored Authority precedent and erred in its view of Supreme Court precedent. In other federal prison cases, the majority and member DuBester differed on whether travel time from the control center to the assigned post and return was principal activity (see 70 FLRA No. 111).

In 70 FLRA No. 102 the majority set aside an arbitration award finding that the agency had violated the Statute, Sections 7116(a)(1) and (5) and the negotiated agreement (CBA) by failing to bargain over matters related to inspections of vehicles entering El Paso, TX from Mexico. The majority found that the memo impacting decisions on when to send vehicles for secondary inspections affected working conditions as distinguished from conditions of employment and thus the agency was not obligated to negotiate. Member DuBester, conversely, wrote that the agency had overturned precedent established by a decision of the District of Columbia Circuit Court of Appeals and the FLRA. Moreover, the CBA did not set forth a duty to bargain, but only a duty to notify and discuss the memo with the union.

Some Implications

A number of implications flow from this preliminary study. One is the possibility of less stable relations in the federal sector for three reasons. Where precedent has been overturned by a majority Republican FLRA, the time may come when prior precedent is reinstated by a Democratic majority FLRA. Another is that the consistency that the parties and arbitrators use to inform respectively their advocacy or their awards may have evaporated, creating questions about the predictability of these relationships. And, if federal agencies come to understand that the odds of having an adverse arbitration award overturned have risen significantly, exceptions may be filed more frequently than under previous Authorities such that arbitration awards will become less final and binding.

The news for federal sector unions is obviously not good for reasons noted above. The lesson here is that when an agency files exceptions to an arbitration award, the union, when it responds, must make a great effort to address the exceptions in a meaningful way with contentions supported by reference to appropriate case law.

The news for arbitrators also is bad. The data suggest the possibility that even carefully crafted awards that are grounded in the record at hand and knowledge of law and existing precedent may be set aside. And, the unanimous "set aside" decisions suggest the possibility that arbitrators have not always complied with relevant law and precedent when writing awards. That said, there may be ways to increase the odds of a final and binding award. Four areas emerge from the reading of FLRA decisions across the three administrations. One is that arbitrators must exercise great care in the framing of remedies that flow from awards in the unions' favor. The Statute, Section 7106 contains a strong management rights clause. A remedy that conflicts with management rights granted by law will be set aside. An understanding of Section 7106 may reduce, if not eliminate the possibility of a remedy that will not withstand Authority scrutiny. Moreover, issues must be framed carefully as they will define the limits of the arbitrators' inquiry and responses. Resolving unstated issues will result in an Authority decision that the arbitrator has exceeded his or her jurisdiction. Where the case involves making a distinction between a classification issue, which is not arbitrable, and a promotion issue, which is, if the ruling is that the grievance concerns promotion and therefore is arbitrable, the reasoning behind the decision should be set forth in detail and grounded in case law, where that law has been provided by the advocates. Finally, if attorney fees are a possibility, such fees should not be awarded as part of the decision on the merits. Retained jurisdiction will allow the union to file a petition for attorney fees once the arbitration award becomes final, followed by an agency response to the union petition. Attorney fees can only be awarded if certain criteria are met, and adopting the petition/response approach should result in advocates providing the relevant federal law, case law and collectively-bargained contract provisions, if any, so that an award of attorney fees speaks to the relevant criteria, is fully justified and will stand up to FLRA scrutiny.

Federal sector arbitration is more complex than private sector arbitration. The federal field is full of land mines in the form of laws with which federal sector arbitrators may be less familiar, FLRA case law, Federal Service Impasse Panel case law and Merit Systems Protection Board case law. It appears as though the Trump FLRA makes federal sector arbitration even more difficult and disturbs the predictability that lends itself to stable labor relations.

APPENDIX

LIST OF FLRA DECISIONS IN THE STUDY

Bush FLRA	Obama FLRA	Trump FLRA
62 FLRA No. 15	69 FLRA No. 28	70 FLRA No. 75
62 FLRA No. 17	69 FLRA No. 29	70 FLRA No. 80
62 FLRA No. 20	69 FLRA No. 30	70 FLRA No. 83
62 FLRA No. 24	69 FLRA No. 31	70 FLRA No. 85
62 FLRA No. 27	69 FLRA No. 34	70 FLRA No. 86
62 FLRA No. 29	69 FLRA No. 37	70 FLRA No. 88
62 FLRA No. 32	69 FLRA No. 38	70 FLRA No. 89
62 FLRA No. 33	69 FLRA No. 44	70 FLRA No. 94
62 FLRA No. 34	69 FLRA No. 49	70 FLRA No. 95
62 FLRA No. 40	69 FLRA No. 54	70 FLRA No. 98
62 FLRA No. 47	69 FLRA No. 58	70 FLRA No. 101
62 FLRA No. 50	69 FLRA No. 59	70 FLRA No. 104
62 FLRA No. 57	69 FLRA No. 61	70 FLRA No. 106
62 FLRA No. 60	69 FLRA No. 64	70 FLRA No. 107
62 FLRA No. 61	69 FLRA No. 66	70 FLRA No. 109
62 FLRA No. 65	69 FLRA No. 77	70 FLRA No. 111
62 FLRA No. 66	69 FLRA No. 84	70 FLRA No. 112
62 FLRA No. 67	69 FLRA No. 86	70 FLRA No. 114
62 FLRA No. 71	69 FLRA No. 87	70 FLRA No. 120
62 FLRA No.73	69 FLRA No. 88	70 FLRA No. 122
62 FLRA No. 78	69 FLRA No. 92	70 FLRA No. 125
62 FLRA No. 79	70 FLRA No. 1	70 FLRA No. 127
62 FLRA No. 80	70 FLRA No. 2	70 FLRA No. 129
62 FLRA No. 94	70 FLRA No. 3	70 FLRA No. 131
62 FLRA No. 96	70 FLRA No. 4	70 FLRA No. 133
62 FLRA No. 97	70 FLRA No. 7	70 FLRA No. 135

63 FLRA No. 2	70 FLRA No. 8	70 FLRA No. 136
63 FLRA No. 7	70 FLRA No. 9	70 FLRA No. 140
63 FLRA No. 13	70 FLRA No. 10	70 FLRA No. 142
63 FLRA No. 21	70 FLRA No. 11	70 FLRA No. 142