

ARTICLE 7 Arbitration

Section 1. Invocation

- A. **Time Limits to Invoke Arbitration:** A notice to invoke arbitration will be made in writing by electronic mail to the other Party within 30 calendar days of receipt of the written decision rendered in the final step of the grievance procedure. If no written decision has been rendered, the 30-calendar day period begins the day after the written decision was due. Failure to provide a timely notice of an invocation will render the grievance not arbitrable.
- B. **The Parties:** Only the Union or the Agency may refer to arbitration any unresolved grievance after the final step of the negotiated grievance procedure. A referral must be made only by the EPA Unit President or the Agency Labor Relations Director (or designee). The notice to invoke arbitration filed by the Union must be served on the alleged responsible management official, Headquarters' Labor Relations Director and on any local designated management representative, such as a Labor Relations Officer.

Section 2. Arbitrator Selection and Site/Timing of the Hearing

- A. **Time Limits to Request List of Arbitrators:** Within five calendar days of invoking arbitration, the invoking party will request the Federal Mediation and Conciliation Service (FMCS) to provide a list of seven impartial qualified persons to act as arbitrators. The invoking party will request that the FMCS serve a copy of the panel list on both parties (Union and management). The invoking party will pay the FMCS fee.
- B. **Site of Hearings:** The Parties agree that virtual arbitration hearings are the default unless otherwise determined by the Arbitrator or both Parties agree to an in-person arbitration. The site of the dispute for grievances involving national matters, not an individual employee grievance, is Washington, DC, unless mutually agreed otherwise. For grievances regarding individual employees, the site of the dispute is defined as the location of the grievant's official duty station unless mutually agreed otherwise. Hearings will be held within the commuting area of the site of the dispute and the panel list will include arbitrators in that area. If the majority of witnesses are located outside of the local commuting area, the site of the dispute is where the majority of witnesses are located and that is where the hearing shall be held.
- C. **Travel Expenses and Other Costs:** For arbitrations that are in person, the Agency will secure a location for the hearing within the Agency's facilities. If this is not possible, the Agency is responsible for securing a location and the parties will share the cost equally. Each party is responsible for any travel-related expenses and per diem associated with travel to the location of the hearing for its advocates and witnesses. Official time for attendance and travel to arbitration hearings, if otherwise in duty status, is covered under Article 2.
- D. **Selecting the Arbitrator:** After the parties receive the list of arbitrators, they will meet in person, by telephone or by videoconference, within seven calendar days or unless the parties consent to extend this period. The invoking party will arrange the logistics for a coin toss to determine the order for striking, i.e., whether the Agency or the union strikes first. The logistics will include provision of the coin (i.e. selecting an online website to perform an electronic coin toss) at a mutually agreeable time, date, and location of the coin toss. The non-moving party will flip the coin. If the coin lands "heads up," the union strikes first; if the coin lands "tails up," the Agency strikes first. If the selection is being done by parties in different locations, the parties may agree to use an electronic audible coin toss or other non-visual mechanism for determining which party goes first. The parties shall each strike one name from the list alternately and then repeat the procedure until only one name remains. The person whose name remains shall be

selected as the arbitrator.

1. Once a final name is selected the parties will sign the FMCS arbitration form letter and the invoking party will email it back to the FMCS within five calendar days and provide a copy to the other party. If electronic filing is used, the invoking party will submit the selection form to FMCS and provide a copy to the other party. The parties will ensure that the listed names, addresses and phone numbers of the applicable Union and management representatives are correct.
- E. **Setting the Hearing Date:** Subject to availability, the hearing with the arbitrator will be scheduled to occur within 90 days of the notice to invoke arbitration in Section I.A. Arbitrators have the authority to dismiss grievances based on staleness.
- F. Upon selection of an arbitrator, the arbitrator will offer dates for the hearing and then the representatives of the parties will communicate with the arbitrator and one another to select a date for the hearing.
- G. **Failure to Comply or Cooperate:** Failure by the invoking party to comply with timelines in this section and/or failure to cooperate in the selection of an arbitrator, shall result in the grievance being withdrawn with no right to refile. If the non-invoking party refuses to participate in the selection of an arbitrator than the invoking party is entitled to select the arbitrator from the FMCS list.

Section 3. Fees and Expenses

- A. The cost of the arbitrator's fees and expenses will be shared equally by the parties.
- B. Once a hearing is scheduled, should one Party request unilaterally that the hearing be postponed or canceled for whatever reason, that Party will pay any fees charged by the arbitrator for the delay.
- C. In cases where the Parties mutually agree to postpone or cancel a hearing, the Parties will share any fees charged by the arbitrator for the delay. Outside of settlement, if the invoking party withdraws its grievance prior to an arbitrator rendering a decision, the invoking party is responsible for all arbitrator's fees or expenses incurred.
- D. If a settlement agreement is reached prior to the hearing, the parties agree to notify the arbitrator that the matter has been settled as soon as possible, in order to minimize the costs.

Section 4. Arbitrator's Jurisdiction and Authority

An arbitrator's jurisdiction is limited to the allegations raised in the grievance at Step 2 or the Grievance of the Parties (for an institutional grievance). The arbitrator shall have no authority to alter, in any way, the terms and conditions of this agreement, any supplemental other negotiated agreement, any other condition of employment or issue not properly before the arbitrator.

Section 5. Bifurcation

The arbitrator has the authority to make all grievability and/or arbitrability determinations. The arbitrator shall make decisions as to grievability and/or arbitrability before addressing the merits of the case. Such threshold issues (i.e. timeliness, compliance with the grievance procedures of Article 6, staleness, standing, election of remedies, arbitrator authority, etc.) may be submitted to the arbitrator by brief and decided prior to a hearing on the merits of the underlying grievance.

No later than 21 calendar days before a scheduled hearing or any time before the hearing is scheduled, either party may move to bifurcate into separate jurisdictional and merits proceedings so that all jurisdictional issues shall be decided prior to a hearing on the merits of the grievance. The parties may submit documentation to the Arbitrator in support of their positions on jurisdictional matters. The

arbitrator is empowered to make a decision based upon the submissions. A hearing on the merits will only be scheduled after the arbitrator has rendered a decision on all jurisdictional issues.

Section 6. Pre-Hearing Procedures

- A. Pre-Hearing Exchange: No later than 5:00 pm Pacific time, ten (10) work-days prior to the arbitration, the parties will identify their statement of the issue(s) and the witnesses and documents they intend to present at the hearing. The list of witnesses shall include a brief one or two sentence summary of each witness' expected testimony. If the other party is unclear on a document or does not have a copy, it will be provided within 24 hours of receipt of request. Rebuttal witnesses and rebuttal evidence not previously identified may be presented to the arbitrator; the arbitrator has the authority to determine whether that information should have been previously identified and, if so, whether it shall be allowed into evidence and/or whether the other party shall be permitted a delay to present sur- rebuttal evidence. In the event of a known disagreement over the parties' proposed witnesses or evidence, the parties may initiate a conference call with the arbitrator at least five (5) work days prior to the hearing to seek a ruling on the contested witnesses and/or evidence. Not having done so does not preclude either party from making objections to witnesses or evidence at the hearing. However, if not having raised the issue in advance has resulted in a challenged witness traveling to the hearing from outside the local commuting area, arbitrators are empowered to take that into account in determining whether a witness should be permitted to testify. If evidence or information becomes available to a party prior to the start of or during the proceeding, which has not been made available to the other party and it intends to enter that evidence or information in the arbitration, the other party will be provided that evidence or information immediately. If the information or evidence is substantial, the other party may seek a postponement of the arbitration for one work day or until the arbitrator's next available date.
- B. The parties will attempt to reach agreement on joint exhibits.
- C. The above exchanges may be done in person or through email.

Section 7. Stipulations

Prior to the hearing, the parties will attempt to stipulate the issue(s) to be arbitrated, joint exhibits, and any factual matters which would expedite the arbitration. In the event no questions of fact exist, the parties may, by both parties' consent, forego a formal hearing and present the grievance directly to the arbitrator by written submission. In that case, the Parties will agree on the time frame within which joint submissions are due to the arbitrator. The arbitrator is empowered to make a finding and award based on those submissions. If the parties do not agree on whether questions of fact exist to warrant a formal hearing, either party may request that the arbitrator make this determination and the arbitrator is empowered to do so. If the parties are unable to agree on a joint stipulation of the issue(s), each party shall submit its statement of the issue(s) to the arbitrator at the opening of the hearing. In that situation, the arbitrator is empowered to articulate the issue(s).

Section 8. Hearing Procedures

- A. Hearing Location and Official Time: As provided by Section 2, the Agency will secure a location for the hearing within the Agency's facilities. If this is not possible, the Agency is responsible for securing a location and the parties will share the cost equally. The hearing will be held during the regularly scheduled workweek. Grievants and witnesses in a duty status will be granted official time

necessary to prepare for and participate in the arbitration proceedings. Official time for Union representatives will be granted pursuant to Article 2 of this Agreement. Number of Representatives: The Union and the Agency shall each be allowed up to two representatives to present its case; additional representatives may be permitted only by the consent of the parties.

B. Closed Hearings: Arbitration hearings are not open to the public and, except by the consent of both Parties, may not be attended by anyone other than the party representatives and the grievant(s).

C. Hearings Not Held in the Local Commuting Area: In arbitration hearings involving a single named grievant or multiple named grievants from a single duty station, if the hearing is not held virtually or at the official duty station of the grievant(s), the Agency shall pay travel expenses and per diem, as authorized by law and regulations, for:

1. The single named grievant or a representative grievant if there are multiple grievants.

2. Witnesses whose official duty stations are not in the local commuting area of the hearing location will participate via videoconference or teleconference and the arbitrator will accept this testimony as if given in person. However, either party may elect to have such a witness testify in person at its own expense.

3. Party representatives may participate via videoconference or teleconference. However, in such a case, the other party is not obligated to participate virtually.

Section 9. Case Presentation and Burden of Proof

- A. Order of Presentation: The Agency will make its presentation first in disciplinary and adverse action cases. In all other issues, the party invoking arbitration will make its presentation first in the hearing and that party has the burden to prove its case by a preponderance of the evidence. In bifurcated cases, the party requesting bifurcation will make its presentation first in the jurisdictional hearing. For disputes presented only via briefs, rather than at a hearing, the party invoking arbitration files shall submit the first brief, with the other party responding within a time period set by the arbitrator.
- B. Post-Hearing Briefs: Each party is entitled to file a post hearing brief by email within the time frame decided by the arbitrator at the hearing. Each party shall serve the other party with its brief by email on the next business day after briefs filed with the arbitrator or by other arrangement made with the arbitrator.

Section 10. Decisions

- A. Issuance of Arbitration Decision: The Parties will request the arbitrator to issue the decision as soon as possible but within thirty (30) days from the conclusion of the hearing or the close of the hearing record, including submission of briefs, unless the parties consent to extend the time limit. When the parties both consent an expedited arbitration, the arbitrator may render a decision at the close of the proceedings.
- B. Finality of Arbitration Award: An arbitrator's decision shall be binding on the parties as to the specific facts and circumstances of the grievance subject to the provisions in Section 11. If the parties have a dispute on the interpretation of a specific provision of the award, they will meet to discuss the disputed provision. If no agreement on the interpretation of a specific provision is reached; they may mutually agree to return to the arbitrator for clarification.

Section 11. Exceptions

Either party may file exceptions to the arbitration award with the FLRA under regulations prescribed by the Authority. Pursuant to the Statute, an arbitration award is final when no timely exceptions have been filed with the FLRA or when timely filed exceptions have been decided by the FLRA.

For ESC:

For: EPA