

ARTICLE 46

ARBITRATION

SECTION 1- Invocation of Arbitration

- A. Any unresolved grievances processed under Article 45, Grievance Procedures, may be appealed to binding arbitration upon written notification by the Union or by the Employer, as appropriate, unless otherwise provided in this Agreement. Arbitration must be invoked within [sixty \(60\)](#) calendar days after of the receipt of the final decision in the grievance procedure by the designated NTEU representative or agency representative. If no final decision is issued, the arbitration may be invoked no more than [sixty \(60\)](#) days from the date the decision should have been issued.
- B. Invocation must be served on the designated management official, if filed by the Union, or on the National President of the NTEU, if filed by the Employer. Invocation notices may be transmitted via email, facsimile, hand delivery, USPS mail, or by any other commercial delivery. Arbitration is deemed to be invoked upon email or fax transmittal, hand delivery, or date of postmark, if mailed, to the appropriate party.

SECTION 2- Arbitrator Panel Procedures

- A. The Parties will establish a permanent panel of arbitrators for hearing arbitration appeals filed by the Union or the Employer. There will be two panels - East of the Mississippi and West of the Mississippi. There will be eight (8) arbitrators for the East panel (4 of which must be from the DC area) and six (6) arbitrators on the West panel. The selection of arbitrators will be made within thirty (30) calendar days of the effective date of this Agreement. For the East panel, the Parties will request two lists of twelve (12) arbitrators affiliated with the National Academy of Arbitrators and with experience arbitrating Federal sector labor-management disputes from the Federal Mediation and Conciliation Service (FMCS); one such panel shall consist of arbitrators located within the FMCS' Eastern Region, and the other shall consist of arbitrators located in the Washington, DC area. For the West panel, the Parties will request two lists of fourteen (14) arbitrators affiliated with the National Academy of Arbitrators and with experience arbitrating Federal sector labor-management disputes from the Federal Mediation and Conciliation Service (FMCS); one such panel shall consist of arbitrators located within the FMCS' Western Region.
- B. Each party may strike up to one (1) arbitrator during a calendar year twelve (12) month period from either panel by giving written notice to the other party ~~and the arbitrator~~. Thereafter, no additional cases will be assigned to that arbitrator; however, he/she will hear and decide any case already assigned. [The arbitrator will be immediately removed from the panel but notified of his/her removal only after all cases already assigned to him/her have been decided or otherwise resolved.](#)

- C. In replacing arbitrators, the parties will request three (3) names, within the region for the applicable panel, from the Federal Mediation and Conciliation Service (FMCS) for each vacancy. The parties will then strike names from the list until there is one arbitrator remains to fill the vacancy. The parties will alternate who makes the first strike for each geographic panel vacancy. If an arbitrator is removed, the Parties will select a replacement using the procedure described in 2A above (the parties shall request from the FMCS a list of three (3) arbitrators appropriate for the panel in question consistent with the criteria set forth in 2A above). Any unassigned pending cases will be assigned to the remaining arbitrator(s), until a replacement arbitrator is selected.
- D. Cases will be assigned to the designated arbitrators on a rotating basis; to be determined by the date arbitration is invoked.
- E. Where a case settles after arbitration has been invoked and an arbitrator assigned, the next case invoked shall be assigned to the next arbitrator on the panel.

SECTION 3- Deadline for Contacting the Arbitrator and Scheduling a Hearing

Within six (6) months of invocation, the party invoking arbitration will contact the arbitrator assigned to the case to schedule the hearing to take place on a date mutually agreeable to all Parties. If the party invoking arbitration fails to contact the arbitrator within the six (6) month period, the grievance will be considered withdrawn but may be re-filed. If within thirty (30) calendar days after arbitration is invoked the Parties have not agreed upon a hearing date, the arbitrator has unilateral authority to schedule the hearing.

SECTION 4- Location of Local and National Arbitration

- A. Other than national grievances, the arbitration hearing will be held on the Employer's premises during regular duty hours (day shift) of the basic workweek, unless the Parties agree otherwise. The arbitration will be held within the local commuting area of the grievant(s) unless the Parties mutually agree otherwise.
- B. For national grievances, the hearing will be held alternately in Washington, D.C., on the Employer's premises and NTEU's National Office during regular duty hours. Where appropriate, the Parties will consider the use of long-distance telephone and/or video-conferencing during the arbitration hearing for the taking of testimony of witnesses whose assigned duty station is outside the commuting area of the site selected.

SECTION 5- Witnesses

The grievant, the grievant's representative, and all employees who are approved as witnesses and who are in an active duty status, shall be excused from other assignments to the extent necessary to participate in the arbitration proceeding without loss of pay.

SECTION 6- Transcript

A verbatim transcript of the arbitration shall be made, (unless mutually waived). [The Employer will make arrangements for the transcript and will pay all transcript costs.](#)

SECTION 7- Limits on Arbitrator's Authority

The arbitrator has no power to add to, subtract from, disregard, alter or modify any terms of this Agreement. The procedures used to conduct the arbitration shall be determined by the arbitrator, except to the extent provided herein, or as otherwise mutually agreed by the parties.

SECTION 8

SECTION 9- Issues, Exhibits and Stipulations

- A. By mutual agreement, the Parties may arrange for a pre-hearing conference, with or without the Arbitrator, to consider possible settlement and/or means to expedite the hearing. For example, they may agree to reduce the issue(s) to writing, stipulate to facts, outline intended offers of proof, authenticate proposed exhibits, or determine the need for a transcript.
- B. If the Parties fail to agree on a joint submission concerning the facts and issues for arbitration, each shall submit a separate statement of the issue(s) and the Arbitrator will determine the issue(s) to be heard. Issues not raised by the Parties during the grievance procedure may not be raised by either Party or the Arbitrator during arbitration.

SECTION 10- Witnesses

- a. Normally, the Parties agree to exchange a complete list of prospective witnesses at least fifteen (15) days prior to the hearing, after which they will attempt to agree on witnesses to testify at the hearing.
- b. In the event the Parties cannot agree on appropriate proposed witnesses, the respective lists of requested witnesses will be presented to the Arbitrator, in whose sole discretion the witnesses will be determined. In approving witnesses, the Arbitrator will include only those persons whose testimony will be material to the matter in dispute and not unduly repetitious of other testimony to be offered. Attendance at the hearing will be limited to those individuals determined by the arbitrator to be relevant and material witnesses with direct knowledge of the circumstances and factors bearing on the case.

SECTION 11- Greivability/Arbitrability

If the Employer or the Union declares a grievance to be non-grievable and/or nonarbitrable, the original grievance will be considered amended to include this issue. The Arbitrator will have the authority to make all arbitrability and/or grievability determinations. The Arbitrator must hear arguments regarding both arbitrability and the merits of the case at the same hearing. Any arbitrability/grievability determination(s) must be made prior to addressing the merits of the original grievance. The Parties may mutually agree otherwise, however, in highly complex cases which would involve several days of hearings. [For example, the parties could mutually agree to limit the scope of the hearing to the grievability/arbitrability issue and set a later hearing date to address the merits of the case.](#)

SECTION 12

SECTION 13- Scheduling and Procedures

- A. The Arbitrator will set the date of the hearing with the concurrence of the representatives of the Parties. Once that date has been established, a party unilaterally requesting that an arbitration hearing be postponed, delayed, and/or canceled for any reason (which results in any fees being charged by the arbitrator and/or court reporter) shall pay any and all fees. In any case where the Parties mutually agree to postpone, delay, and/or cancel an arbitration proceeding, the Parties, will equally share the cost of any fees being charged by the Arbitrator.
- B. The hearing will be informal, and the rules of evidence will not apply. The Parties have the right to issue opening and closing statements, and to present and cross-examine witnesses. All testimony must be given under oath or affirmation.
- C. The Arbitrator shall have the authority to draw an appropriate inference when either party fails to present facts or witnesses that the arbitrator deems necessary and relevant.
- D. Absent mutual agreement, the Parties will be entitled to submit pre-hearing and post hearing briefs, provided that all documents given to the arbitrator are also provided to the opposing party's representative at the same time.

SECTION 14- Arbitration Fees and Expenses

[The Arbitrator's fees and expenses \(including travel and per diem\) shall be shared equally by the Parties unless the Union substantially prevails as determined by the Arbitrator. In such cases, the Employer shall pay the full cost of the hearing, to include travel and per diem for the Arbitrator.](#)

SECTION 15- Arbitration Decisions

- A. The Arbitrator will strive to issue a decision within thirty (30) days from the close of the record (which will occur at the close of the hearing unless the Arbitrator approves submission of post-hearing briefs, in which case the record will close at the end of the specified briefing period). If the Arbitrator issues a bench decision, it will be placed on the record at the end of the transcript. The award or recommendation shall be limited to the issue(s) stipulated to by the Parties or determined by the Arbitrator pursuant to Section 4C of this Article.
- B. The written decision will include findings of fact and an opinion containing the reasoning and basis for the decision.
- C. The Arbitrator's decision shall be final and binding for that grievance.
- D. The Arbitrator shall possess the authority to make an aggrieved employee whole to the extent such remedy is not limited by law, including the authority to award back pay, interest, and attorney's fees in accordance with 5 CFR 550.801(a), reinstatement, retroactive promotion where appropriate, and to issue an order to expunge the record of all references to a disciplinary, adverse, or unacceptable performance action, if appropriate.
- E. The Arbitrator must submit a copy of the decision to the Employer and the Union.
- F. If the case involves back pay under the Back Pay Act, the Union may submit a request for attorney fees within sixty (60) days after it receives notice from the Agency that back pay has been awarded.

SECTION 16- Cases Involving Performance Appraisals

- A. In any arbitration where the grievant is contesting a performance appraisal of lower than fully successful, the burden of proof shall be on the Employer in any arbitration to establish that the rating was proper.
- B. In all cases in which an employee challenges a final rating of record in a performance appraisal, the evidentiary standard shall be substantial evidence.

SECTION 17- Appeals

Either Party may file exceptions to an Arbitrator's award under regulations prescribed by the Federal Labor Relations Authority. Unless overturned by the FLRA or a court, the Arbitrator's award will be binding on both Parties.