

ARTICLE 46

ARBITRATION

SECTION 1

- 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 thirty (30) calendar days after of the receipt of the final decision in the grievance procedure by the designated NTEU representative. If no final decision is issued, the arbitration may be invoked no more than forty-five (45) 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, first class 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

- 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.
- C. 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.

SECTION 3

Within twenty-one (21) calendar days 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 twenty-one (21) calendar day period, the grievance will be considered withdrawn and may not 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

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. For national grievances, the hearing will be held alternately on the Employer's premises and the Union'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

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

A verbatim transcript of the arbitration shall be made, (unless mutually waived). The cost of the transcript will be shared equally.

SECTION 7

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

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.

SECTION 9

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

- 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

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.

SECTION 12

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 13

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. 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.

SECTION 14

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.

The Arbitrator's fees and expenses (including travel and per diem), and the transcript costs, shall be shared equally by the Parties.

SECTION 15

- 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.

SECTION 16

- 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

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.