

Abrogating the Abrogation Test: The Federal Labor Relations Authority Erases a 12-Year Mistake

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Federal-sector labor relations isn't rocket science. But sometimes it's a little too much like astrology. The Federal Labor Relations Authority's so-called abrogation test is a case in point.

The Old Rules

Until September 1990, life was simpler. When an arbitrator, in deciding a grievance, interpreted a collective bargaining agreement in a way that interfered with the exercise of statutory management rights, the agency could file exceptions with the Federal Labor Relations Authority. The agency would argue that the award was contrary to law, specifically the "management rights clause" set forth in 5 U.S.C. § 7106(a). The Authority would first determine if the provision, as interpreted by the arbitrator, in fact interfered with one of the "reserved" management rights. If it did interfere with a management right and the provision was intended to constitute an "appropriate arrangement" for employees adversely affected by the exercise of management rights, the Authority would apply its "excessive interference" test to determine whether the provision was legal and enforceable as an "appropriate arrangement."¹

The excessive interference test was the very same test the Authority would have applied had the same language come before it in a negotiability appeal filed after an agency declined to negotiate about a bargaining proposal it alleged to be inconsistent with its management rights. In applying the excessive interference test, the Authority would balance the benefits afforded to employees by the provision against its intrusion on the exercise of management rights. If the provision, as interpreted by the arbitrator, were found to "excessively" interfere with the exercise of management rights, the award would be set aside. This was a little complicated, but it wasn't illogical. And, it gave agencies at least some measure of protection from arbitrators who might otherwise have interpreted collective bargaining agreements to restrict the exercise of management rights in ways never envisioned by the agency representatives who negotiated those agreements.

The Abrogation Test

Then, things took a turn for the worse. In a case involving the U.S. Customs Service and the National Treasury Employees Union, the Authority articulated a

¹ First articulated in *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA 24 (1986).

new test, immediately termed the “abrogation” test.² The Customs Service case concerned an award interpreting the parties’ agreement to permit an employee to refuse an overtime assignment after he had worked 26 of the previous 33 hours just prior to being directed to work additional overtime. In upholding the award (which reversed a disciplinary action based on the refusal to work overtime), the Authority said that it would no longer use the excessive interference test in such cases. Rather, it would now uphold arbitration awards enforcing agreement provisions intended as arrangements for employees adversely affected by the exercise of management rights if those provisions did not “abrogate” the exercise of the management rights at issue. The Authority explained that abrogate meant to **preclude** an agency from exercising a management right (presumably as distinguished from merely placing some limitations on the exercise that right).

The Authority said that it had formulated the new test because of what it believed to be the fundamental difference between the processes of negotiating and enforcing collective bargaining agreements. It indicated that Congress expected arbitrators to enforce Federal-sector collective bargaining agreements and intended the Authority to narrowly review the awards those arbitrators rendered. Consequently, it reasoned, it made sense for the Authority to leave undisturbed arbitral decisions enforcing agreement provisions that were “. . . on their face, within the range of matters bargainable under the Statute.”³ This, the Authority pronounced, would facilitate resolution of duty-to-bargain questions as part of the negotiation process and encourage the final resolution of disputes by arbitration as intended by Congress.

Effects of the Abrogation Test

For the next twelve years, the abrogation test was the law of the land. While it’s hard to say for sure, the new test probably didn’t change the final outcome in very many cases. Although the Authority did not find a single case in which the arbitrator’s decision actually abrogated the exercise of management rights, many of those cases would have been upheld under the excessive interference test as well.⁴ In a few close cases, awards that probably would have been set aside under the old rules were allowed to stand. But, I believe two effects of the abrogation test were unanticipated by the Authority. First, agency managers became less willing to include anything in collective bargaining agreements that

² *Department of the Treasury, U.S. Customs Service and National Treasury Employees Union*, 37 FLRA 309 (1990)

³ This reasoning made it clear, if it had not been already, that the very same language could be found nonnegotiable as in violation of 5 U.S.C. § 7106 if it were the subject of a negotiability appeal, but valid and enforceable if it were incorporated into an agreement and then challenged in exceptions to an arbitration award.

⁴ Ironically, in my view, the Customs Service case in which the Authority first stated the abrogation test would very likely have been decided the same way under the excessive interference test. I believe that it would have been very easy for a reasonable person to conclude that an agreement provision that allowed an employee who had worked 26 straight hours to refuse additional overtime was not an **excessive** interference with the management right to assign work.

might be construed as a limitation on management rights. Having lost the “safety net” of effective Authority review, they didn’t want to risk an arbitrator’s interpretation that would override statutory management rights. I can’t support this view with statistical evidence, but I’ve had enough conversations with practitioners to know that it did affect the approach of some agencies to collective bargaining.

Secondly, the abrogation led to diminished credibility for the Federal Labor Relations Authority and reduced respect for it on the part of many management practitioners. While the Authority has always had its detractors, the abrogation test was greeted with widespread cynicism. In imposing the new test, the Authority decided to use two entirely different legal tests to resolve the identical legal question (i.e., whether agreement language impermissibly interferes with statutory management rights) depending on whether the issue comes up in a negotiability appeal or exceptions to an arbitration award. It cited no statutory basis for this dichotomy, nor does any suggest itself. The principle of deference to arbitrators that the Authority stressed in the Customs Service case, as current Authority Chair Dale Cabaniss was to later point out, did not justify the decision since arbitrators are entitled to no special deference when they are interpreting law, as distinguished from collective bargaining agreements. Rightly or wrongly, many practitioners believed that, to advance its policy objectives, the Authority made a decision it knew was legally unsupportable, secure in the knowledge that its new test would very likely never be subject to judicial review.⁵

The Tide Turns

Then in May 2001, Chair Cabaniss dissented in a case that applied the abrogation test. The majority Authority members relied on the test to uphold an arbitration award enforcing agreement language that prevented the agency from making work assignments with durations of more than three months.⁶ Cabaniss, who had concurred in previous cases applying the test, had hinted earlier that she was about to change her mind. Now, she argued that the abrogation test was based on a flawed interpretation of the law. However, members Wasserman and Pope remained solidly behind the abrogation test and it continued in force for a while longer. But then, in September 2002, almost exactly twelve years after it was issued, the Authority, now with a new composition, overruled the U.S. Customs Service case.⁷ In the new decision, Chair Cabaniss and newly reappointed member Tony Armendariz voted, though for different reasons, to return to the old excessive interference test. Now, as it did before September 1990, the Authority will apply the excessive interference test in reviewing

⁵ 5 U.S.C. § 7123 provides that Federal Labor Relations Authority orders resolving exceptions to arbitration awards are not subject to judicial review unless those orders involve unfair labor practices.

⁶ *Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 171, Council of Prison Locals C-33*, 57 FLRA 158 (2001).

⁷ *Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 171, Council of Prison Locals #33*, 58 FLRA 109 (2002).

arbitration awards alleged to have improperly enforced as appropriate arrangements agreement provisions that interfered with management rights.

In her rationale for the change, Cabaniss made many of the arguments that labor relations practitioners had been advancing ever since the abrogation test was first articulated in 1990. She pointed out that nothing in the Federal Service Labor-Management Relations Statute suggests that a different standard should be used to evaluate agreement language for compliance with 5 U.S.C. § 7106(a) after that language has gone into effect. In particular, she cited Authority precedent to the effect that agreement language which has not been disapproved on agency-head review pursuant to 5 U.S.C. § 7114(c) is nonetheless void and unenforceable if it is inconsistent with § 7106(a). She also argued that what the Authority's analysis in the original abrogation test decision did was to “. . . conflate the distinction between an arbitrator's deference in determining what a contract means (an essence analysis) with the total lack of deference to that same interpretation in terms of whether it conflicts with law (a *de novo* analysis).” Member Armendariz was arguably less clear in agreeing that it was time for the abrogation test to go. The thrust of his argument appears to be that, since the Authority had never found any agreement provision to abrogate the exercise of a management right, the test couldn't be a meaningful way to make the necessary distinctions.⁸

What Now?

I'm not an FLRA insider and I don't know what prompted the Authority to issue the Customs Service case in 1990 or to jettison the abrogation test in 2002. I'd certainly like to have been a fly on the wall during the deliberations. My guess is that factors that weren't included in the published opinions played a part. What I do know is that the abrogation test was a bad decision. It made the Federal Labor Relations Authority, which needs to be perceived as fair and objective, look unprincipled and political. Twelve years is a long time to take to change your mind, but better late than never.

What will the Authority's return to the excessive interference test mean to the Federal labor relations program? It's too early to tell. That bottom-line outcomes will change in very many cases seems unlikely. But, the net effect of those outcomes that do change may be that Federal agencies are more able to carry out their missions effectively and efficiently. And, at least with agency labor relations professionals, discarding the abrogation test is one small step toward restoring the Federal Labor Relations Authority's credibility.

⁸ As with the original abrogation test case, it appears that the Authority's decision to substitute one test for another didn't really alter the outcome of the case in which that decision was made. Member Carol Waller Pope, while arguing that the Authority should retain the abrogation test, nevertheless agreed that the award should be set aside because she believed that the arbitrator's decision abrogated management's rights to assign work and determine internal security practices.

