C # 16650
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NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS with AMERICAN POSTAL WORKERS UNION as Intervenor	GRIEVANT: J. Goode CASE NOS.: D90N-4D-D 95003945 D90N-4D-D 95003961

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Ms. Patricia A. Heath

For the National Association of Letter Carriers: Mr. Keith Secular

For the American Postal Workers Union: Ms. Susan L. Catler

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: September 20, 1996

POST-HEARING BRIEFS: January 2, 1997

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is substantively arbitrable and that there is arbitral jurisdiction to proceed to the merits of the case. The grievant did not waive his right to arbitration under the parties' collective bargaining agreement by appealing the denial of his EEO complaint to the Merit Systems Protection Board. The matter is remanded to a regional arbitrator for a hearing on the merits of the case. It is so ordered and awarded.

Date: April 24, 1997

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
UNITED STATES POSTAL SERVICE)
)
AND)
)
NATIONAL ASSOCIATION OF) ANALYSIS AND AWARD
LETTER CARRIERS)
)
WITH) Carlton J. Snow
) Arbitrator
AMERICAN POSTAL WORKERS UNION)
as Intervenor)
(J. Goode Grievance))
(CASE NOS.: D90N-4D-D 95003945)
D90N-4D-D 95003961))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. A hearing occurred on September 24, 1996 in a conference room of Postal Headquarters located at 955 L'Enfant Plaza, S.W. in Washington, D.C. Ms. Patricia A. Heath, Labor Relations Specialist, represented the United State Postal Service. Mr. Keith Secular of the Cohen, Weiss, & Simon law firm in New York City represented the National Association of Letter Carriers. Ms. Susan L. Catler of the O'Donnell, Schwartz & Anderson law firm in Washington, D.C. represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. A reporter from Diversified Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 123 pages.

The parties stipulated that the issue before the arbitrator involves the matter of substantive arbitrability and that there are no other challenges to the arbitrator's jurisdiction. They agreed that, should be matter be adjudged substantively arbitrable, the dispute will be remanded to a regional arbitrator for a decision on the merits. The arbitrator officially closed the hearing on January 2, 1997 after receipt of all post-hearing briefs in the matter. Influenza delayed preparation of the report.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Is the grievance substantively arbitrable?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 ARBITRATION-GRIEVANCE PROCEDURE

Section 4. Arbitration

A. General Provisions

9. In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such asrbitrator. The arbitrator's determination shall be final and binding.

ARTICLE 16 DISCIPLINE PROCEDURE

Section 9. Veterans' Preference

A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure.

IV. STATEMENT OF FACTS

In this case, the Employer challenged the substantive arbitrability of the dispute before the arbitrator. It is a narrow dispute before the arbitrator, and the question is whether a regional arbitrator had authority to assert subject matter jurisdiction over the underlying dispute in this case. Central to the case is the coalescence of several federal statutes with the parties' collective bargaining agreement,

and their impact on special circumstances of the dispute.

The grievant is a preference eligible, full-time regular letter carrier. He received a proposed Notice of Removal on January 3, 1994. After receiving the Notice, the grievant requested Equal Employment Opportunity counseling and alleged that racial discrimination actually was the case of his removal. On July 8, 1994, the Employer issued a Letter of Decision that upheld the proposed removal. In response, the National Association of Letter Carriers filed two grievances, one addressing the proposed Notice of Removal and the other addressing the Letter of Decision. After a final interview with an EEO Counselor on August 16, 1994, the grievant filed a formal complaint on August 25, 1994. The complaint was accepted for investigation on October 3, 1994.

While the administrative action was moving forward in the system, the grievances proceeded through Step 3; and arbitration was requested in both matters on December 19, 1994. On February 8, 1995, the Equal Employment Opportunities Commission completed its investigation. On May 18, 1995, the administrative agency issued a final decision indicating that neither racial nor reprisal discrimination had been a factor in the grievant's removal. This was an administrative determination made without a hearing. The decision rendered by the administrative agency informed the grievant of his right to appeal the decision to the Merit Systems Protection Board or to file a civil action in district court within 30 days.

On June 16, 1995, the grievant filed an appeal with the Merit Systems Protection Board concerning his EEO complaint. On June 30, 1995, the grievant's case was scheduled to be heard before a regional arbitrator. Subsequently, an administrative law judge for the Merit Systems Protection Board granted the grievant's request to dismiss the appeal without prejudice so that he might pursue his contractual rights in arbitration. The dispute, however, did not reach the regional arbitrator because the Employer challenged the substantive arbitrability of the dispute based on the grievant's appeal to the Merit Systems Protection Board. When the parties were unable to resolve the matter, it proceeded to arbitration at the national level.

V. POSITION OF THE PARTIES

A. The Employer

The Employer contends that the underlying grievances in this case are not arbitrable due to the parties' agreement as codified in Article 16.9 of the National Agreement. The Employer also relies on a Memorandum of Understanding dated March 3, 1988. It is the position of the Employer that, once the grievant appealed his EEO complaint to the Merit Systems Protection Board, he waived any right to proceed through the arbitration system set forth in the parties' collective bargaining agreement. It is the belief of the Employer that

Article 16.9 of the collective bargaining agreement clearly and unequivocally precludes "preference eligible" employes who exercise their right to appeal to the MSPB from seeking additional resolution within the contractually negotiated grievance procedure.

It is also the position of the Employer that circumstances of this case are not such that they create an exception to explicit language in the parties' agreement. Management argues that merely because the present dispute deals with an EEO claim does not justify deviation from the written agreement. According to the Employer, if such an exception was intended to become a part of the parties' agreement, it was the obligation of the Union at the bargaining table to have the exception expressly codified in the parties' agreement. The fact that it has not been expressly incorporated into the National Agreement allegedly proves that no such exception exists in the parties' labor contract.

Moreover, management rejects the Union's allegation that neither Article 16.9 nor the Memorandum of Understanding applies in this case. It is the contention of the Employer that legislation calling for EEO claims of "preference eligible" employes to be appealed through the Merit Systems Protection Board does not establish any additional rights for such employes. Rather, the legislation simply established a process that enables a "preference eligible" employe to exercise rights under the Veterans' Preference Act, according to the Employer. Finally, management alleges that arbitral

authority at the national level supports its position in this dispute and that any other conclusion would produce a harsh result.

B. The National Association of Letter Carriers

The National Association of Letter Carriers contends that the grievant did not waive access to arbitration by appealing the denial of his EEO complaint to the Merit Systems Protection Board. Previous arbitral awards allegedly have interpreted Article 16.9 of the parties' agreement in a way that suggests a strong presumption against waiver. To overcome the presumption against waiver, a party allegedly must clearly and unambiguously establish such a forfeiture. The National Association of Letter Carriers believes that the parties' agreement is far from clear and unambiguous with regard to the issue of EEO appeals to the Merit Systems Protection Board.

It is the contention of the National Association of Letter Carriers that, pursuant to Article 16.9, employes waive their right to arbitration only when appealing to the Merit Systems Protection Board pursuant to the Veterans' Preference Act. According to the Union's theory of the case, the grievant used EEO procedures to assert his right to be free from racial discrimination under Title VII of the Civil Rights Act. Regulations of the Equal Employment Opportunities Commission allegedly require "preference eligible" employes

to use this process, although they are not necessarily filing a claim under the Veterans' Prefernce Act. Hence, there allegedly was no waiver in this case.

The National Association of Letter Carriers also contends that the 1988 Memorandum of Understanding, although negotiated after the procedures for filing "mixed" cases had been established, failed specifically to address the issue of such "mixed case" appeals. Since the parties did not clearly express an intent to adopt the "waiver" procedure in the Memorandum of Understanding and to apply it to the type of dispute before the arbitrator, the Union argues that it does not have such an effect. Moreover, a regional arbitrator specifically addressed the issue and allegedly found in favor of the position of the National Association of Letter Carriers. Finally, the Union contends that three national arbitration decisions on which the Employer relies actually support the position of the Union.

C. The American Postal Workers Union

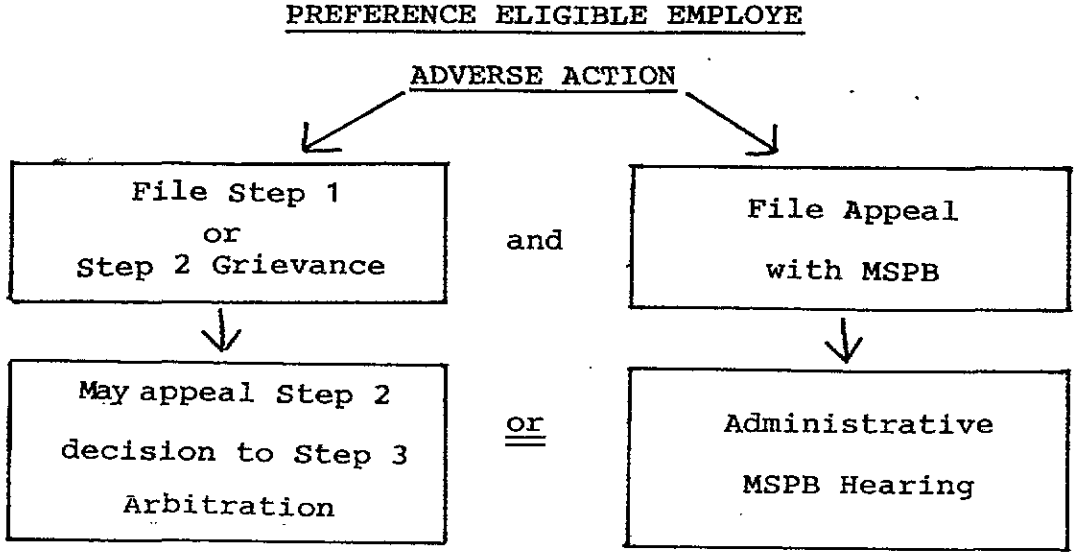
The American Postal Workers Union adopts the position of the National Association of Letter Carriers insofar as it addresses Article 16.9 of the parties' agreement. To the extent, however, that the position of the National Association of Letter Carriers is premised on the 1988 Memorandum of Understanding, the American Postal Workers Union asserts that it is not bound by any obligations, since it was not a party to that agreement.

VI. ANALYSIS

Like Scylla and Charybdis of old, the modern concept of substantive arbitrability guards the gateway to arbitration; and an arbitrator's steering a correct course is as important to the parties. As a consequence of numerous prior decisions on the topic of substantive arbitrability, the parties possess an extensive institutional knowledge of issues involving subject matter jurisdiction. There is little utility in reviewing principles that are all too familiar to them. This case, however, is different in that the matter of substantive arbitrability at issue in the dispute hinges to a large extent on interplay between federally mandated procedures and the parties' negotiated agreement. There is a dearth of guidelines on this complex aspect of substantive arbitrability and little informative authority.

To gain a clearer understanding of the issue, it is useful to contrast "adverse action" procedures. An "adverse action" is defined as: removal, suspension for more than 14 days, reduction in grade, reduction in pay or a furlough of 30 days or less. (See, 5 U.S.C. 7512). Procedures exist for "preference eligible" employes and "nonpreference eligible" employes both in a non-EEO case. A "preference eligible" refers to a military veteran who may have rights under the Veterans' Preference Act.

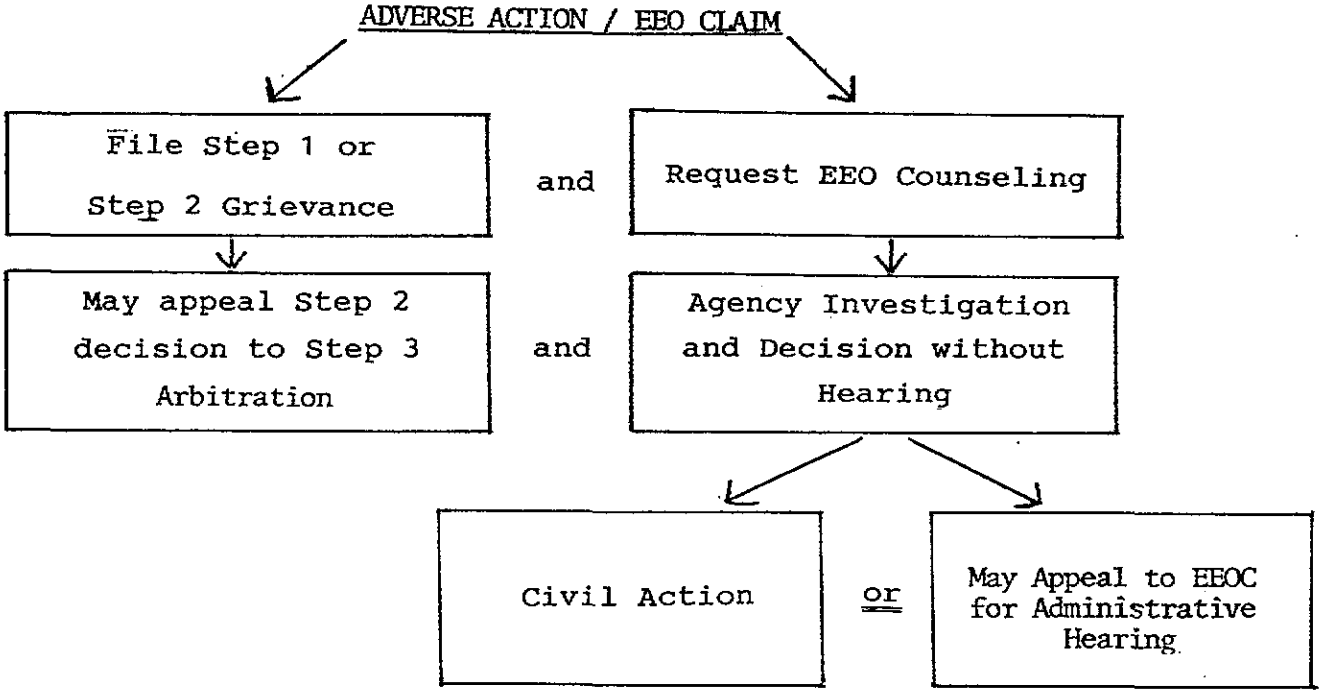
Rights of a "preference eligible" employe in a non-EEO case could be diagrammed as follows:



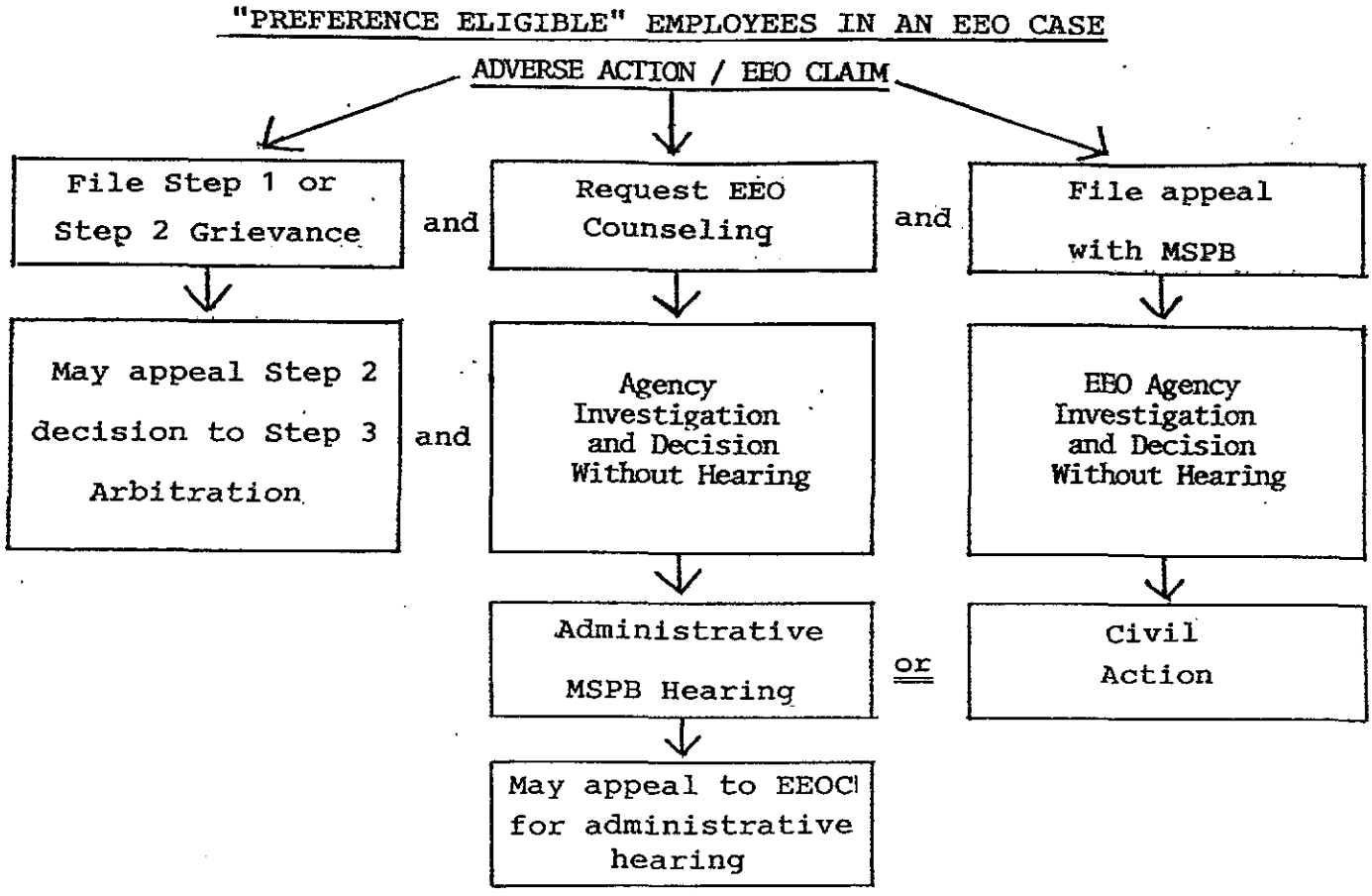
In a non-EEO situation, all employes receive only one chance for a full hearing on the merits concerning an adverse action. The Merit Systems Protection Board gives special consideration to "preference eligible" employes. An appeal, however, through this administrative process means that an employe waives rights to an arbitration hearing. The waiver constitutes a compromise between the special status of "preference eligible" employes and the impracticality of compelling the Employer to defend against two claims each in a different forum arising from the same event. Once, however, a Title VII complaint alleging employment discrimination has been filed, the process undergoes a significant change. This change is not mandated by the parties' agreement but by federal statutes. (See, 29 CFR § 1614 and 5 USC § 7702.)

It is useful to contrast the difference between "nonpreference eligible" employes and "preference eligible" employes who pursue a complaint before the Equal Employment Opportunities Commission The system is designed as follows for a "nonpreference eligible" employe in an EEO case:

"NON-PREFERENCE ELIGIBLE" EMPLOYEE IN AN EEO CASE



An even more complicated system is available to "preference eligible" employes in an EEO case. The design is as follows:



In a "mixed" case (that is, one involving an EEO claim of a "preference eligible" employe), federal regulations require that "preference eligible" employes process any claim through the Merit Systems Protection Board if a "preference eligible" employe is to receive an administrative hearing on the merits of the EEO claim. (See, 5 USC § 7702 and 29 CFR 1614.303). Moreover, if such an individual is to have a claim heard at all by the Equal Employment Opportunities Commission, it is necessary, first, to proceed through the Merit Systems Protection Board. (For examples of mixed cases, see Werners v. Dept. of Navy, 7 MSPR 272, 7 MSPB 171 (1981), or Portlock v. VA, 14 MSPR 359 (1983), 16 MSPR 92 (1983), reaffirmed.) The right to an administrative hearing by the

Equal Employment Opportunities Commission is guaranteed to "preference eligible" employes regardless of their decision to grieve the matter to arbitration. (See, 29 CFR 1614.401.07). The purpose of federal regulations which route EEO claims through the Merit Systems Protection Board is to avoid inconsistent results in simultaneous EEOC and MSPB hearings. Accordingly, EEO claims and MSPB appeals are combined into one process. This results in a mandated MSPB hearing before an EEO claim may reach the Equal Employment Opportunities Commission.

The United States Supreme Court has held that all federal employes are entitled to such protection. (See, Brown v. General Services Administration, 42 U.S. 820, 96 S. Ct. 1961 (1976)). It is clear that "nonpreference eligible" employes with an EEO claim are entitled to an administrative hearing on the matter. Such a choice does not waive an individual's right to gain access to the arbitration procedure in the parties' agreement. Theoretically, it should be no different for "preference eligible" employes.

Since federal legislation mandates that "preference Eligible" employes must appeal EEO claims through the Merit Systems Protection Board, it is not reasonable to conclude that such employes have made a meaningful choice between the Merit Systems Protection Board and a negotiated arbitration system. Such an individual is merely pursuing an EEO claim by federally mandated procedures. This is a statutory process which should not affect an employe's rights under the parties'

collective bargaining agreement, unless the parties have expressly included such procedures in their agreement.

Such a design grants to "preference eligible" employes an opportunity for a full hearing in two forums, and it is conceivable that the Employer might be compelled to defend itself in two cases. Such inefficiency, however, is not unique to "preference eligible" employes. As observed in another arbitration case, "nonpreference eliglble" employes who pursue EEO claims get "two bites of the apple." (See, Case No. S4N-3U-D 13382, p. 7). It would be a highly curious result, if, due to the special status accorded "preference eligible" employes, they received fewer rights within their place of employment. Neither legislation nor labor contract supports such a result.

A regional arbitrator for the parties addressing the same basic problem offered these insightful comments:

> The basis of the prohibition in [Article 16], Section 9 is to prevent two "bites of the apple" and to prevent a burdensome procedure of both contesting the grievance and the appeal by the Employer. However, it must be noted that the removal of the right to arbitrate is limited to the holder of veteran's rights in exercising his rights under the Veteran's Preference Act. Section 5 defines the rights as a right to file under the provisions of the MSPB.
>
> In this case, grievant filed an action under his rights under the Equal Employment Opportunity Act. He ended up with the MSPB, not through exercise of his rights of the Veterans Preference Act, but by procedural requirements of the EEOC. There is no contractual prohibition of arbitration, or waiver of grievance procedure/arbitration rights for EEOC discrimination claims. There is also no contract prohibition of arbitration for filing before the MSPB.

> The only prohibition occurs if he files with the MSPB as an exercise of his Veterans Preference Act rights. It is the Employer's burden to demonstrate that this has occurred. In this it has failed. The evidence demonstrates that the MSPB proceeding resulted from exercise of grievant's rights under the EEOC, not the Veterans Preference Act. To proceed through the EEOC, a protected activity, grievant must first file with the MSPB and appeal a negative response to the EEOC. (See, Exhibit No. 23, pp. 7-8, emphasis added).

While recognizing it as an anomalous result, the Employer argued that this is precisely the design for which the parties bargained. A deeply rooted belief in freedom of contract in the United States honors even imprudent bargains between the parties as long as they are not unconscionable, and it is for the parties to negotiate their own bargain without the intrusion of an arbitrator into the validity of an agreement based on personal beliefs about equity. (See, e.g., Bliss v. Rhodes, 384 N.E.2d 512 (1978); and Black Industries, Inc. v. Bush, 110 F. Supp. 801 (1953)). For an arbitrator to conclude that a bargain has crossed the line and has become one that no person in his or her right senses would make, there must be compelling evidence. The question in this case is not whether the Union agreed to an improvident bargain it now wants to avoid but, rather, what was the intent of the parties in Article 16.9.

A general standard of preference in contract interpretation is the principle that express terms of the parties' agreement provide the best expression of their commitments to each other. (See, Restatement (Second) of Contracts, § 203, comment d, 94 (1981)). Express terms in the parties' National Agreement,

however, failed to establish the anomalous contractual interpretation for which the Employer argued. The relevant contractual provision is Article 16.9, and it states that:

> A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure. (See, Joint Exhibit No. 1, emphasis added).

Article 16.9 of the agreement simply failed to address "mixed" cases or disputes involving EEO claims. Evidence presented at the arbitration hearing established that, at the time the article came into existence in 1971, "mixed case" procedures did not exist. (See, NALC Exhibit Nos. 16 and 18).

Nor did the 1988 Memorandum of Understanding, executed after the parties established the "mixed" case procedure, explore or even mention such disputes. There simply is nothing expressed in the Memorandum of Understanding to indicate that the Memorandum was or was not intended to apply in such circumstances. Evidence that the parties might have intended it to cover such situations came from Mr. Stephen Furgeson, Appeal Review Specialist with the Office of EEO Appeals and Compliance for the Employer. He testified as follows:

> Q Do you recall any discussion involving representatives of both the employer and the union with respect to mixed case complaints?
>
> A I don't recall the discussion in specific detail as far as this was concerned. I know it was an issue that had come up. It was certainly a problem in our minds, because that was one of the issues that was causing it.

Q Well, I -- let's be precise here, because there may or may not have been issues in both our minds. I'm asking you the very narrow question whether you can presently recall any discussion with any representative of the union in which there was explicit reference to mixed case complaints.

A I don't have crystal clear, verbatim recollection. I do have a strong impression that when we had originally discussed it --

MR. SECULAR: Well, Mr. Arbitrator, I would object to any impressions. I'm asking for a recollection as to a specific discussion.

ARBITRATOR SNOW: I think he was about to state a recollection, but it was a more vague recollection. But if that's not what you were about to do, perhaps you ought not. But you may state a recollection.

THE WITNESS: The vague -- recollection that I recall is, when we had these general meetings to set up the process to come up with such an agreement, that this was one of the troubling areas. The mixed case process was part of the troubling areas that we were trying to address.

I didn't have detailed discussion on it. It was just one of the general areas that came up when we discussed it with Larry and Bill Downes and myself. (See, Tr., pp. 63-64, emphasis added).

Beyond a vague recollection unsupported by any hinted of detail, the arbitrator received no evidence that "mixed case" appeals constituted a pervasive problem or a topic of mutual discussion at the time the parties negotiated the relevant Memorandum of Understanding. Such insubstantial evidence failed to support the sort of significant deviation for which management argued. As Justice Cardozo once observed, "The law will be slow to impute a purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture." (See, Jacob and Youngs v. Kent, 230 N.Y. 239 (1921)).

There is no express language in the parties' agreement addressing the issue before the arbitrator. Any conclusion that the parties' agreement forces a waiver of rights to arbitration on the part of "preference eligible" employes must be implied. While implications are "standard stuff in the process of contract reading," evidence is required to establish that the implied term is consistent with the reasonable expectations of the parties. (See, Mittenthal and Block, NAA Proceedings for the 42nd Annual Meeting, 65, 66 (1989)). Some implications in contract interpretation result from well-established default rules. If an ambiguity or a gap has been left in an agreement, an arbitrator might resolve an ensuing dispute based on implications flowing from a default rule.

Arbitrators, for example, have implied a "good faith" term in collective bargaining agreements because there is a well-established principle in the common law of the shop that there is a duty of good faith in the performance of labor contracts. But no such default rule provides a basis for concluding that a waiver occurred in this case, absent documentary or testamentary evidence to the contrary. Testimony from one witness provided relatively insubstantial evidence to support a conclusion that the parties intended the 1988 Memorandum of Understanding to cover the area in dispute. Arbitrators are slow to impute a contractual forfeiture without more substantial evidence.

As the parties know from an earlier decision, there is a

strong arbitral presumption against construing unclear contractual language as setting forth a waiver or forfeiture of rights. (See, Case No. H7C-3D-D 13422, p. 13). Apart from a clear contractual term, an intention of waiver is not easily presumed by arbitrators and needs considerable evidence to support it. The Employer in this case argued that clear and unambiguous language of Article 16.9 in the parties' agreement as well as the 1988 Memorandum of Understanding expressed an unassailable intent of the parties to waive arbitration rights of "preference eligible" employes with EEO claims, if they appealed their right through the Merit Systems Protection Board.

Yet, neither language of Article 16.9 in the parties' agreement nor the 1988 Memorandum of Understanding expressly examined the issue. There was no direct or indirect reference in either document to "mixed case" situations. Testamentary evidence was inconclusive. In view of a need for a clear and unmistakable expression of a waiver in this case, the process of implication ultimately is not helpful. There is no credible basis for implying that language in the parties' agreement precluded the grievant from pursuing the matter in arbitration.

The Employer also argued that prior national arbitration decisions support an implication of a waiver in this case. None of the cases cited by the Employer, however, addressed the issue of waiver when appealing an EEO claim. (See, Case Nos. AB-W-113 69 and NB-N 4980-D; Case No. AC-N-8662-D; Case No. H4C-3W-W 40195; and Case No. H7C-3D-D 13422.) Those

cases examined the timing of waivers and not a need for a clear and unmistakable implication of a waiver. While the cases were enlightening with regard to the scope and purpose of the "Veterans Preference waiver" provision of Article 16, they failed to analyze "mixed case" situations directly or by implication. It should be noted, however, all those cases highlighted the fact that the special status given to "preference eligible" employes was not intended to place them at a disadvantage with regard to their rights under the negotiated agreement. Accordingly, the decisions may not be used in this case to support an interpretation which almost certainly would accomplish such a result.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is substantively arbitrable and that there is arbitral jurisdiction to proceed to the merits of the case. The grievant did not waive his right to arbitration under the parties' collective bargaining agreement by appealing the denial of his EEO complaint to the Merit Systems Protection Board. The matter is remanded to a regional arbitrator for a hearing on the merits of the case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: April 24, 1997