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CORNELIUS V. NUTT AND THE CURRENT STATE OF ARBITRAL REMEDIAL AUTHORITY IN THE FEDERAL SECTOR

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The subject of remedies is one of the most controversial and complex areas in the law of arbitration. Although there is no serious dispute over whether arbitrators can formulate and order remedies, questions frequently arise over the source and scope of arbitral remedial power. Nowhere is this more evident than in federal sector labor arbitration, particularly now that the Supreme Court has decided *Cornelius v. Nutt.¹*

Congress specifically authorized arbitration as a grievance resolution mechanism for federal employees when it enacted the Civil Service Reform Act of 1978 (CSRA).² The CSRA provides that federal sector collective bargaining agreements must contain a grievance procedure that provides for binding arbitration in the event that a settlement of a disputed personnel action is not otherwise reached. The CSRA also established the Merit Systems Protection Board (MSPB), a more formal adjudicative body, which deals with certain employee grievances. Most federal employees, regardless of whether they are union members, can use the MSPB’s statutory procedures in seeking relief from agency actions, provided they meet certain jurisdictional requirements.

Given this dual system of grievance resolution and the fact that certain federal employees can choose between the two forums in some cases, concerns have arisen over a perceived lack of consistency in the resolution of federal employee grievances. In the years immediately following passage of the CSRA, the federal appellate courts struggled with the problem of interforum consistency as they were called upon to review arbitration awards. The issues addressed generally centered on whether arbitrators were bound to apply the same standards, procedures, and precedents in resolving employee grievances that had been utilized by the MSPB. The Supreme Court provided at least a partial answer to these questions in *Cornelius v. Nutt*, where it ruled that an arbitrator had to apply the MSPB’s definition of "harmful error" in determining whether an employee was entitled to relief because of agency errors in processing an adverse action. The Court based this result in part

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upon its view that permitting a different harmful error standard in each forum would lead to inconsistent results and forum shopping. Hence, the Court held that a uniform standard based on the MSPB definition must control in each forum.

An issue raised by *Cornelius v. Nutt* is whether the rationale of the case extends to arbitral remedial authority. In essence, it can now be argued that because of the need to promote consistent results, arbitrators hearing cases that also could have been brought before the MSPB must formulate remedies equivalent to those the MSPB would apply in the same case. This article addresses this argument and offers an alternative view of the effect of *Cornelius v. Nutt* on arbitral remedial authority. Part I discusses both the MSPB and federal sector arbitration and explains the overlapping scheme of grievance resolution. Part II delineates efforts by the appellate courts to deal with problems raised by this dual system and presents a detailed discussion and analysis of *Cornelius v. Nutt*. Part III then gives a brief overview of the respective remedial powers of the MSPB and federal sector arbitrators. Finally, Part IV recognizes the arguments that favor a single standard for developing remedies regardless of whether a dispute is resolved by an arbitrator or by the MSPB, but argues that because of both inherent differences between these forums and the need for arbitral finality, *Cornelius v. Nutt* should not be read so broadly. Accordingly, part IV concludes that certain disparities in the formulation and application of remedies, when otherwise permissible under federal civil service law, should not be grounds for setting aside or modifying an arbitration award.

I. Background: The Civil Service Reform Act and Federal Employee Grievance Resolution

*The Merit Systems Protection Board*

The central purpose of the CSRA was to revise, simplify, and reorganize the vast array of statutes governing the expansive federal civil service system. The earlier rules and procedures were perceived by many as providing a sanctuary for incompetent employees and as making it inordinately difficult to remove civil service employees whose performance contributed little to government operations or efficiency. However, the CSRA was also a response to long-standing concerns that civil service employees should be protected from the arbitrary actions of agency heads whose adverse personnel actions were too often the product of short-term political expediency and not long-term interest in good government. To mediate between these two competing goals, Congress established the MSPB. The MSPB is an independent, three-member agency charged with protecting merit principles in the federal civil service and with adjudicating certain disputes between civil service employees and their agencies.¹ MSPB members are appointed by the President, subject to Senate

¹ See U.S.C. §§ 1201-1205 (1982). The CSRA also established the Office of the Special Counsel. It is responsible for investigating and prosecuting prohibited personnel practices, employment dis-
confirmation, and serve nonrenewable seven-year terms. No more than two members may be from the same political party and a member can only be removed for inefficiency, neglect of duty, or malfeasance of office. 4

Congress limited MSPB jurisdiction to "appealable actions." These fall into five major categories: (1) adverse actions; (2) performance-related actions; (3) within-grade increase denials; (4) reduction-in-force actions; and (5) retirement-related actions. 5 Because the interforum consistency issue is most often raised during adjudication of the first two categories of appealable actions, this article focuses solely upon how adverse actions and performance-related actions are handled by the MSPB and by grievance arbitration and how the respective remedies in these two types of actions are formulated and applied. 6

Section 7512 of the CSRA defines an adverse action as an action by an administrative agency against an employee that consists of removal, suspension for more than fourteen days, reduction in grade, reduction in pay, or furlough of thirty days or less. Chapter 75 actions are normally limited to disciplinary actions for misconduct and are appealable only by "employees." 7 In order to take an adverse action, the agency must give the employee thirty days advance written notice of the charges. 8 This notice must explain the charges and be specific enough to permit an informed reply. 9

An adverse action may be taken by an agency for "such cause as will promote the efficiency of the service." 10 This standard has been interpreted to mean that when an adverse action is based on misconduct, the agency must show a nexus between that conduct and the efficiency of the service. 11 Among those incidents which have been held sufficient to support an adverse action are: lying about qualifications on employment applications, 12 insubordination, 13

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4. Id. §§ 1201, 1202.
6. See infra part II.
7. "Employees" are defined as those individuals appointed into the competitive service who have completed a probationary period, or as preference eligible employees in the excepted service who have completed one year of current and continuous service. All civilian positions in the executive branch are in the competitive service unless otherwise excepted by the Office of Personnel Management. 5 C.F.R. § 1.2 (1982). The first year of appointment in the competitive service is considered probationary and no appeal to the MSPB is available unless the employee is alleging the adverse action was based on discrimination on the basis of marital status or political affiliation. Bates v. Department of the Navy, 6 M.S.P.B. 279 (1981). Preference eligible employees are defined at 5 U.S.C. § 2108 (1982) and generally refer to veterans of the armed forces who were discharged under honorable conditions.

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falsifying government documents, and misusing or misappropriating government property. Although homicide, for example, is usually considered such an "egregious circumstance" that the requisite nexus can be presumed, the authorities are split as to whether particularly serious off-duty conduct, such as child molestation, can also constitute a per se nexus. Agencies are permitted, under Chapter 43 of the CSRA, to remove or demote employees whose performance has been unacceptable. Such actions usually are justified only after periodic appraisals of an employee's job performance and concomitant failure by the employee to perform one or more "critical elements" associated with his position. "Critical elements" are defined as those aspects of an employee's job that are so important that "unacceptable performance on the element would result in unacceptable performance in the position." As with Chapter 75 adverse actions, an employee must be given thirty days written notice before a performance-based action can be taken, and the employee is also entitled to respond to any allegations orally and/or in writing. Additionally, appeal to the MSPB is limited to competitive service employees or preference eligibles who have completed one year of service. Unlike adverse actions, however, the procedures that are required for taking performance-based actions also apply to all excepted service employees.

The standards of review applied by the MSPB when considering adverse actions and performance-related actions differ markedly. Adverse action cases are sustained by the MSPB only when the action was taken for "such cause as will promote the efficiency of the service" and "is supported by a preponderance of the evidence." Thus, the MSPB will uphold an agency decision under Chapter 75 only when the agency has shown by a preponderance of the evidence that the employee committed the misdeeds with which he is charged and that imposition of the discipline will promote the efficiency of the service. A more deferential standard of review, however, applies to Chapter 43 actions as a result of Congress' desire that the difficulties of proof associated with Chapter 75 cases not carry over to cases brought pursuant to Chapter 43. Hence, agency action under the latter provision is upheld by the MSPB if it is supported on the record by substantial evidence.

19. Id. § 4301(3).
22. Id. § 4303(c).
23. Id. § 4301(2) defines an "employee" as "an individual employed in or under an agency."
24. Id. §§ 7502(a), 7701(c)(1)(B).
25. See infra notes 127-128 and accompanying text.

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Arbitration Under the CSRA

In 1962 federal employees were officially granted organizational and bargaining rights by Executive Order No. 10,988. These rights were extended by Executive Order No. 11,491 in 1969, which made changes to coordinate, strengthen, and clarify the program. Among other things, Executive Order No. 11,491 required that any collective bargaining agreement include a negotiated grievance procedure as the exclusive grievance procedure for employees governed by a collective bargaining agreement. The order did not require arbitration as part of the procedure. However, if the parties chose to arbitrate grievances, conventional nonadvisory arbitration was required. Arbitrators were given the authority to conclusively resolve disputes over collective bargaining agreements, but the parties could file exceptions to the arbitration decision with the Federal Labor Relations Council. The opportunity for appeal of an arbitrator's decision to the Council, various delays associated with the Executive Order arbitration scheme, and the intrusion of outside agencies (e.g., the Comptroller General) challenging the legality of arbitral awards resulted in many complaints about the system and led many to conclude that reform of these procedures was needed. Accordingly, improving federal sector arbitration was a prime concern of the drafters of the CSRA.

Continuing what it intended to be a trend toward enhancing meaningful bargaining rights for federal employees, Congress included in the CSRA the first codification of arbitration as a dispute resolution mechanism for federal employees. Section 7121 of the Act required that all collective bargaining agreements in the federal sector provide for binding arbitration as part of the negotiated grievance procedure. The procedure was to be "fair and simple" and "provide for expeditious processing" of grievances. As in private sector arbitration, a core function of federal sector arbitration procedures is to assure compliance with collective bargaining agreements. Federal sector arbitration, however, has a second key function—to assure compliance with controlling laws, rules, and regulations covering federal employment by agency employers. According to one noted commentator, this dual role of federal sector arbitration was a principal factor in Congress' decision:

(1) to specify that each collective agreement in the federal sector "shall" provide a grievance procedure with arbitration, (2) to specify that all grievances "shall" be subject to the grievance and arbitration procedures except those specifically excluded by the col-


29. 5 U.S.C. § 7121(a), (b) (1982).
lective agreement or statute; and (3) to define the term "grievance" very broadly. 30

Generally speaking, all grievances are automatically covered by the grievance procedure unless excluded by agreement of the parties or by statute. 31 A grievance, in turn, is broadly defined as any complaint:

(A) by any employee concerning any matter relating to the employment of the employee;
(B) by any labor organization concerning any matter relating to the employment of any employee; or
(C) by any employee, labor organization, or agency concerning—
   (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
   (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. 32

Federal sector grievances can be divided into four different types of disputes. First, there are "pure grievances." Pure grievances do not involve reduction or removal for unacceptable performance, removal or suspension for more than fourteen days, reduction in grade or pay, furlough of thirty days or more, or a complaint of discrimination. In these cases, employees must resort either to a collectively negotiated grievance procedure or to the agency's own grievance procedure. Second, there are "pure discrimination" cases. These involve allegations of discrimination that do not raise matters appealable to the MSPB. Instead, available forums include grievance arbitration, Equal Employment Opportunity Commission procedures, the federal district courts, and sequential combinations of the foregoing. Third, there are "mixed cases." These involve allegations of unlawful discrimination together with another complaint, perhaps one involving an adverse action under Chapter 75. The forums for mixed cases are the same as those covering pure discrimination cases, except that a grieving employee may also elect to appeal directly to the MSPB and from there to federal district court. 33

Finally, where the collective bargaining agreement does not exclude appealable actions under Chapters 43 or 75 from its grievance system, bargaining unit members may use either the negotiated grievance procedure or the MSPB statutory appeal procedure in cases involving adverse actions or performance-related actions. 34 When an employee has a choice of procedures, however, the forum where he files first is the forum where he must remain. 35

32. Id. § 7103(a)(9).
34. 5 U.S.C. § 7121(e) (1982).
35. Id. § 7121(d).
II. The Problem of Alternative Forums

The Early Cases

Because of the availability to some employees of different, mutually exclusive forums for the appeal of adverse and performance-based actions taken against them, disputes arose concerning whether, and to what extent, federal arbitrators and the MSPB were required to apply the same standards in resolving cases. To promote consistency and discourage forum shopping, Congress provided that an employee’s choice of procedural routes should not affect the applicable standard of review applied in either forum. Thus, section 7121(e)(2) of the CSRA requires that arbitrators apply the same evidentiary standards as the MSPB would in its review of agency actions. Similarly, certain arbitral decisions are subject to judicial review “in the same manner and under the same conditions as if the matter had been decided by the Board [MSPB].”36 Despite this statutory guidance, however, important questions involving the relationship between standards applied in the respective forums continued to trouble courts during the initial consideration of these cases.

In Devine v. White,37 for example, the United States District Court for the District of Columbia reviewed an arbitrator’s award in an adverse action case. The employee, Noe Lopez, was an agent for the Immigration and Naturalization Service (INS). Lopez was involved in an accident while driving a government vehicle “for purposes other than official business.”38 More than four months after the accident, the INS advised Lopez that it intended to suspend him for thirty days without pay. In addition, the agency advised him that he could either appeal to the MSPB or ask his union to pursue a grievance through the arbitration mechanism established by the applicable collective bargaining agreement. Lopez chose the latter.

At the arbitration hearing, the arbitrator found that Lopez had violated federal law and INS rules but ordered the agency to reverse the suspension, citing the lack of either timely investigation or timely administration of discipline, both violations of procedures set forth in the collective bargaining agreement.39 The Office of Personnel Management (OPM) entered the case at this point and petitioned the arbitrator to reconsider his decision.40 The arbitrator rejected the petition because it contained materials not introduced at the earlier hearing and because he had no authority to reconsider after rendering a final decision. OPM then went to the court of appeals, arguing that the arbitrator had incorrectly applied the MSPB’s harmful error stan-

36. Id. § 7121(f).
37. 697 F.2d 421 (D.C. Cir. 1983).
38. Id. at 426 (quoting Arbitrator’s Decision 6, reprinted in Joint Appendix 46, 52).
39. Id.
40. Under sections 7703(d) and 7121(f) of the CSRA, the Director of OPM may petition for review of an arbitrator’s decision if it will have a substantial impact on civil service laws, rules, or regulations. The burden of showing this impact is on the Director. Devine v. Sutermeister, 724 F.2d 1558, 1562 (Fed. Cir. 1983).
OPM contended that an agency decision supported by the preponderance of the evidence could be reversed on procedural grounds (i.e., lack of either timely investigation or timely administration of discipline) only if the employee demonstrated that the defect constituted harmful error. Under the MSPB definition of this term, a harmful error is one that "might have caused the agency to reach a conclusion different than the one reached." In addition, under MSPB case law, the burden of proving the defense of harmful error rests on the employee. Since no previous case had held that the MSPB's harmful error standard applied in arbitral proceedings, the court found it necessary to examine the history of the CSRA for guidance.

After observing that "the Act [CSRA] is fraught with ambiguities, peppered with provisions that appear at cross purposes, and often lacking any useful legislative history," Judge Edwards nevertheless was able to discern several guiding principles from the statute's provisions. He noted that under the standard of review established by the CSRA, the Board must uphold an agency decision "supported by a preponderance of the evidence," unless the employee shows, among other things, "harmful error in the application of the agency's procedures in arriving at such decision." Although he noted the plausibility of an argument that the harmful error standard did not apply to arbitration, Judge Edwards rejected this reading of the statute for two reasons. First, he concluded that the harmful error standard had to be incorporated into arbitral proceedings because section 7701(c)(1) of the Act (involving the burden of proof in challenges to agency actions) applies under its own terms to section 7701(c)(2) (containing the harmful error standard). Therefore, the fact that section 7121(e)(2) only provides that an arbitrator is governed by section 7701(c)(1) does not exempt arbitration from the harmful error standard set forth in section 7701(c)(2). Second, Judge Edwards pointed out that Congress intended to promote consistency and to discourage forum shopping in the resolution of these cases. Allowing arbitrators to reverse an adverse action for procedural reasons without finding harmful error,
something the MSPB refrained from doing in its cases, would frustrate this congressional intent.\textsuperscript{49}

Even within these constraints, however, Judge Edwards suggested a broad view of both arbitral authority and the scope of a collective bargaining agreement:

[W]here the parties to a collective bargaining agreement negotiate concerning the timing of disciplinary actions or other matters and impose specific procedural requirements in their agreement, it may be possible to find "harmful error" even absent evidence that the violation led to a loss of evidence or other measurable effects. We believe, in other words, that a violation of a clear provision of a collective bargaining agreement could constitute "harmful error" under the theory that some bargained-for procedural rights are, by definition, substantial rights of an employee.

\ldots

[T]he inclusion of a valuable procedural safeguard, such as a requirement that discipline be administered in a timely manner, can constitute persuasive evidence that the employees attach considerable importance to it.\textsuperscript{50}

Accordingly, the court remanded the case to the arbitrator for reconsideration based on the harmful error rule. The court specifically directed the arbitrator to determine

(1) whether the error affected the outcome of the disciplinary proceeding, or (2) whether the collective bargaining agreement between the INS and the Union established the timely notice requirement as one of such importance to the employees that a violation should be considered harmful even in the absence of a showing that the delay affected the outcome of the disciplinary proceeding.\textsuperscript{51}

On remand, the arbitrator indicated that the delay did not affect the outcome of the disciplinary proceedings. Regarding the second issue, however, he found that inclusion of the timely notice requirement in the collective bargaining agreement was of such importance that the delay had to be considered harmful. On that basis, he adhered to his original decision to overturn the discipline.\textsuperscript{52}

In \textit{Local 2578, American Federation of Government Employees v. General Services Administration},\textsuperscript{53} the Court of Appeals for the District of Columbia

\textsuperscript{49} 697 F.2d at 441.

\textsuperscript{50} Id. at 443. Such an analysis would not be appropriate in the aftermath of \textit{Cornelius v. Nutt}, 472 U.S. 648 (1985). See \textit{infra} notes 88-106 and accompanying text.

\textsuperscript{51} 697 F.2d at 443-44.

\textsuperscript{52} See White, \textit{supra} note 33, for a discussion of the subsequent history of this case. Mr. White was the arbitrator in \textit{Devine v. White}.

\textsuperscript{53} 711 F.2d 261 (D.C. Cir. 1983).
Circuit again confronted the problem. The court of appeals reviewed an arbitrator's decision involving the discharge of an employee accused of stealing government property. The employee, Joseph T. Moore, had told a supervisor that on several occasions he had helped a fellow National Archives employee steal money from mail sent to the National Archives. In so confessing, Moore had, in the court's words, "act[ed] on his own initiative, and pursuant to conscience." Moore subsequently pled guilty in a criminal proceeding to theft of government property and, after explaining that he never took any money himself, was sentenced to one year's probation. Although it had initially taken no disciplinary action, the General Services Administration (GSA) notified Moore on the day he was sentenced that it intended to fire him because of his offense. Despite the presence of strong mitigating evidence and a plea from Moore's union steward that the penalty be reduced to a reprimand, the GSA adhered to its decision to discharge Moore.

The union initiated grievance proceedings on Moore's behalf, which ultimately resulted in arbitration. The arbitrator concluded that theft normally constitutes just cause for discharge and that the severity of the penalty was within the discretion of the agency. The arbitrator noted, however, that the GSA apparently did not consider the request by Moore's probation officer that Moore be allowed to keep his job. Accordingly, the arbitrator ordered the GSA to reconsider its decision, adding that if the GSA adhered to its decision to dismiss, he would not find that it had violated the collective bargaining agreement. After reconsidering, the GSA adhered to its decision; and the union petitioned for review in the court of appeals.

On appeal, the union argued that the arbitrator erred in deferring to the GSA's decision concerning the severity of the penalty. The union argued that since arbitral and MSPB decisions are governed by the same standards and the MSPB can independently assess the severity of penalties imposed by agencies, arbitrators must necessarily possess the same power. In response, the court stated that "nothing in the CSRA requires that arbitration and MSPB actions always adhere to the same standards and procedures or produce the same results in like cases." Nevertheless, the court agreed with the union that the arbitrator's failure to assess independently the severity of the penalty required remand for such consideration.

The court cited Devine v. White for the proposition that judicial review

54. Id. at 252.
55. Id.
56. Id. at 262-63. Apparently, Moore had cooperated fully with postal investigators. In addition, his parole officer requested that Moore be allowed to keep his job.
57. Id. at 263.
58. Id.
60. 711 F.2d at 263.
61. Id. at 264.
62. Id.
of arbitral decisions should be limited. Nevertheless, casting notions of deference aside and stating that the principal problem in the case was not the arbitrator's decision per se "but the manner in which it was reached," the court concluded that the arbitrator had abdicated his responsibility to fully consider the grievance. Noting congressional intent that there be some symmetry between arbitration and MSPB proceedings "in order 'to promote consistency and to discourage forum shopping,'" the court held that the inequity of having an arbitrator with less authority to review penalties than that possessed by the MSPB was self-evident since employees would probably be more inclined to choose the forum that had the greatest power to reduce the penalty. The court drew a parallel with private-sector arbitration, noting that in the private sector the power of the arbitrator to consider the appropriateness of an employer's penalty was "[s]o central to [his] authority" that even if a collective bargaining agreement failed to authorize mitigation, the power to decide just cause was inherent in arbitral authority.

Thus, both Devine v. White and AFGE Local 2578 recognized the need for consistency between forums when resolving standard of review issues. Local 2578 went beyond the procedural aspects of applying harmful error, however, and stated that forum consistency considerations were also important to the issue of mitigation. Nevertheless, the court tempered this result by positing that arbitrators were not necessarily bound by MSPB results in similar cases. Apparently, forum consistency at this point did not equate with firm adherence to MSPB precedent.

The problem of relating arbitral authority to that of the MSPB arose again in Devine v. Sutermeister, but this time the issue arose in the newly established Court of Appeals for the Federal Circuit. In Sutermeister the court was asked to consider whether a federal sector arbitrator is bound to follow MSPB precedents in resolving grievances filed under negotiated procedures. The case involved the Custom Service's dismissal of an employee who had withheld from his employment application information concerning his prior arrest and conviction record. The dispute was submitted to arbitration. The arbitrator found that the employee had deliberately failed to list various motor vehicle offenses and a conviction for carrying a concealed weapon. The arbitrator found, however, that the agency had been dilatory in starting its investigation of the matter and that the employee's removal would not promote the effi-

63. Id. at 264-65 (citing Devine v. White, 697 F.2d 421, 440 (D.C. Cir. 1983)). See infra notes 168-178 for a general discussion of judicial deference to arbitration in the federal sector.
64. 711 F.2d at 265.
65. Id. (quoting Devine v. White, 697 F.2d 421, 428 (D.C. Cir. 1983)).
66. The court concluded that the MSPB's authority to weigh the severity of penalties in adverse action cases was firmly established in Douglas v. Veteran's Admin., 5 M.S.P.B. 313 (1981).
711 F.2d at 265.
67. Id. at 266.
68. 724 F.2d 1558 (Fed. Cir. 1983).
ciency of the service. The arbitrator then reduced the penalty to a thirty-day suspension, with reinstatement and back pay. OPM petitioned for review and asked the court to reverse the arbitrator’s award, arguing that he erred in not applying the standards set forth in Douglas v. Veteran’s Administra-

tion for mitigation of penalties.

The court declined to address the general principle of arbitral adherence to MSPB precedent, however, stating:

We need not decide whether an arbitrator is always or never bound by MSPB precedents. It will suffice to say that the arbitrator here did not err by not specifically addressing himself to the Douglas opinion, as we find no conflict between the arbitrator’s opinion and the MSPB’s decision in Douglas.

Nevertheless, the court stated in dicta that there was nothing in the legislative history of the CSRA to support the proposition that an arbitrator is bound by MSPB precedents. The court distinguished Devine v. White and its own earlier opinion, Devine v. Nutt, as having dealt only with the "statutory standard of review." Thus, the Federal Circuit in Sutermeister agreed with the D.C. Circuit’s opinion in Local 2578 that the CSRA does not require consistent arbitral adherence to MSPB standards or procedures and that arbitration need not produce the same result as would the MSPB in the same case.

The line of cases continued into the following year with two additional Federal Circuit opinions, Devine v. Brisco and Devine v. National Treasury Employees Union. In Brisco the arbitrator had reduced a sixty-day suspension to thirty days, finding that the agency had unreasonably delayed in imposing discipline. In doing so the arbitrator rejected the agency’s argument that the delay was not harmful error. The arbitrator reasoned that since the collective bargaining agreement was silent with respect to the harmful error standard, this amounted to a waiver of the statutory standard of review. The court of appeals reversed, holding that it was error for the arbitrator to mitigate a penalty without requiring the union and the grievant to show that agency procedural errors were prejudicial to either the grievant’s or the

70. 724 F.2d at 1561.
71. See 5 M.S.P.B. 313 (1981). These standards number twelve in all and include, inter alia, (1) the nature and seriousness of the offense; (2) the employee’s job level; (3) any prior discipline; (4) the employee’s work record; and (5) consistency of the penalty with those imposed upon other employees for the same or similar offenses. Id. at 329-32.
72. 724 F.2d at 1565.
73. See supra notes 37-52 and accompanying text.
75. 724 F.2d at 1565 (emphasis therein).
76. 733 F.2d 867 (Fed. Cir. 1984).
77. 737 F.2d 1031 (Fed. Cir. 1984).
78. 733 F.2d at 869-70.
union's rights. The court concluded that it was irrelevant that the agreement was silent as to the harmful error standard since the statute requires such a showing. Moreover, the court refused to permit agencies to waive their rights by agreeing to a less rigorous standard of proof.79

In NTEU the arbitrator had applied the MSPB's Douglas factors and reduced the removal of an employee who had falsified her performance statistics to an eleven-month suspension. OPM intervened and argued that once charges are shown to be supported by a preponderance of the evidence and a nexus exists between the charges and the efficiency of the service, the arbitrator must uphold an agency penalty unless it can be shown to be arbitrary, capricious, unreasonable, or an abuse of discretion. OPM further asserted that this was the standard used by the MSPB and, to the extent Sutermeister allowed arbitrators to use a different standard, Sutermeister should be overruled.80 The Federal Circuit disagreed, stating that discipline cases, because of their disparate fact patterns, are generally unsuited for appellate review. The court concluded that in these cases arbitrators are not bound by MSPB precedent. In fact, the court cited Sutermeister with approval and again stated that whether the MSPB would have reached a different result is irrelevant. Mitigation, in the court's view, was a fact-sensitive judgment that should seldom be disturbed on appeal.81

This was an interesting result, particularly when compared to Devine v. Pastore,82 a D.C. Circuit case decided less than three months earlier. In Pastore the court was asked to review an arbitrator's reduction of an employee's removal to a thirty-one day suspension. The arbitrator apparently based his decision to reduce the penalty on the lack of any evidence of progressive discipline in the case and the absence of a comparable penalty in cases involving similar employee offenses.83 The court set aside the arbitrator's decision, however, holding that although an arbitrator need not apply all of the factors listed in the MSPB's Douglas decision, he must follow Douglas's judicially approved standard of review. In the D.C. Circuit's view, the arbitrator's decision operated as a substitution of the arbitrator's judgment of the appropriate penalty for that of the agency, thereby failing to accord the agency adequate discretion in disciplining employees.

The court emphasized the need for consistent results, noting that one area needing uniformity was the standard of review applied in each forum. Although the arbitrator need not undertake a detailed review of MSPB case law, the arbitrator does have to apply the MSPB standard of review. Since the arbitrator had failed to apply the Douglas standard, the case was remanded for further consideration not inconsistent with that decision.84 In addition, the

79. Id. at 872-73.
80. 737 F.2d at 1032-33.
81. Id. at 1033.
82. 732 F.2d 213 (D.C. Cir. 1984).
83. Id. at 214-15.
84. Id. at 217-18.
court stated that if on reconsideration the arbitrator still found the agency discipline unsupportable, he was not to select a discipline he personally believed was appropriate. Rather, he should merely reduce the penalty to a level “within the parameters of reasonableness”; or, in other words, he should reduce it only so much as necessary to bring it to a level that could be sustained."

As the foregoing line of cases demonstrate, the federal appellate courts have had several opportunities to address the relationship between arbitral and MSPB resolution of cases where the grievant had a choice of forum. As demonstrated by Devine v. White and Local 2578, consistency between the two procedures is needed in order to prevent forum shopping. Whether this policy goal extends beyond requiring application of the same standard of review is questionable, however, in light of the views expressed in Sutermeister and NTEU that arbitrators are not bound by MSPB precedents when considering the mitigation of penalties in adverse action cases.

Adding to this confusion is Pastore, where the D.C. Circuit held that an arbitrator reviewing an agency disciplinary action may not substitute his judgment for that of the agency and that an inappropriate penalty could only be reduced to a level that could be sustained. Although the Federal Circuit now has the exclusive jurisdiction over the initial review of these cases, Pastore's well-reasoned assessment of how MSPB standards of review can effect an arbitrator's substantive power to mitigate a penalty is still persuasive."

In any event, the stage was set for Cornelius v. Nutt, where the Supreme Court had its first opportunity to address the interrelationship between the standards applied by federal sector arbitrators and those applied by the Merit Systems Protection Board.

**Cornelius v. Nutt**

An understanding of the factual and procedural background is necessary to fully grasp the scope of the Court's holding in Cornelius v. Nutt. Cornelius v. Nutt involved two employees of the General Services Administration, Thomas Rogers and Robert Wilson. Both were officers in the Federal Protective Service (FPS). Rogers' job was to patrol federal property near Denver, Colorado. Wilson worked as a dispatcher at the FPS command center. On January 7, 1982, Rogers was on patrol in a government car when he received a request from his shift supervisor to go to the supervisor's home, pick up

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85. *Id.* at 219. This was the guideline set forth in Douglas v. Veteran's Admin., 5 M.S.P.B. 313 (1981), and was apparently the one to be used at arbitration.

86. As a result, Pastore's precedential value is somewhat diminished.

87. In this regard, the D.C. Circuit in Pastore seemed to recognize that its view of arbitral adherence to MSPB case-law was at odds with that of the Federal Circuit. The former cited Sutermeister's statement that arbitrators are not bound by MSPB precedents, characterizing it as "not entirely clear" and as "dictum in any event." More generous toward its own decisions, calling them "entirely clear" and "correct," the D.C. Circuit had no difficulty in linking arbitral authority to that of the MSPB. 732 F.2d at 216-17 n.4.

some beer, and deliver it to the supervisor at the command center. Rogers complied with the request and delivered the beer to his supervisor, which the latter drank, leaving the empty cans scattered around the command center. The following day the supervisor became concerned that the presence of the empty beer cans at the center might lead someone to conclude that he had been drinking on duty. To cover his tracks, he told Wilson to alter the tape from the previous day and to provide a false explanation for the presence of the cans. Wilson complied, but eventually an FPS investigator noted irregularities on the tape.\textsuperscript{89}

The GSA's Inspector General conducted an investigation, and Rogers and Wilson were both brought to a local police station where they were questioned about their involvement in the incident. Neither was told during the questioning that he was entitled to have a union representative present. A month later, they were interviewed again. This time, investigating agents asked them to sign affidavits made from the agents' notes taken at the earlier interview. Both men signed the affidavits, admitting their involvement in the earlier wrongdoing. Once again, neither was advised that he could have a union representative present.\textsuperscript{90}

In early April of 1982, the GSA informed Wilson and Rogers that they would be removed from the federal service. Wilson was to be removed because of his falsification of records and his attempt to conceal activities of record; and Rogers, for falsification of records, failure to report irregularities, and use of a government vehicle for a nonofficial purpose. Both employees challenged their removals through grievance arbitration procedures established under a collective bargaining agreement between their union, the American Federation of Government Employees, and the GSA. At arbitration, the arbitrator found that Rogers and Wilson had committed the acts alleged and that such conduct normally would justify removal. The arbitrator, however, also found that the GSA had committed two procedural errors: it had failed to give the employees an opportunity for union representation during the questioning and it permitted an unreasonable period of time to pass before initiating action. Although the arbitrator concluded that neither error had prejudiced the employees personally, he still reduced their penalties from removal to brief disciplinary suspensions without pay, citing "the Agency's pervasive failure to comply with . . . the [collective bargaining] agreement."\textsuperscript{91}

The Director of OPM sought review of this decision in the Federal Circuit Court of Appeals, arguing that the arbitrator had misapplied the CSRA's harmful error rule. The court of appeals rejected this contention and affirmed the arbitrator's decision in substantial part.\textsuperscript{92} The court upheld the now familiar

\textsuperscript{89} Id. at 653.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 654-55.

\textsuperscript{92} Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983). The court found the arbitrator's penalty with respect to Rogers to be contrary to law (citing 31 U.S.C § 1349(b) (1982) which requires one month's suspension for the unauthorized use of a government vehicle) and modified his two-week suspension to a one-month suspension without pay. Id. at 1055-56.
principle that arbitrators should take account of the harmful error rule in deciding whether a grievant has been personally prejudiced. The court noted and apparently accepted the arbitrator's conclusion that the employees had suffered no prejudice because of agency errors. Nevertheless, the court held that violations of certain negotiated procedural rights "could fairly be said to be tantamount to 'harmful error' to the Union" and may thus provide a basis for setting aside or mitigating a disciplinary action against an employee. The court reasoned that the union was a major party to the collective bargaining agreement and that its interests, standing apart from any individual claim of prejudicial error, must be protected in federal sector arbitration.94

The Supreme Court reversed. Writing for the majority, Justice Blackmun outlined the effect of the harmful error rule as applied in cases where the employee had a choice between grievance arbitration and an MSPB hearing. He noted that the CSRA did not define "harmful error" and that the legislative history covering the concept was inconclusive. Nevertheless, he observed that the CSRA allows the MSPB to promulgate "regulations to carry out the purposes of . . . [section 7701],"95 and accordingly the MSPB had devised a definition of harmful error.

Under the MSPB's definition, harmful error by an agency included not only violations of procedures required by statute, rule, or regulation but also agency failure to comply with procedures established by the applicable collective bargaining agreement.96 The important point in this definition was that the MSPB would not overturn an agency disciplinary decision unless the procedural violation "might have affected the result of the agency's decision to take disciplinary action against the individual employee."97

The employees and the union did not dispute the Court's interpretation, but argued that arbitration was different from MSPB proceedings. They argued that in arbitration a union was a "major party" and, as such, an arbitrator should take into account the union's interest in having the terms of its collective bargaining agreement honored as well as considering the rights of the individual employee. Citing both the legislative history of the CSRA and the effect of the MSPB definition of harmful error, the Court rejected these contentions, stating: "Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing any agency disciplinary decision."98

Furthermore, the Senate Report explaining section 7701 states that when an employee elects to pursue grievance arbitration rather than the statutory appeals procedures,99 the arbitrator must apply the same standards that would be applied by "an administrative law judge or an appeals officer" if the case

93. Id. at 1055.
94. Id. at 1054.
95. 472 U.S. at 657-58 (citing 5 U.S.C. § 7701(j) (1982)).
96. Id. at 659.
97. Id.
98. Id. at 660.
99. Section 7701 was originally contained in only the Senate version of the CSRA.
was decided by the MSPB. The Court noted that the House-Senate Conference Committee retained this provision in the Senate bill in order to promote consistency and discourage forum shopping.

In short, the Court rejected the respondents' interpretation of harmful error in the arbitral forum, summing up its position as follows:

Under [the grievant’s] interpretation . . . an employee who elects to use the grievance and arbitration procedures may obtain reversal merely by showing that significant violation of the collective-bargaining agreement, harmful to the union, occurred. In the present case, if the disciplined employees had elected to appeal to the Board, their discharges would have been sustained by the Board under its interpretation of the harmful error rule. . . . If respondents' interpretation of the harmful-error rule as applied in [arbitration] were to be sustained, an employee with a claim that the agency violated procedures guaranteed by the collective-bargaining agreement would tend to select the forum—the grievance and arbitration procedures—that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid.

The Court's decision did not, however, rest solely upon deference to the MSPB's definition of harmful error and congressional intent that there be consistent results between forums. A more central goal of the CSRA, the need to maintain effective and efficient government by identifying and removing substandard federal employees, also entered into the Court's decision. In the Court's view, there was no question that the employees involved in the case deserved to be removed from the federal service. The only question was whether "nonprejudicial procedural mistakes," those mistakes which "cast [no] doubt upon the reliability of the agency's factfinding or decision," should be weighed so heavily that they frustrate the CSRA's goal of effective and efficient government. The Court declined to interpret the statute in such a manner, implicitly concluding that such error would not nullify an otherwise justified personnel action.

The Court was similarly unimpressed with the contention that arbitral consideration of nonprejudicial procedural error was needed to vindicate the federal sector collective bargaining process, characterizing this concern as "overstated." It reasoned that unions had their own remedy; specifically, unions have the power to file a grievance on their own behalf, and an arbitrator can handle procedural violations by ordering the agency to "cease and desist."

101. Id.
102. Id. at 661-62.
103. Id. at 663.
104. Id.
105. Id.
In addition, where "clear and patent" breaches of the collective bargaining agreement have occurred, the union can file an unfair labor practice before the Federal Labor Relations Authority.\textsuperscript{106}

Thus, in \textit{Cornelius v. Nutt} the Supreme Court answered the question of how an arbitrator should apply the CSRA's harmful error standard in adverse action cases. Henceforth, the MSPB's definition must be applied at arbitration. Although the Court's analysis was similar to that of Judge Edwards in \textit{Devine v. White}, the Court declined to adopt \textit{White}'s holding that arbitrators possess the power to remedy procedural violations by reducing the disciplinary sanctions thereby imposed. Therefore, until the MSPB revises its harmful error definition or Congress amends the CSRA, arbitrators will be unable to remedy nonprejudicial agency procedural errors by mitigating agency actions taken against the grieving employee.

Despite having settled this issue, \textit{Cornelius v. Nutt} raises other issues that may continue to confuse the scope of arbitral authority in federal sector cases. Specifically, given an established rule that arbitrators must adhere to MSPB standards of review in deciding cases, does it follow that an arbitrator must also apply the same remedy that the MSPB would have applied had the case gone through statutory appeal procedures? Earlier cases discussing arbitral adherence to MSPB precedent certainly raised this issue, but \textit{Cornelius v. Nutt} gave no definitive answer. Before addressing this question, however, a brief overview of the remedial authority vested in these respective forums is appropriate.

\textbf{III. Remedies Under the CSRA}

\textit{MSPB Remedial Powers}

Under the provisions of section 1205(a) of the CSRA, the MSPB has broad powers to remedy improper personnel actions taken by federal agencies. Section 1205(a) states that the MSPB can order an agency to take any action necessary to give effect to MSPB decisions. \textit{Meier v. Department of Interior} was one of the Board's earliest assertions of this authority.\textsuperscript{107} In \textit{Meier} the Board stated that an improper personnel action would be considered void and that the most effective way to ensure that the ill effects of the action are undone is to order the agency to cancel the action.\textsuperscript{108}

The basic purpose behind a Board cancellation order is to place the employee as nearly as possible in the status quo ante.\textsuperscript{109} Should this have the effect of placing two employees in one position, as was the case in \textit{Meier}, the agency should place one of the employees in another, comparable position.\textsuperscript{110} In any event, the Board is unreceptive to arguments by agencies that they are without

\begin{itemize}
  \item \textsuperscript{106} Id. at 664.
  \item \textsuperscript{107} 3 M.S.P.B. 341 (1980).
  \item \textsuperscript{108} Id. at 348-49.
  \item \textsuperscript{109} Kerr v. National Endowment of the Arts, 726 F.2d 730 (Fed. Cir. 1984).
  \item \textsuperscript{110} 3 M.S.P.B. at 349.
\end{itemize}
the authority to do what the Board has ordered.\footnote{111} Moreover, when an employee believes that an agency action taken subsequent to a cancellation order was a reprisal for the employee's exercise of statutory appellate rights, the employee may petition the Board for an order stopping the harassing action, even if such action would not be independently appealable to the Board.\footnote{112}

Aside from its power to order cancellation, the Board seldom considers remedies other than reinstatement, back pay, and attorney's fees.\footnote{113} Reinstatement to the employee's prior position is usually implicit in a Board order to cancel an improper action involving removal, transfer, or demotion. Board decisions regarding back pay are somewhat perplexing, however. The Board definitely has the power to award back pay and benefits when it sets aside an improper removal, demotion, or suspension.\footnote{114} Until 1984, however, the Board's view was that back pay disputes arising from its awards were beyond its jurisdiction and that these matters were properly left for resolution by the employee and the agency. The Board was of the opinion that if this did not produce results, section 71 of title 31 of the United States Code required that the dispute be resolved by the General Accounting Office.

In \textit{Kerr v. National Endowment of the Arts},\footnote{115} however, the Court of Appeals for the Federal Circuit indicated that the MSPB had jurisdiction to ensure compliance with its orders. Several months later, the Board held in \textit{Robinson v. Department of the Army}\footnote{116} that pursuant to subsections 1205(a)(1) (regarding final Board decisions) and 1201(a)(2) (regarding Board authority to order compliance) of the CSRA, it had the power to order back pay during its review of personnel actions subject to its jurisdiction.\footnote{117}

Section 7701(g) of the CSRA governs the award of attorney's fee in cases adjudicated before the MSPB. Subsection (1) states that an award of attorney's fees can be made when it is determined that the employee is a "prevailing party" and "payment by the agency is warranted in the interest of justice."\footnote{118} According to MSPB precedent, a prevailing party is one who obtains all or

\footnote{111} See, \textit{e.g.}, Matthews v. Office of Personnel Mgmt., 4 M.S.P.B. 482 (1980).

\footnote{112} 5 M.S.P.B. at 350 n.8. \textit{See also} 5 C.F.R. § 1201.181 (1987).

\footnote{113} But see \textit{In re Frazier}, 1 M.S.P.B. 268 (1979), a Special Counsel case involving allegations of reprisals in the form of geographical reassignments. The Board found no improper action, but noted that it had the power "under its broad corrective authority" to order an employee made whole (\textit{i.e.}, to order compensation for a financial loss arising from the sale of a home, sale necessitated by an improper reassignment). \textit{Id.} at 270 n.4.


\footnote{115} 726 F.2d 730 (Fed. Cir. 1984). \textit{See supra} text accompanying note 109.

\footnote{116} No. SF07528370135 (MSPB Jan. 4, 1985).

\footnote{117} The Board has apparently struggled with this issue. \textit{Compare} Tanake v. Department of the Navy, No. SF07528310321 (MSPB Feb. 24, 1984) (leaving back-pay issues to employee and agency, subject to GAO resolution), \textit{with} Spezzaferro v. Federal Aviation Admin., No. BN075281F0717 (MSPB Feb. 24, 1984) (formerly overruling its past decision denying its role in back-pay decisions, Board instructs agency to calculate and pay back pay due as result of Board's decision). See P. Broda, A \textit{GUIDE TO THE MERIT SYSTEM PROTECTION BOARD} 206-07 (2d ed. 1985) for a discussion of Board vaccinations in the area.

\footnote{118} 5 U.S.C. § 7701(g)(1) (1982).
a significant part of the relief sought. The interest of justice criterion, as interpreted by MSPB decisions, is not coextensive with the prevailing party requirement.

In *Allen v. Postal Service,* for example, the MSPB reversed a presiding official's determination that any time an employee prevails, the agency action is "clearly without merit" and a fee award is therefore appropriate. The MSPB reasoned that the "interest of justice" standard required more than just being a prevailing party and declared that it would have to be developed on a case-by-case basis. In *Allen* the MSPB provided an "illustrative" list of circumstances that should be considered. These include considering whether the agency had engaged in a prohibited personnel practice, whether it had acted in bad faith, and whether it "knew or should have known that it would not prevail on the merits." In addition, the MSPB indicated that "gross procedural error" which prolonged a proceeding or "severely prejudiced an employee" would weigh in favor of awarding attorney's fees.

The MSPB can mitigate penalties in section 7512 discipline cases. It emphasizes, however, that deference should be given to an agency's decision, particularly when the decision shows consideration of mitigating factors; and the MSPB will not substitute its judgment for that of the agency. Nevertheless, the MSPB ultimately judges the appropriateness of a disciplinary penalty by using a standard of reasonableness. The range of factors and circumstances involved in assessing an agency penalty necessarily trigger case-by-case evaluations. The MSPB requires its presiding officials to determine whether the penalty is within the range allowed by law, rule, or regulation and whether the penalty is based upon relevant factors. As a practical matter, a penalty can be so grossly disproportionate to an offense that its imposition constitutes an abuse of discretion.

The same remedial power does not attend Chapter 43 cases, however. In *Lisiecki v. Merit Systems Protection Board,* the Court of Appeals for the Federal Circuit held that the MSPB had no authority to mitigate the severity of penalties imposed pursuant to section 4303. The court reasoned that the rationale behind *Douglas v. Veteran's Administration* did not apply to agency actions taken on account of unacceptable performance. Congress did not require proof by a preponderance of the evidence for Chapter 43 cases as it did for Chapter 75 cases because it wanted fewer obstacles to the removal

120. 2 M.S.P.B. 582 (1980).
121. Id. at 592.
122. Id. at 593.
123. Id.
124. See supra notes 24, 41-43 and accompanying text.
126. See, e.g., Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984) (removal of twenty-four-year employee with unblemished record for unauthorized possession of government property (two bars of soap valued at $2.10) was an abuse of discretion).
127. 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 106 S.Ct. 1514 (1986).
of incompetent employees. The court reasoned that Chapter 75 penalties are essentially punitive in nature, while Chapter 43 performance-related actions are more in line with the CSRA’s central goal of ridding the federal service of substandard employees. In short, "[t]he conclusion . . . that the MSPB could mitigate penalties assessed under Chapter 75 was based on considerations not anywhere present under Chapter 43."128

A final area of MSPB remedial authority pertains to its power to order and enforce compliance with its decisions. The MSPB can order an agency to take such action as it necessary to assure compliance with its order. In addition, pursuant to section 1205(d)(2) of the Act, the MSPB has the authority to enforce its decisions by ordering that any employee shall not be paid during any period of noncompliance.129 Furthermore, the Board has the power to issue cease and desist orders and to order corrective action.130

Arbitral Remedial Powers

Arbitrators in the private sector are usually given broad latitude in formulating remedies. Private sector arbitrators are required only to ensure that their remedies conform to the terms of the collective bargaining agreement except in cases that involve applications of external law.131 The situation in the federal sector is somewhat different. Although arbitrators are still called upon to interpret and apply the terms of a negotiated agreement, their task is complicated by the presence of a maze of laws, rules, and regulations affecting the entire scope of federal sector employment.

Indeed, the term "grievance" has a very broad meaning under the CSRA and encompasses, among other things, any complaint by an employee, union, or agency concerning "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."132 Moreover, regarding actions taken pursuant to either Chapter 43 or Chapter 75, section 7703(c) of the Act provides that a court considering an appeal from either an MSPB or an arbitration decision shall set aside any action, findings, or conclusions that are: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without compliance with procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence. Thus, a primary concern of a federal sector arbitrator is that the remedy he directs is not proscribed or qualified by a relevant law or regulation.133

128. Id. at 1566.
129. Stone v. OPM, 5 M.S.P.B. 142 (1981). Presidential appointees are excluded from such authority of the MSPB.
130. See Barger v. Department of Justice, 10 M.S.P.B. 148, 152 n.9 (1982) (Board announces that under certain circumstances, it can order an agency to make changes in an employee’s personnel records).
131. See F. Elkouri & E. Elkouri, supra note 30, at 285-90.
132. See supra note 80 and accompanying text.
133. Although antedating the CSRA, a 1977 General Accounting Office publication contains guidance which can “assist third parties in fashioning remedies consistent with federal statutes
Nevertheless, to a large extent the remedial power of federal sector arbitrators parallels that of the MSPB in cases involving adverse actions or performance-related actions. For example, like the MSPB, any arbitrator who finds that an agency's removal action was improper can set aside the action and order reinstatement. 134 Similarly, arbitration remedies often include back pay. 135 Under the terms of the Back Pay Act, an arbitrator may award back pay when the agency action caused a loss of pay to the grievant. Furthermore, the Federal Labor Relations Authority, citing the same provisions, has upheld the authority of an arbitrator to grant a retroactive promotion along with back pay where the agency action also denied the grievant a promotion he otherwise would have received. 136

Two separate statutory provisions also provide that the prevailing party in an arbitration case can be awarded attorney's fees. One is the previously discussed amendment to the Back Pay Act, which also provides for the award of attorney's fees in administrative proceedings. The other provision is section 7701(g) of the CSRA, which covers the award of attorney's fees incurred in the course of proceedings before the MSPB. Both provisions are applicable to arbitral awards of attorney's fees since the Back Pay Act provisions incorporate by reference the standard set forth in section 7701(g) of the CSRA. 137

In essence, these provisions trigger arbitral consideration of attorney's fees in any case where back pay is awarded. In determining the necessity of an award of attorney's fees, the arbitrator should consider the same "prevailing party" and "interest of justice" criteria as used in Board determinations of the same issue. 138

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134. See, e.g., Devine v. Sutermeister, 724 F.2d 1558, 1561 (Fed. Cir. 1983).
135. See, e.g., Treasury Dep't, U.S. Customs Serv., 83 F.L.R.R. 2-1671 (1983) (arbitrator found that employee's lost time was due to retaliation for engaging in protected concerted activity; ordered grievant made whole for lost pay).
137. Section 5596(b)(1) of the Back Pay Act provides in pertinent part:

An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to a grievance) is found . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled . . . to receive for the [affected period]—

(i) an amount equal to all or any part of the pay, allowances, or differentials, . . . which the employee normally would have earned or received during the period if the personnel action had not occurred.


138. See supra notes 119-123 and accompanying text.
Arbitrators are also empowered to issue cease and desist orders and, like the MSPB, can order an agency to take corrective action. In addition, arbitrators have the authority to mitigate penalties in adverse action cases, at least insofar as the MSPB has similar authority in like cases. Unlike the MSPB, however, the arbitrator’s authority over a specific case normally terminates upon rendering a final decision. As one commentator has noted: “The cases are unanimous in supporting [the] principle [that] when the final award has been rendered . . . all power of the arbitrator is exhausted, and any further action that they take will be utterly void unless the parties confer new authority upon [him].” This language was cited favorably by the court in Devine v. White in discussing whether OPM must file a petition for reconsideration with an arbitrator before appealing the case to federal court. Thus, unlike the MSPB, arbitrators possess no extended power to ensure compliance with their decisions.

In sum, federal sector arbitrators appear to have substantial latitude in the formulation of remedies. As noted earlier, except for a few instances, their remedial power parallels that of the Board. The arbitrator’s inquiry regarding remedies should take into account the applicable collective bargaining agreement, along with any pertinent statutes or regulations, with a view toward assuring that a proposed remedy does not conflict with their provisions. Nevertheless, excepting awards of back pay, attorney’s fees, or other monetary relief, there appears to be no requirement that a statute or regulation

139. Whether cease and desist orders are truly arbitral remedies has been a matter of debate. Arbitrator Louis Crane, addressing the National Academy of Arbitrators, observed that when a court issues an injunction requiring a party to cease and desist from engaging in certain conduct, it gains the power to issue a contempt citation in order to compel compliance. On the other hand, an arbitrator’s power after a party violates his cease and desist order is the same as it was when he issued the order in the first place. Crane, The Use and Abuse of Arbitral Power, in Labor Arbitration at the Quarter Century Mark, Proc. of the Twenty-Fifth Annual Meeting, National Academy of Arbitrators 66-75 (1973). Another commentator, Stuart Bernstein, termed cease and desist orders as “gratuitous advice in the award.” Id. at 79-80. Bernstein added, however, that such a remedy is useful when directed at conduct occurring at the time of the hearing. Id. at 80. See Veteran’s Admin. Med. Ctr., 85 F.L.R.R. 2-1107 (1984) (arbitrator ordered an agency to pay a union monetary damages for failing to call a supervisor as a witness at a hearing).

140. See, e.g., Veteran’s Admin. Med. Ctr., 85 F.L.R.R. 2-1107 (1984) (as a result of its failure to consult with union concerning the selection of job candidates, as required by the collective bargaining agreement, the agency was required to post a notice stating its willingness to so meet with the union).

141. See discussion supra part I. See, e.g., In re Library of Congress, 78 Lab. Arb. (BNA) 784 (1982) (Rothschild, Arb.) (termination in insubordination case mitigated to suspension without back pay provided the employee undergo a fitness for duty examination).


143. 697 F.2d 421, 433 (D.C. Cir. 1983) (concluding that federal sector arbitrators lacked authority to grant OPM petitions for reconsideration).

144. One commentator has stated that when the CSRA was enacted, the GAO reevaluated its statutory authority and its labor-management procedures, and this reevaluation indicated that “[a]lmost every term and condition of employment of federal employees that involves the payment of appropriated funds was still under the GAO’s statutory jurisdiction.” Blatch, The General
authorize a specific remedy; it is only important that they not bar it.\textsuperscript{145}

IV. The Effect of Cornelius v. Nutt on Arbitral Remedial Authority

\textit{Cornelius v. Nutt} held that in an adverse action case where the employee has a choice of forum between arbitration and the MSPB and chooses the former, the arbitrator must apply the MSPB's definition of harmful error when he assesses the impact of agency procedural errors.\textsuperscript{146} The Court in \textit{Cornelius v. Nutt} reversed the arbitrator's overruling of the GSA's decision to remove the offending employees because the GSA's procedural errors, made in violation of the collective bargaining agreement, were not prejudicial and, therefore, did not constitute harmful error. According to the Court, two factors justified this result. First, the need to promote consistency between arbitral and MSPB forums could not be met if each forum applied its own definition of harmful error. Second, the need to apply a definition of harmful error that was consistent with the CSRA's purpose of promoting effective and efficient government would best be served by the removal of ineffective and inefficient employees.

The effect of this result upon the comparative remedial power of arbitrators and the MSPB was not addressed by the Court and remains an open question. \textit{Cornelius v. Nutt}'s refusal to condone a system favoring forum shopping arguably supports the notion that arbitrators should adhere to MSPB precedents regarding remedies in cases arising under both Chapter 43 and Chapter 75.\textsuperscript{147} Nevertheless, because of inherent differences between the respective forums, \textit{Cornelius v. Nutt} should not be read so broadly and, accordingly, certain differences in the formulation and application of remedies should still be permitted.

The arguments in favor of coextensive remedial power stem from the Court's conclusion in \textit{Cornelius v. Nutt} that Congress intended to promote consistency between forums. As with the disparate application of the harmful error standard, a predictable disparity between arbitral and MSPB remedy formulation could systematically promote forum shopping and inconsistent results in like cases.

\textsuperscript{145} See General Serv. Admin. & AFGE, 76 Lab. Arb. (BNA) 1028, 1032 (1981) (Rothschild, Arb.) (arbitrator ruled that an employee harmed by an agency's negligent delay in forwarding injury compensation forms was not limited to remedies set forth in the Federal Employee's Compensation Act where the damages sought were beyond the scope of the statute). See generally Hayford, The Impact of Law and Regulation Upon the Remedial Authority of Labor Arbitrators in the Federal Sector, 37 Admin. J. 28 (1982).

\textsuperscript{146} See discussion supra part I.

\textsuperscript{147} Although \textit{Cornelius v. Nutt} dealt only with an adverse action under Chapter 75, the case's rationale should also apply with full force to performance-related actions taken under Chapter 43. Employees in such cases may also have a choice of forum and the Supreme Court's emphasis on consistency would, therefore, be equally relevant. In addition, performance-related actions obviously trigger concerns over the maintenance of an efficient and effective federal work force, the other prong of the Court's analysis.
The potential for forum shopping is more readily apparent when considered in light of the D.C. Circuit's decision in Steger v. Defense Investigative Service. In Steger, Steger challenged the MSPB's order denying him attorney fees incurred in successfully challenging his removal from the Defense Investigative Service. The court acknowledged that the MSPB has considerable discretion in deciding whether an award of attorney fees "is warranted in the interest of justice" and stated that it would not set aside the MSPB's decision in this regard unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Nevertheless, court delved into relevant MSPB case law in order to test the MSPB's admittedly discretionary decision. Steger's position was found to be clearly analogous to that presented in O'Donnell v. Department of Interior, since both cases involved nearly identical failures on the part of the respective agencies to conduct adequate investigations prior to taking adverse action. The court thought it untenable that the MSPB did not reach the same decision and criticized the Board for completely disregarding its own precedent:

"As this court had indicated before, an agency is under an obligation to follow, distinguish, or overrule its own precedent. The Board cannot, despite its considerable discretion, treat similar situations dissimilarly and, indeed, can be said to be at its most arbitrary when it does so. When the Board not only fails to distinguish its precedent, but wholly fails to even consider it, the agency's arbitrariness is compounded. Such is the case here."

Although the Federal Circuit now has jurisdiction over such cases, the MSPB's duty to adhere to its own precedents, forcefully expressed in Steger, will likely continue to be good law. In fact, Steger may well represent a noteworthy statement of the importance of stare decisis in administrative adjudication. Thus, Steger's analysis could have a profound impact upon the "remedy shopping" problem raised but left unresolved by Cornelius v. Nutt.

In sum, if the substance of the Board's remedy in a given case is more predictable than is the remedy an arbitrator might apply in the same case, the risk of forum/remedy shopping would be increased. Indeed, if an arbitrator is free to disregard Board precedents establishing remedies in similar cases, and if he is free to adopt a remedy that might be more favorable to the employee, the situation would be little different from the one condemned.

149. See supra notes 118-123 and accompanying text for discussion of the Board's authority for awarding attorney's fees.
150. 717 F.2d at 1404.
151. 2 M.S.P.B. 604 (1980).
152. 717 F.2d at 1406 (citations omitted).
153. Predictability is enhanced by the presence of controlling MSPB precedent and the application of Steger.
154. Arbitrators are normally not bound by prior arbitration cases unless the parties provide otherwise. See generally F. Elkouri & E. Elkouri, supra note 30, at 419-36; Seitz, The Citation
by the Supreme Court in *Cornelius v. Nett*. In effect, the disparate application of remedies would not be much different from the disparate application of the harmful error standard. Both are contrary to congressional intent regarding forum shopping since both invite employees having a choice of forum to pursue their claims before the forum that promises the best result. The result could be both a more favorable decision on the merits and a more favorable remedy. To prevent this frustration of congressional intent, similar application of remedies in similar cases must be maintained.

Furthermore, there is some support in the CSRA for the proposition that arbitrators are bound by MSPB decisions establishing the availability of attorney's fee awards. An arbitrator's authority to award attorney's fees comes from a 1978 Amendment to the Back Pay Act, which is part of the CSRA. Section 5596 of the Back Pay Act specifies that an award of attorney's fees at arbitration shall be "in accordance with standards established under section 7701(g) of the [CSRA]." Section 7701(g) in turn is the MSPB's statutory guidance regarding the award of attorney's fees.

An early House version of the CSRA provided instead that the FLRA establish guidelines for awarding attorney's fees in unfair labor practice and arbitration cases. As the Act developed, however, the legislative statements evinced an "intent to provide a standard rule on such awards that is consistent with the provisions available to the Merit Systems Protection Board." Thus, the final version of the CSRA excluded any reference to FLRA authority in this area, providing instead the standards set forth in section 7701(g).

This interplay between section 5596 of the Back Pay Act and section 7701(g) of the CSRA, combined with the relevant legislative history, indicates that an arbitrator is bound by MSPB precedent with respect to attorney's fee awards. After *Cornelius v. Nett*, a condemnations of disparate standards that encourage forum shopping, an arbitrator who disregards MSPB precedent in this area may be doing so at his peril.

Despite the foregoing arguments favoring interpretation of *Cornelius v. Nett* as a case mandating the formulation of arbitration remedies in light of MSPB precedents, the balance of considerations favors denying that case such a broad scope. First, inherent differences between the forums having little to do with remedies per se, but still affecting their application, favor the distinct formulation and application of remedies. Second, making arbitration remedies conform to MSPB remedies in like cases denigrates the strong interest in arbitral finality, an interest that already suffers enough under the current state of

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155. See supra part II.

156. 124 CONG. REC. H29176, 29185 (daily ed. Sept. 13, 1978) (statements of Mr. Udall).


federal labor law. Finally, when considered in light of the previously decided cases, *Cornelius v. Nutt* is more properly read as requiring MSPB and arbitral use of similar standards in reaching their respective results, not as requiring that their respective results regarding remedies be the same.

A broad application of *Cornelius v. Nutt* could pose additional burdens upon federal sector arbitration. The first difficulty in equating remedies centers on the inherent differences between arbitration and MSPB procedures, specifically the possible presence or absence of relevant actors in the respective forums. To understand this difference it is necessary to compare the procedures used in each forum.

In a typical adverse action or performance-related action dispute involving negotiated procedures, the parties are the employee and his union on one side and the agency on the other. They will first attempt to resolve the dispute informally and at the lowest level possible. This approach could involve something as simple as a consultation between a union representative and an appropriate agency official. Should this fail to yield results, the parties might call upon an agency overseer, perhaps its inspector general, to investigate and make recommendations. In any event, low-level resolution will be a common preface to formal arbitration and will vary somewhat depending upon the terms of the applicable collective bargaining agreement. The key point, however, is that virtually every decision to invoke arbitration on behalf of a grieving employee is made by the union. In essence, the individual employee will not have a personal right to invoke arbitration since the right attends to his union, the collective entity that negotiated the procedure in the first place.

In contrast, the employee who opts for MSPB procedures could pursue his claim by simply writing a letter to the MSPB that identifies the agency that took the action, the nature of the action, the effective date of the action, and the action the employee wishes the Board to take. An employee may also indicate whether he desires a hearing and the identity of his representative. The key distinction is that with the MSPB the employee retains the power to pursue the action. In addition, he chooses his own representative, or may even decide to proceed without one. Although this representative may come from the union, there is no requirement that the union provide, or that the employee accept, such assistance when the case is going before the MSPB.

This procedure can ultimately lead to a wide disparity between the claims advanced at arbitration and those submitted to the MSPB. A union successfully pursuing a case through arbitration could invoke a provision in the collective bargaining agreement that requires that a certain remedy be applied in that

160. This circumstance is understandable because seldom will an agency invoke such a procedure in order to have its own actions reviewed by an outside party.
161. See E. Bussey, supra note 5, at 29.
type of case. Moreover, the CSRA itself can be construed as allowing negotiated limits on arbitral remedial power. Under section 7121(a)(2), "[a]ny collective bargaining agreement may exclude any matter from . . . the [negotiated] grievance procedures." This provision presumably allows the parties to limit the arbitrator's remedial authority by agreement. Since part of the arbitrator's function is to apply the terms of the collective bargaining agreement, a negotiated remedy or a limitation on arbitral remedial authority would control the award's content, provided it did not run afoul of an applicable statute, rule, or regulation.

A case going before the MSPB might come out differently, however. The union need not be present in this forum and, therefore, its interest in seeing its negotiated remedies applied may not be emphasized. Indeed, the employee may seek (and deserve) a wholly different remedy, a consequence that may even have prompted his decision to proceed alone before the MSPB. Although the MSPB is presumably just as competent as an arbitrator to interpret and apply relevant collective bargaining agreement provisions, the scope of its remedial power is broad enough to allow it to also fashion other remedies that correct the agency's wrongful action while still satisfying the employee. Furthermore, it is unlikely that the parties could agree to limit the MSPB's remedial power in a given case. Unlike an arbitration proceeding, the MSPB is a public agency with a public mandate; it is unlikely to consider its remedial authority as being subject to any limitations other than those found in applicable statutes, rules, and regulations.

In sum, the requirement that arbitrators apply the relevant terms of the collective bargaining agreement, combined with the presence of a union that will push for enforcement of those terms, may lead arbitrators to formulate remedies that reflect both collective interests and the interests of the individual employee. Collective interests may be downplayed before the MSPB,

163. See, e.g., Department of Defense (Luke AFB) & AFGE, 82 F.L.R.R. 2-2280 (1982) (award of temporary promotion in a case where the collective bargaining agreement specified such a remedy to correct overly long detail to a higher graded position).

164. The D.C. Circuit recognized this possibility in Local 2578, American Fed'n of Gov't Empl. v. General Serv. Admin., 711 F.2d 261 (D.C. Cir. 1983), but because the issue was not before the court, declined to discuss the extent to which the parties may limit arbitral authority to mitigate agency actions. Id. at 267 n.19.

165. This issue has not been decided yet.

166. This conclusion also stems from the idea that there are two perspectives from which to examine arbitral remedial power. One is based on the arbitrator's "legal" authority to formulate a specific remedy under the labor agreement, or any applicable statute, rule, or regulation. The other has a policy basis: the assessment of the likely effect of a specific remedy on the collective bargaining institution. See generally Fleming, Arbitrators and the Remedy Power, 48 VA. L. REV. 1199 (1962); Stein, Remedies in Labor Arbitration, in CHALLENGES TO ARBITRATION, PROC. OF THE THIRTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 39 (1960). Naturally, these perspectives are not mutually exclusive and both play an important role in remedy formulation. Nevertheless, the Court in Cornelius v. Nutt gave short shrift to "collective interests" in reaching its result in that case. See supra text accompanying notes 105-106. An arbitrator at a hearing where a union advocate is present (and making the union presence felt) will not be so quick to discount the interests of the collective bargaining unit when it comes to remedies, even though the Court says his test for prejudice must center on harm to the specific
however, particularly if the union is absent. Minimizing collective interests
would likely lead to a remedy different from the one that would have been
provided had the case gone to arbitration. Thus, requiring coextensive remedies
in each forum may defy tactical factors present in certain cases. These factors
are beyond the control of the respective forums but may still have a pro-
found impact on any remedy that might be devised.167

Furthermore, the arbitrator’s authority over a case ends upon his rendering
of an award, while the MSPB can continue to take steps to assure compliance
well after the date of its decision.168 Although this authority does not pertain
directly to the award itself, it is sufficiently linked to remedial authority that
its presence in one forum and absence in the other deserves attention. Applying
the “avoidance of forum shopping” rationale to this situation, one might
argue that it favors employee use of MSPB procedures, especially if the
employee fears that the agency will drag its feet in complying with a decision
setting aside its action.

Although judicial enforcement of an arbitration award would be available,
the advantages of being able to obtain compliance assistance from the same
forum that rendered the original decision could be significant. Board personnel
presumably would already be well-versed in both the history of the case and,
more important, the parties’ demonstrated attitude toward the entire situa-

Thus, it could be argued that Congress implicitly sanctioned disparate
remedial powers in some cases by giving the power to enforce compliance
to one forum but not to the other.

A more momentous problem centers on the need for arbitral finality. In
the private sector, the concept of judicial deference to arbitration awards found
its most emphatic expression in the Steelworkers Trilogy.169 In those land-

167. Along these lines, it is interesting to note the disparity in actual results in the respective
forums. One commentator, Peter P. Broida, has studied OPM statistics and found that through
May 1983, arbitrators had reversed or mitigated adverse actions taken for performance-related
reasons in approximately 39% of their cases; the comparable MSPB rate was 17%. Likewise,
in discipline cases, arbitrators had reversed or mitigated the agency in 52% of their cases; the
MSPB took similar action in just 24% of its disciplinary cases. Broida opines the difference
exists because

[in the arbitration process, the arbitrator is interested in salvaging the employee;
discharge is considered the industrial equivalent of capital punishment and the penalty
is not sustained absent egregious circumstances or progressive discipline. The Board
tends to protect the employer; a discharge penalty will be sustained absent egregious
circumstances.

P. BROIDA, supra note 117, preface. Regardless of the reasons, there appear to be significant
differences between forums when it comes to employee success rates in cases brought pursuant
to Chapter 43 or Chapter 75. Thus, the congressional intent that choice of forum not turn on
a difference in anticipated outcome may be wishful thinking in light of palpable institutional
differences regarding the reasonableness of agency actions and the propriety of providing relief.

168. See supra part II.

169. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United
mark cases, the Supreme Court set forth the limits of judicial review of arbitration awards and emphasized the importance of according finality to those awards: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."170 Although arbitrators were not turned loose to mete out their "own brand of industrial justice," any award that "draws its essence from the collective bargaining agreement is entitled to judicial deference."171 The Court reasoned that arbitration is faster and cheaper than conventional litigation in resolving labor disputes, better-suited to maintain industrial peace, and, because of the special expertise of arbitrators, more responsive to industrial needs.172 Although the concept of judicial deference has suffered some setbacks over the years,173 it is still "so well-established as to need little defense."174

Judicial deference to arbitration ought to apply in federal sector labor relations as well. Concerns of economy, efficiency, and stable labor relations are as important as in the private sector. Even though they may be required to go well beyond contract interpretation and application, federal sector arbitrators can contribute considerable expertise to the dispute resolution process and the maintenance of healthy labor relations. As Judge Edwards observed in Devine v. White, "the typical adverse action case represents issues identical to those with which labor arbitrators deal on an everyday basis."175 Moreover, language in the CSRA itself indicates that Congress intended for courts to defer to arbitration. In "pure grievance" cases,176 which are appealable to the Federal Labor Relations Authority only, an arbitration award can be set aside only if it is "contrary to any law, rule, or regulation" or otherwise deficient on "grounds similar to those applied by Federal Courts in private sector labor management relations."177

The standard of review applicable to arbitration awards in adverse action and performance-related cases, though somewhat different from the one applied in pure grievance cases, is similarly deferential. Sections 7121(f) and

171. Id. at 597.
175. Id. at 439.
176. See supra note 33 and accompanying text.
7703(c) of the Act, when read together, permit setting aside arbitration awards that are (1) arbitrary and capricious or an abuse of discretion; (2) obtained without procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence.\footnote{178} It has been argued that in devising this latter standard of review, Congress deviated from private sector notions of judicial deference to arbitration. The D.C. Circuit considered this issue in \textit{Devine v. White} and concluded that Congress intended to leave arbitrator interpretations of collective bargaining agreements largely unreviewable. In Judge Edwards’ view, an arbitration award would withstand judicial review if the arbitrator has not “erred as a matter of law in interpreting a civil service law, rule, or regulation.” This standard of review “is at least as deferential as the standard governing review of arbitral decisions in the private sector.”\footnote{179}

It is particularly important to note the absence of any mention in the case law of arbitral adherence to MSPB precedents regarding remedies. Indeed, the Supreme Court’s decision in \textit{Cornelius v. Nutt}, insofar as it requires arbitrators to apply the MSPB’s definition of harmful error, can be construed as a clear affront to well-established concepts of arbitral finality. Although the MSPB definition of harmful error could be deemed a “rule” that an arbitrator must apply or else risk having his award set aside,\footnote{180} there is no CSRA provision saying that an arbitrator must apply a remedy coextensive with the one the MSPB would apply in the same case. Similarly, no CSRA provision supports the proposition that a court of appeals should set aside an arbitration award simply because its remedy fails to conform with one ordered by the Board in a similar case. To read such provisions into the Act would only encumber the arbitration process with further complications and risk its preferred status as a fast, economical, and final method of grievance resolution.

Furthermore, even court decisions in the aftermath of \textit{Cornelius v. Nutt} support the conclusion that arbitrators need not apply the same remedies as would the MSPB. In both \textit{Local 2578} and \textit{Sutermeister},\footnote{181} the courts addressed the standard of review applied by arbitrators. Although \textit{Cornelius v. Nutt} determined the test for prejudice, \textit{Local 2578} and \textit{Sutermeister} both drew conclusions about arbitral adherence to MSPB precedent that still bear upon the remedies issue. In \textit{Local 2578} the D.C. Circuit unequivocally stated that “nothing in the CSRA requires that arbitration and MSPB actions . . . \textit{produce the same results in like cases}."\footnote{182} \textit{Sutermeister} cited this language with approval and concluded that the legislative history of the CSRA did not support “the proposition that an arbitrator is . . . bound by MSPB precedents.”\footnote{183}

Seemingly, these cases stand for the proposition that since Congress desired
consistency between forums, both arbitrators and the MSPB must apply the same standards of review in deciding cases where the grievant had a choice of forum. Applying the same standard of review, however, does not necessarily mean that each forum has to order the same remedy or even to reach the same result in a given case. It only means that each forum must follow the same legal avenue in reaching its result and in formulating an appropriate remedy. The outcome, and any attendant remedies, may still vary in like cases. The D.C. Circuit seemed to recognize this in Local 2578 when it held that both forums necessarily had the same power to mitigate, yet they need not yield the same result. Indeed, because of the inherent subjectivity involved in most of these cases, disparate results may be unavoidable.

Such was the Federal Circuit's conclusion in NTEU, 184 and this may well reflect an unavoidable fact of life in a grievance resolution scheme that allows multiple forums. For example, in an adverse action case raising issues of mitigation, either the Board or an arbitrator, each applying the Douglas standards, could easily order different remedies in response to an indefensibly harsh agency action. Such disparate results should not be construed as an invitation to forum shop, however. Rather, they are simply unavoidable variances that are the product of what is actually an open-ended, amorphous test of reasonableness.

So long as the respective forums apply the same standards in formulating remedies, there should be no advance indication as to the remedies either forum might order. 185 Accordingly, so long as the arbitrator has applied the proper standard of review before affirming or adjusting an agency action, 186 his results should not be subject to further attack simply because an earlier MSPB case, close on the facts, had a different remedy. Likewise, so long as an arbitrator has faithfully applied the MSPB's test as set forth in Allen v. Postal Service, 187 his award of attorney's fees should not be reversed. 188

As Judge Scalia cogently stated in Pastore:

We do not suggest that the arbitrator must conduct an examination of the MSPB case law, in the manner of a common law judge, to assure himself that the outcome of his determination is similar to the MSPB case closest on its facts. But it must be clear, at least, that he is making a conscientious application of the judicially approved MSPB standard. Only in this manner can there be assured that rough uniformity which is necessary in the review of federal agency disciplinary action. 189

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184. 737 F.2d 1031 (Fed. Cir. 1984).
185. But see supra notes 158-166 and accompanying text for a discussion on how the current regime of federal sector labor regulations may systematically promote disparate remedial power.
186. Douglas in Chapter 75 cases and Lisiecki in Chapter 43 cases.
187. 2 M.S.P.B. 582 (1980).
188. The proper application of Allen v. Postal Service is something the Board itself failed to do in Steger. See supra note 148. In this light, arbitrators faced with this issue should carefully consider MSPB case award cases similar to the one under construction. Should a contrary result be envisioned, the similar MSPB case or cases should be either distinguished in light of the criteria set forth in Allen v. Postal Service, or followed.
This statement of the law is as valid now as it was before *Cornelius v. Nutt*. As long as arbitrators apply the same standards the MSPB would apply in determining the propriety of mitigation, reinstatement, back pay, attorney's fees, or any other remedial measure that could be awarded in either forum, there is little cause for concern that the remedies ordered are different from the ones that MSPB would order on the same facts. Disparities of this nature are a natural and acceptable by-product of this dual system of employee grievance resolution. Because of the need for both remedial flexibility and timely grievance resolution, such disparities should not be a reason for upsetting arbitration awards where there has been a conscientious application of the relevant MSPB standards.

**Conclusion**

Despite the need for consistency between arbitral and MSPB forums, the disparate formulation and application of remedies in like cases is unavoidable. Since Congress implicitly allows different remedial powers, it is likely that Congress believed some degree of disparity was acceptable even though its intent otherwise was to emphasize consistency. This is especially true where arbitrators have consciously sought to apply MSPB standards and procedures in arriving at an appropriate remedy. Any difference in remedies actually devised would reflect the inescapable fact that reasonable people can differ as to precisely what needs to be done to make an injured employee whole.

Moreover, given the largely symmetric power between forums with respect to the basic remedies (reinstatement, back pay, and attorney's fees), grievants are not likely to base their forum choice on an expectation of quantum differences in remedial relief. Indeed, an employee with a meritorious claim is more likely to choose a forum based on where he has the best chance of prevailing on the merits. Although remedies are certainly of great importance, they are of little use when one's entitlement to them cannot be established. For these reasons, an arbitrator's general discretion to formulate remedies consistent with the applicable collective bargaining agreement and relevant statutes, rules, and regulations, should remain intact despite counterarguments based on the Supreme Court's decision in *Cornelius v. Nutt*. 