FMCS
FEDERAL MEDIATION & CONCILIATION SERVICE

MEMORANDUM

November 4, 2026

SUBJECT: **Federal Sector Arbitration Panel Request Review Under 29 C.F.R. § 1404.9(b)(3)**

FROM: **Anna Davis, General Counsel** *Anna Davis*

TO: **FMCS Office of Arbitration**

Background

On March 27, 2025, President Trump issued Executive Order 14251, "Exclusions From Federal Labor Management Relations Programs," 90 Fed. Reg. 14553. On August 8, 2025, President Trump additionally issued Executive Order 14343, "Further Exclusions From the Federal Labor-Management Relations Program," 90 Fed. Reg. 42683. On February 12, 2026, the Office of Personnel Management (OPM) issued supplementary guidance and frequently asked questions on these Executive Orders. These two Executive Orders (collectively, "the EOs"), as their names suggest, excluded many federal agencies from participating in labor-management relations programs under Chapter 71 of Title 5 and Subchapter X of Chapter 52 of title 22 of the United States Code. This exclusion covers grievance arbitration procedures under 5 U.S.C. § 7121.

On April 22, 2026, FMCS issued a guidance memorandum titled "Aligning Federal Mediation and Conciliation's Arbitration Services with Executive Orders 14251 and 14343 ("April memorandum"). The April memorandum stated that FMCS would seek agency consent before issuing an arbitration panel for agencies affected by the EOs. Absent this consent, FMCS held such arbitration panel requests in abeyance pending the outcome of litigation surrounding the EOs. FMCS additionally published FAQs regarding the April memorandum.

On October 29, 2026, FMCS published a final rule in the Federal Register, 91 Fed. Reg. 68030, updating part of its arbitration regulations, 29 C.F.R. § Part 1404. This final rule clarified that the FMCS Office of Arbitration (OA) will not provide any service that FMCS "may not lawfully provide." 91 Fed. Reg. 68041; *accord* 29 C.F.R § 1404.9(b)(3). To this end, the final rule allows for OA to "conduct a limited threshold inquiry to determine whether [providing a

service] would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority." 29 C.F.R. § 1404.9(b)(3).

OA's Limited Threshold Inquiry into Federal Sector Panel Requests Involving the EOs

OA shall effectuate 29 C.F.R. 1404.9 through the processes in this guidance memorandum and shall cite these sources of authority as necessary when communicating with parties. The April memorandum and the accompanying FAQs are hereby rescinded and supplanted by this guidance memorandum; however, panel requests that predate the effective date of this guidance memorandum will not change status based on this recission, including those panel requests held in abeyance.

OA shall maintain the automatic "EO hold" currently in place on the FMCS online arbitration platform. The "EO hold" status is automatically placed on incoming panel requests that are labeled "federal sector" or contain .gov or .mil addresses for either party point of contact. While this automatic hold captures more than those agencies affected by the EOs, the hold prevents requestors from obtaining automatically-generated panels before OA has a chance to review the requests. The hold was instated to prevent this circumvention, and circumstances have not changed in this regard. Because OA will be maintaining the EO hold through the online system, federal sector panel requestors shall no longer be directed to submit panel requests directly to OA via email or paper request forms as required by the April memorandum and the accompanying FAQs. OA shall diligently work to reduce the time panel requests remain in "EO hold" status, especially for requests unaffected by the EOs.

After receiving notification that a case has been placed on EO hold, OA shall review the case against the list of agencies removed from labor-management relations programs under the EOs. OA shall abide by the following parameters in making its limited threshold inquiry into whether FMCS has the authority to issue the requested federal sector arbitration panel:

- If the party triggering the EO hold is not a federal agency (e.g., State or municipal agency, federal contractor), the panel request shall be released from the EO hold.
- If the agency party is the requestor, the act of making the request is considered consent, and the panel request shall be released from the EO hold.
- If the agency party is fully removed from labor-management relations programs under the EOs, OA shall contact the agency point of contact to clarify agency consent to arbitrate.
- If only certain subdivisions of an agency are removed from labor-management relations programs under the EOs,
    - and the agency subdivision is not clear from the panel request, OA shall contact both parties seeking clarification of the agency subdivision.
    - and the agency subdivision is clear from the panel request,

- if the subdivision is removed from labor-management relations programs under the EOs, OA shall contact the agency point of contact to clarify agency consent to arbitrate, or,
- if the subdivision is not removed from labor-management relations programs under the EOs, OA shall release the EO hold on the panel request.

Upon receiving an agency's consent to arbitrate, OA shall release the panel request from the EO hold. This process is detailed in Figure 1 below. When releasing a panel request from EO hold, OA shall note the justification for doing so in agency records.

OA's requests to federal sector parties to clarify subdivision may be answered by either party to a panel request. Depending on the situation, the union or the agency may be better situated to clarify the agency subdivision at issue. In the event the parties present conflicting information as to the subdivision, OA shall defer to the agency party and, where the agency asserts that relevant subdivision is subject to the EOs, return the panel request to "EO hold" status (if already released) and proceed with an agency consent inquiry. OA's request for agency consent, however, may only be answered by the agency party; the union party may not consent on behalf of the agency. As stated in the final rule,

> OA's inquiry whether an agency covered by the Executive Orders consented to the arbitration [is] not a solicitation of an objection; where the agency has been excluded from chapter 71 and the agreement terminated, the agency's consent is the only potential remaining source of authority for the proceeding, and whether it has been given is the threshold question itself.

91 Fed. Reg. 68039. If an agency covered by the EOs denies consent to arbitrate, OA shall place the panel request in abeyance. These requests shall remain in abeyance pending the outcoming of litigation surrounding the EOs. When such litigation reaches a final decision on the merits, or upon revocation of the EOs, OA shall reassess the status of the requests held in abeyance. If an agency consents to arbitration during this pendency, OA shall remove the request from abeyance.

OA shall consider the agency party's consent at the time the panel request is processed. Accordingly, if an agency party withdraws its consent after initially consenting, OA shall not recall the panel nor alter the request's status. Any withdraw of consent after OA releases a panel request from the EO hold or abeyance may be raised with the arbitrator or in the appropriate forum. If a party believes an agency has already manifested consent to arbitrate the particular matter underlying the panel request at the time such a request is made, in its threshold inquiry, OA shall verify whether such consent has manifested. If such consent has manifested, absent evidence of extenuating circumstances, OA shall remove the panel request from "EO hold" status.

This guidance memorandum is not retroactive; panel requests submitted on or before the date of this guidance memorandum's publication shall not be bound by the provisions herein.

This guidance memorandum memorializes and binds current OA practices in accordance with 29 C.F.R. § 1404.9(b)(3) and thus should not be considered as a change, with the only exception being that the updated regulations and this memorandum shall be OA's cited authority when communicating with federal sector panel requestors; however, to the extent that parties hold reliance interests or circumstances affected by this guidance memorandum, FMCS will consider these specific reliance interests or circumstances submitted via email to arbitration@fmcs.gov. Requests will be evaluated on a case-by-case basis by attorneys in FMCS's Office of General Counsel.

This guidance memorandum shall be effective upon publication and shall remain in effect until rescinded. Members of the public can petition for withdrawal or modification of this guidance memorandum by filing a petition with the FMCS Office of General Counsel, ogc@fmcs.gov.

FIGURE 1: FEDERAL SECTOR ARBITRATION PANEL REQUESTS

