

73 FLRA No. 73

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ASHLAND, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1286
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5782

DECISION

December 8, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

As relevant here, in a 2019 award (the 2019 award), Arbitrator Jay Nadelbach found the Agency violated the Fair Labor Standards Act (FLSA)¹ by failing to properly compensate employees. The Arbitrator directed the Agency to make affected employees whole, and he expressly retained jurisdiction to resolve any issues regarding implementation of the remedy.²

In November 2021, at the Union's request, the Arbitrator asserted jurisdiction over, and issued an award (the 2021 award) resolving the Union's claim that the Agency circumvented the Union and Union counsel by directly contacting grievants to discuss and issue payments of monetary damages arising out of the 2019 award.

The Agency excepts, challenging the Arbitrator's assertion of jurisdiction in the 2021 award. Because the

Arbitrator acted within the bounds of his retention of jurisdiction, we deny the exceptions.

II. Background and Arbitrator's Award

This case's background is more fully explained in previous Authority decisions³ and is summarized only briefly here. The Union filed a grievance alleging the Agency failed to relieve certain employees for their half-hour, duty-free lunch breaks and to properly compensate them, in violation of the parties' agreement and the FLSA. On December 2, 2019, the Arbitrator issued the 2019 award, finding the Agency violated the parties' agreement and the FLSA. The Arbitrator also directed the Agency to make affected employees whole, and he retained jurisdiction "for the limited purpose of resolving any issues that may arise in the implementation of the remedy granted herein."⁴ The Agency filed exceptions challenging the Arbitrator's procedural-arbitrability determination, which the Authority denied.⁵ However, the Agency did not file any exceptions to the Arbitrator's retention of jurisdiction.

On March 1, 2021, the Arbitrator issued an award (fee award) granting the Union's attorney-fee petition. The Agency filed exceptions. The Authority partially sustained and partially denied the exceptions, and remanded to the parties for resubmission to the Arbitrator, absent settlement.⁶

In November 2021, the Union filed a motion with the Arbitrator seeking an order prohibiting the Agency from bypassing the Union and its counsel in various ways. Specifically, the Union alleged that the Agency had communicated directly with the grievants, negotiated settlement agreements for individual claims, made direct payments to the grievants, and obtained signed waivers after payments were made. According to the Union, the Agency's actions were improper, unethical, and violated the American Bar Association's Model Rules of Professional Conduct.

On November 8, 2021, the Arbitrator issued the 2021 award – the award at issue here – which was entitled "Ruling on Motion for Clarification and Enforcement of Arbitration Award."⁷ The Arbitrator directed the Agency to: (1) stop contacting the grievants regarding "any aspect

¹ 29 U.S.C. §§ 201-209.

² Exceptions, Attach. C, Dec. 2, 2019 Award (2019 Award) at 28.

³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997 (2020) (*Ashland I*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 72 FLRA 681 (2022) (*Ashland II*).

⁴ 2021 Award at 2; 2019 Award at 28.

⁵ See *Ashland I*, 71 FLRA at 997-98 (denying nonfact and essence exceptions challenging Arbitrator's determination that grievance was properly filed with a regional director).

⁶ See *Ashland II*, 72 FLRA at 682-83. In *Ashland II*, the Authority held that the Arbitrator was not functus officio when he issued the fee award after the deadline he imposed on the Union to submit an attorney-fee petition. *Id.* However, the Authority held the Arbitrator failed to set forth sufficiently specific factual findings to support the fee award and remanded it to the parties for further proceedings, absent settlement, as to the amount of fees. *Id.* at 683.

⁷ 2021 Award at 1.

of the instant litigation”;⁸ (2) stop making direct payments to the grievants; (3) stop seeking or obtaining waivers and acknowledgments of receipt of payment; (4) notify employees who have already received direct payments that the direct contact and direct payments were improper, and that the Union may review the payment amounts for accuracy; and (5) direct all communications and payments – including individual backpay awards – to the Union’s counsel.

On December 8, 2021, the Agency filed exceptions to the 2021 award, and on January 26, 2022, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusion: The Arbitrator was not *functus officio*.

The Agency’s exceptions assert the Arbitrator exceeded his authority, and the 2021 award is contrary to law, because the Arbitrator was *functus officio* when issuing that award.⁹

Under the doctrine of *functus officio*, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.¹⁰ Consistent with this principle, unless arbitrators retain jurisdiction or receive permission from the parties, they exceed their authority by reopening and reconsidering an original award that has become final and binding.¹¹ However, the Authority has long held that arbitrators may retain jurisdiction over a case to oversee the implementation of remedies.¹² If an arbitrator does so, then the arbitrator may properly consider disputes arising out of the manner in which an awarded remedy is or is not fulfilled.¹³

In the 2019 award, the Arbitrator unambiguously retained jurisdiction to “resolv[e] any issues that may arise

in the implementation of the remedy granted.”¹⁴ Thus, the above precedent supports a conclusion that the Arbitrator properly exercised jurisdiction over the remedial-implementation issues he resolved in the 2021 award.

The Agency alleges that the Authority’s consideration of exceptions to the 2019 award as a final, non-interlocutory award, establishes that the Arbitrator’s retention of jurisdiction was limited to the issue of attorney fees.¹⁵ This argument was raised and rejected in *Guaynabo*.¹⁶ We agree that the 2019 award was final in that the Arbitrator addressed all issues that were then capable of resolution. However, in the 2019 award, the Arbitrator could not have anticipated that the Agency would thereafter contact grievants directly to discuss the implementation of the remedy. By retaining jurisdiction over any issues arising out of the implementation of his remedies, the Arbitrator established a proper basis for considering the matters at issue here.¹⁷

The Agency also argues that the Arbitrator resolved a new, legal issue of “bypass” that the Union was required to raise through an unfair-labor-practice (ULP) charge, or a new grievance, instead of filing a motion for clarification with the Arbitrator.¹⁸ In addition, the Agency contends the only method for enforcing an arbitration award is through the Authority’s ULP procedures because arbitrators “do not have any statutory or innate right to enforce their own awards.”¹⁹

The Union argues that the Authority should not consider the Agency’s bypass argument because it was not raised below.²⁰ However, even assuming the bypass argument is properly before us, the Agency’s arguments are unavailing. First, the award does not include a finding by the Arbitrator that the Agency violated the Statute.²¹ Second, the notion that the Union *could* have filed a ULP charge or a new grievance does not mean that the Union

⁸ *Id.* at 4.

⁹ Exceptions Br. at 8-19.

¹⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636, 637 (2022) (Member Abbott dissenting) (*Guaynabo*).

¹¹ *Id.*

¹² *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1175 (2020) (then-Member DuBester dissenting in part on other grounds); *U.S. Dep’t of Energy, Oak Ridge Off., Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010) (*Energy*); *U.S. Dep’t of Veterans Admin., Med. Ctr., Leavenworth, Kan.*, 38 FLRA 232, 239 (1990) (*Veterans Admin.*).

¹³ *Energy*, 64 FLRA at 538.

¹⁴ 2019 Award at 28 (emphasis added).

¹⁵ Exceptions Br. at 8-9.

¹⁶ *Guaynabo*, 72 FLRA at 637 (finding that previous arbitrator’s award was final “in that [the previous arbitrator] addressed all of the issues before him that were, in 2016, capable of resolution,” but that the previous arbitrator’s retention of jurisdiction permitted the second arbitrator to resolve continuing FLSA violations).

¹⁷ *See Energy*, 64 FLRA at 538-39 (arbitrator who retained jurisdiction over the implementation of his award had a proper basis for considering issues that arose from implementation of remedy); *Veterans Admin.*, 38 FLRA at 239-40 (arbitrator who retained jurisdiction over “any questions which may arise concerning compliance” with his award did not exceed his authority by resolving a union complaint regarding the manner in which the agency was complying with the award).

¹⁸ Exceptions Br. at 15-16.

¹⁹ *Id.* at 13.

²⁰ Opp’n Br. at 9.

²¹ Although the Arbitrator stated that the Union claimed “the

was *required* to do so; the decisions the Agency cites do not support such a conclusion.²² When, as here, parties' negotiated grievance procedures do not exclude ULP claims,²³ arbitrators may address such claims.²⁴ Moreover, arbitrators are permitted to conduct compliance proceedings when they have properly retained jurisdiction to do so.²⁵ Thus, we reject the Agency's arguments.

For the above reasons, we conclude the Arbitrator was not *functus officio* and, thus, did not exceed his authority or act contrary to law. Accordingly, we deny the Agency's exceptions.

IV. Decision

We deny the Agency's exceptions.

Agency is bypassing the Union," the Arbitrator's award discusses the Agency's actions in the context of *ex parte* communications disallowed by professional and ethical standards. *See* 2021 Award at 3. The Arbitrator never stated that he found a statutory violation or otherwise indicated that he was finding a ULP. *See* 2021 Award at 4-5; *see also* Opp'n Br. at 9 ("Nothing in the Arbitrator's award identifies 'bypass' as an issue which the . . . award . . . is addressing.").

²² *U.S. Dep't of VA, Veterans Canteen Serv.*, 66 FLRA 944, 949 (2012) (finding Veterans Canteen Service employees cannot grieve their removals pursuant to a negotiated grievance

procedure); *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296-97 (1999) (Member Segal concurring) (finding respondent could not collaterally attack arbitration award in a ULP proceeding to enforce the award); *SSA, Balt., Md.*, 53 FLRA 1053, 1062 (1997) (stating that disregard of an arbitrator's unambiguous award is a ULP).

²³ *See* Exceptions, Attach. B, Master Agreement at 9 (grievance procedure providing for "all grievances properly grievable under 5 [U.S.C. §] 7121").

²⁴ *NLRB Prof'l Ass'n*, 73 FLRA 50, 52 (2022).

²⁵ *See, e.g., NTEU*, 70 FLRA 57, 61 (2016).