UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| FEDERAL AVIATION ADMINISTRATION<br>WASHINGTON, D.C.<br>and<br>FEDERAL AVIATION ADMINISTRATION<br>WESTERN PACIFIC REGION<br>and<br>FEDERAL AVIATION ADMINISTRATION<br>PRESCOTT, ARIZONA<br><br>Respondents | |
| and<br><br>JEFFREY G. LETTS, INDIVIDUAL<br><br>Charging Party | Case No. DE-CA-90680 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 21, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, Suite 415
Washington, DC 20424-0001

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 22, 2000

Washington, DC

UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 22, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
and
FEDERAL AVIATION ADMINISTRATION
WESTERN PACIFIC REGION
and
FEDERAL AVIATION ADMINISTRATION
PRESCOTT, ARIZONA

Respondents

and Case No. DE-CA-90680

JEFFREY G. LETTS, INDIVIDUAL

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I hereby transfer the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the motions, exhibits, and any briefs filed by the parties.

Enclosures

**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges OALJ

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WASHINGTON, D.C.

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| FEDERAL AVIATION ADMINISTRATION<br>WASHINGTON, D.C.<br>and<br>FEDERAL AVIATION ADMINISTRATION<br>WESTERN PACIFIC REGION<br>and<br>FEDERAL AVIATION ADMINISTRATION<br>PRESCOTT, ARIZONA<br><br>Respondents | |
| and<br><br>JEFFREY G. LETTS, INDIVIDUAL<br><br>Charging Party | Case No. DE-CA-90680 |

Ms. Gwendolyn Marshall
For the Respondents

Jeffrey G. Letts, Esquire
Pro se

Steven B. Thoren, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

**DECISION**

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et

[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(8) will be referred to, simply, as, "§ 16(a)(8)".

seq., concerns whether the Transportation Act[2] renders inapplicable the provisions of the Back Pay Act, 5 U.S.C. § 5596, to an arbitration award of attorney's fees rendered under a negotiated grievance procedure, pursuant to § 21 of the Statute. For reasons fully set forth hereinafter, I find that the provisions of the Back Pay Act are fully applicable and that Respondents violated §§ 16(a)(8) and (1) of the Statute by their failure and refusal to comply with the arbitrator's award.

This case was initiated by a charge filed on June 28, 1999; the Complaint and Notice of Hearing issued November 30, 1999, and set the hearing for February 18, 2000; on February 2, 2000, an Amended Charge was filed and on February 3, 2000, General Counsel filed a Motion to Amend Complaint to: (a) include the Federal Aviation Administration, Washington, D.C. and Federal Aviation Administration, Western Pacific Region as Respondents to the

[2] The Transportation Act was amended in 1995 to permit and direct the Administrator to develop and implement, ". . . a personnel management system for the Federal Aviation Administration that addresses the unique demands on the agency's workforce. . . ." Department of Transportation and Related Agencies Appropriations Act of 1996, P.L. 104-50, Title III, § 347, November 15, 1995, 109 Stat. 460. As enacted, Sec. 347(b)(3) exempted from FAA's "new personnel management system" all portions of the Statute except: "(3) section 7116(b)(7), relating to limitations on the right to strike;" (id.). But on March 29, 1996, Section 347(b)(3) of P.L. 104-50 was amended to read as follows: "(3) chapter 71, relating to labor-management relations;" (P.L. 104-122, March 29, 1996, 110 STAT. 876). Accordingly, all of Chapter 71 of the Statute now is applicable to FAA's "new personnel management system". Finally, on October 31, 1998, Section 347(b) of P.L. 104-50 was further amended to add a new subsection (8) as follows: "(8) sections 3501-3504, as such sections relate to veterans' preference." (P.L. 105-339, October 31, 1998, 112 STAT. 3187).

Agency Exhibit A, Federal Aviation Administration Personnel Management System, is dated March 28, 1996, one day before the initial amendment of Sec. 347(b)(3) on March 29, 1996, and now is seriously in error, inter alia, in asserting that, "Congress did not include Chapter 71 of Title 5, 'Labor Management Relations,' in the list of sections that will continue to apply to FAA's new personnel management system. . . ." (Agency Exhibit A, Sec. III, p. ii) because Congress did precisely that by P.L. 104-122, 110 STAT. 876.

Complaint; and (b) add new paragraphs 22-26 to the Complaint to reflect the change resulting from the Amended Charge, filed on February 2, 2000, and, as set forth in (a), above, Respondents did not object and, accordingly, General Counsel's motion is granted and the Complaint is hereby amended to include the Federal Aviation Administration, Washington, D.C. and the Western Pacific Region as Respondents and to further amend the Complaint to include new Paragraphs 22-26.

At the pre-hearing conference held on February 3, 2000, by the undersigned, at which all parties were represented, counsel for Respondents acknowledged that Respondents by their Answer had admitted all substantive allegations of fact set forth in the Complaint; conceded that they had not filed any exception or appeal to Arbitrator Brand's Award and Opinion of February 9, 1999, and/or his Supplemental Award and Opinion of May 3, 1999; conceded that they had refused to pay the attorney fees ordered by Arbitrator Brand; and that there are no material facts in dispute. General Counsel and Respondents indicated their intention to file cross motions for Summary Judgment; further agreed that such motions would be filed on, or about February 7, 2000; the hearing, scheduled for February 18, 2000 was canceled; and by Order dated February 8, 2000, the case was indefinitely postponed pending disposition on motions for summary judgment. General Counsel's Motion For Summary Judgment and Brief and Memorandum of Points and Authorities in Support, were received on February 7, 2000. Respondents' Motion For Summary Judgment and Points and Authorities In Support were received on February 9, 2000.

## Statement of the Facts

The undisputed facts are as follows:

1. On, or about, December 12, 1997, Mr. Martin J.J. Dyer, an employee of the Federal Aviation Administration (FAA) in Prescott, Arizona, which is in the nationwide bargaining unit represented by the National Association of Air Traffic Specialists (NAATS), was removed from his position as an Air Traffic Control Specialist with the FAA.

2. NAATS filed a grievance over the removal which was not resolved through the negotiated grievance procedure and NAATS invoked arbitration. Mr. Jeffrey G. Letts, attorney, was employed to represent Mr. Dyer and NAATS in the arbitration proceeding. A hearing was held by the Arbitrator, Normal Brand, on October 30, 1998, in Prescott, Arizona.

3. Arbitrator Brand issued his Award and Opinion on February 9, 1999 (Agency Exh. B; G.C. Exh. 2). In his decision, the Arbitrator found that Mr. Dyer had not been removed for just cause and ordered his reinstatement. The Arbitrator ordered the penalty for Mr. Dyer's infraction be reduced to a written reprimand and further ordered that Mr. Dyer was entitled to back pay from the date that he was terminated, in accordance with the Back Pay Act, and that Mr. Dyer was entitled to have his attorney fees paid in accordance with the directions contained in his accompanying Opinion (id. pp. 12-13).

4. On March 2, 1999, Mr. Letts submitted his Statement For Attorney Fees, with an itemized list of time for services rendered (G.C. Exh. 3) and on March 19, 1999, Respondents submitted their Opposition to Application For Attorney Fees (G.C. Exh. 4; Agency Exh. 6). On March 26, 1999, Mr. Letts responded to Respondents' objections to the attorney fees requested (G.C. Exh. 5); and on April 16, 1999, Respondents responded to Mr. Letts' response (G.C. Exh. 6).

5. On May 3, 1999, the Arbitrator issued his Supplemental Award and Opinion (G.C. Exh. 7; Agency Exh. D). In his Supplemental Award and Opinion the Arbitrator found the hours spent and the fee sought were reasonable and ordered Respondents to pay Mr. Dyer's attorney's fees in the amount of $20,910.00.

6. Respondents by Letter dated May 28, 1999, to Mr. Wally Pike, President of NAATS, with a copy to Mr. Letts, refused to pay the attorney fees awarded by the Arbitrator, stating, in part, as follows:

> "In consultation with the Office of Chief Counsel, the Office of Labor and Employee Relations has determined that payment of the attorney fees directed by Arbitrator Brand is contrary to law. It is the agency's view that, subsequent to Public Law 104-50, as amended, an arbitrator has no statutory authority to award attorney fees in a proceeding under 5 U.S.C. Chapter 71. Consequently, the agency will not implement that portion of his award." (G.C. Exh. 8).

7. Respondents paid the backpay ordered by the Arbitrator (G.C. Exh. 10) and it also restored the leave Mr. Dyer would have earned had he not been improperly separated from his employment (G.C. Exh. 10).

## CONCLUSIONS

The Authority has made clear that: (a) the FAA personnel management system constitutes another personnel system within the meaning of § 21(e)(1) and (f) of the Statute; (b) when the matter is similar to matters covered by 5 U.S.C. §§ 4303 [unacceptable performance] and 7512 [removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less] it is an award covered by § 21(f) of the Statute; and (c) the Authority is without jurisdiction under § 22(a) of the Statute to review exceptions to awards covered by § 21(f). U.S. Department of Transportation, Federal Aviation Administration (Agency) and National Association of Air Traffic Specialists (Union), 54 FLRA 235 (1998). The Authority stated as follows:

> "Section 7122(a) of the Statute pertinently provides:
>
> > 'Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).'
>
> The matters described in section 7121(f) are those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems. Section 4303 covers removals and reductions-in-grade for unacceptable performance. Section 7512 covers removals, suspensions for more than 14 days, reductions in either grade or pay, and furloughs for 30 days or less. Section 7121(e) of the Statute gives an option to certain employees who decide to challenge a matter covered under section 4303 or 7512 or similar matters that arise under another personnel system. These employees can either: (1) file a grievance over the matter under a negotiated grievance procedure (if the matter is not excluded); or (2) appeal the matter to the Merit Systems Protection Board (MSPB) (if the employee is within the MSPB's jurisdiction), or raise the matter under whatever appellate procedures, if any, are applicable (if the employee is within another personnel system).
>
> "Section 7121(f) addresses the review of arbitration awards resolving grievances encompassed by section 7121(e). For employees in

other personnel systems, section 7121(f), provides that, if the employee has filed a grievance over a matter similar to one covered under section 4303 or 7512, the resulting award has the same review as if the administrative appeal option, if one exists, were chosen. Under section 7122(a), the Authority is without jurisdiction to review these awards. See, e.g., U.S. Department of Defense, Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local 3854, 51 FLRA 1651, 1653 (1996) (AAFES).

"With respect to other personnel systems, section 7121(e) refers to the right of employees to appeal '[s]imilar matters' without regard to whether the employee actually has an administrative appeal alternative. Therefore, the Authority does not look beyond the specific personnel actions listed in sections 4303 and 7512 when determining whether a grievance implicates 'similar' matters within the meaning of section 7121(e) and (f). See id. at 1654.

"Section 7121(f) does not define the phrase '[an]other personnel system.' The Authority has concluded that the determinative factor in deciding whether a personnel system constitutes another personnel system within the meaning of section 7121(f) is whether the system is intended to operate separate and apart from the personnel system that is applicable to general civil service employees. See U.S. Department of Defense Dependents Schools, Germany Region and Overseas Education Association, 38 FLRA 1432, 1436 (1991) (DODDS).

. . .

Accordingly, we conclude that the personnel management system established by the Agency [FAA] is intended to operate separate and apart from the personnel system that is applicable to the general civil service. Consequently, it constitutes another personnel system within the meaning of section 7121(f) of the Statute. See DODDS, 38 FLRA at 1436.

"We also conclude that the award relates to the removal of the grievant, which is a matter that is similar to a matter covered under section 4303 or 7512. Consequently, the award relates to

a matter described in section 7121(f). Under section 7122(a), exceptions to the award may not be filed with the Authority, and the Authority is without jurisdiction to review the exceptions." (Id. at 237-239).

Of course, if the matter is not an award relating to a matter described in § 21(f), the Authority has jurisdiction under § 22(a) to entertain exceptions by FAA. Federal Aviation Administration, Washington, D.C. (Agency) and Professional Airways Systems Specialists (Union), 55 FLRA No. 198, 55 FLRA 1233 (2000).

Moreover, the FAA has not challenged the arbitrator's jurisdiction. Thus, it states in its "Motion For Summary Judgment and Points and Authorities in Support Thereof" (hereinafter, "Agency P&A")

> ". . . the FAA is not challenging the arbitrator's jurisdiction. . . ." (p. 7).

An agency must comply with an arbitrator's award when that award becomes "final and binding" when no timely exceptions are filed under § 22(a) of the Statute. Thus, the Authority has stated,

> ". . . it is well established that, under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." The award becomes "final and binding" when there are no timely exceptions filed under section 7122(a) of the Statute or when timely filed exceptions are denied by the Authority. *Carswell*, 38 FLRA 99; *U.S. Department of Health and Human Services, Health Care Financing Administration*, 35 FLRA 491, 494-95 (1990). Disregard of an unambiguous award is an unfair labor practice under section 7116(a)(1) and (8) of the Statute. *IRS Austin*, 44 FLRA at 1315; *Customs Service*, 39 FLRA at 757-58." U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 55 FLRA No. 46, 55 FLRA 293, 296 (1999).

Respondent conceded that the award in this case is clear and unambiguous and that it did not file exceptions under § 22 (a) of the Statute - indeed, as noted above, because this case involved a § 22(f) award, the Authority could not have

considered exceptions even if they had been filed[3] and its assertions that, "The Award Is Contrary To Law, Rule And The Collective Bargaining Agreement" (id., pp. 8 et seq.) are without merit and/or already have been rejected by the Authority. Federal Aviation Administration, 55 FLRA No. 203, 55 FLRA 1271, 1274-1275 (2000).

A. AUTHORITY HAS DETERMINED THAT BACK PAY ACT APPLIES TO REMEDIES FOR EMPLOYEES COVERED BY TRANSPORTATION ACT.

In Federal Aviation Administration, 55 FLRA No. 203, 55 FLRA 1271 (2000), (hereinafter, "FAA"), which concerned the question of remedies for unfair labor practices involving employees covered by the Transportation Act, the

[3] Inasmuch as this case does not involve exceptions, we need not consider in any detail situations where the Authority has, in effect, side-stepped the ban on 7121(f) exceptions. In U.S. Department of Defense, National Guard Bureau, Arkansas Army National Guard, North Little Rock, Arkansas and National Federation of Federal Employees, Local 1671, 48 FLRA 480 (1993), the arbitrator had awarded a grievant, who was terminated from his civilian technician position for failure to maintain his military status, severance pay. The Authority set aside the award because the arbitrator had failed to apply a governing regulation, TPR 990-2, and did not mention § 21(f) or the qualification in § 22(a), ". . . (other than an award relating to a matter described in section 7121(f) of this title)". In American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Contract Audit Agency Central Region, 49 FLRA 1492 (1994) (hereinafter, "Defense Audit") the arbitrator refused to grant a grievant, who was terminated for failure to accept a management directed reassignment, severance pay. The Authority dismissed the Union's exceptions for lack of jurisdiction (Member Talkin dissenting), because, ". . . the award concerning . . . entitlement to severance pay relates to the grievant's removal within the meaning of the Statute." (49 FLRA at 1487). In American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA 1549 (1996), the Authority set aside an award of severance pay as contrary to law and regulations (Member Armendariz dissenting). Here, the Authority did consider § 21(f) and the qualification in § 22(a), "(other than an award relating to a matter described in section 7121 (f). . . .", and concluded, "On reexamination, we conclude that the majority in DCAA (Defense Audit) interpreted the phrase 'related to' in section 7122(a) more broadly than is warranted. . . ." (51 FLRA at 1553).

Authority held that the Transportation Act does not prevent the Authority from ordering a make whole remedy based on the Back Pay Act. Thus, the Authority stated, in part, as follows:

> "The pertinent statutory background concerning the Transportation Act is as follows. The Transportation Act was enacted in November 1995. It gave the Respondent's Administrator discretion to institute a new personnel management system for the Respondent, referred to herein as the "PPRS." Section 347(a) of the Transportation Act provided in this regard that
>
> > "notwithstanding the provisions of title 5, United States Code, and other Federal personnel laws, the Administrator of the [FAA] shall develop and implement . . . a personnel management system for the [FAA]. . . .
>
> . . .
>
> ". . . section 347(b) of the Transportation Act exempts the Respondent's PPRS from many provisions of title 5, United States Code. However, it also specifically makes applicable to the PPRS 'chapter 71 [of title 5], relating to labor-management relations,' *i.e.*, the Statute. The Statute, in turn, not only establishes the framework of rights and responsibilities that underlies labor-management relations in the federal service; it also assigns the Authority the responsibility to administer the Statute and, of particular relevance here, broadly empowers the Authority to issue appropriate orders to remedy ULPs. For example, section 7105(g)(3) provides that the Authority 'may require an agency or a labor organization . . . to take any remedial action [the Authority] considers appropriate to carry out the policies of [the Statute].' Section 7118(a)(7)(D) repeats this broad congressional authorization with particular reference to the Authority's adjudication of ULPs, authorizing the Authority to remedy ULPs by ordering the relevant agency or labor organization to take 'any combination of the actions described' elsewhere in section 7118(a)(7), *or 'such other action as will carry out the purpose of this chapter*' (emphasis added)." (id. at 1274-1275).

To be sure, FAA involved unfair labor practices and 5 U.S.C. § 5596 (Back Pay Act) is incorporated, inter alia, by § 18 of the Statute, whereas § 5596 is incorporated for grievance awards, inter alia, by § 22(b) of the Statute, and FAA did not involve attorney fees. Nevertheless, the holding of the Authority in FAA applies with equal force to awards under §§ 21(e) and (f) and 22 of the Statute. Indeed, Respondent complied with the back pay portion of the award and, at least by implication, seems to agree to the propriety of the application of § 5596(b)(1)(A)(i) by the arbitrator in this case but asserts that application § 5596(b)(1)(A)(ii) - "reasonable attorney fees" - is contrary to law, rule and the collective bargaining agreement.

Respondent's assertion that application of § 5596(b)(1)(A)(ii) is contrary to the collective bargaining agreement is based entirely on the contention that,

> ". . . In this case, the collective bargaining agreement makes no reference to attorney fees. Article 67, section 14 of the agreement notes only that '[t]he Parties retain their rights under 5 U.S.C. 7122 and 7123.' . . ." (Respondent's "Motion For Summary Judgment and Points And Authorities In Support Thereof" (hereinafter, "Res. P&A"), p. 16).

The Authority has soundly rejected like assertions and has made clear that the authority to award attorney fees is conferred by the Back Pay Act. Thus, the Authority has stated, where the Arbitrator denied attorney fees because the agreement did not specifically provide for the grant of attorney fees, that,

> ". . . the Back Pay Act confers jurisdiction on an arbitrator to consider a request for attorney fees . . . the parties can negotiate into their agreement time limits for filing a request for attorney fees. . . . Further, a union may also agree to language that clearly and unmistakably waives its statutory right to attorney fees. In the absence of such contractual limitations . . . the Arbitrator had full authority to award attorney fees if such an award complied with the requirements of the Back Pay Act. Accordingly, the Arbitrator's denial of the Union's request on the basis that the parties' collective bargaining agreement does not specifically authorize the granting of attorney fees is contrary to the Back Pay Act." U.S. Department of the Army, Red River Army Depot, Texarkana, Texas and National

Association of Government Employees, Local R14-52, 39 FLRA 1215, 1221 (1991).

In National Association of Government Employees, Local R14-52 and U.S. Department of the Army, Red River Army Depot, Texarkana, Texas, 45 FLRA 830 (1992), a different case involving a different arbitrator, but the same agency and the same local union, the arbitrator denied the Union's request for attorney fees because he found, ". . . no reference to awarding attorney's fees in this collective bargaining agreement." (id. at 831) and, again, the Authority set aside the arbitrator's denial of attorney fees, stating

> ". . . the Arbitrator's denial of attorney fees on the ground that he had no authority to make such an award is contrary to the Back Pay Act. There is no requirement in the Back Pay Act that an arbitrator be specifically authorized by the parties' collective bargaining agreement to award attorney fees . . . Rather, the Back Pay Act provides that an employee found entitled to an award of backpay may also receive 'reasonable attorney fees related to the personnel action' for which the backpay was awarded. § 5596(b)(1)(A)(ii)." (id. at 833).

Moreover, Respondent's reference to Article 67, section 14 of the parties' collective bargaining agreement demonstrates that that agreement by affirmatively referring to 5 U.S.C. § 7122, specifically incorporated 5 U.S.C. § 5596.

B. AUTHORITY WILL REVIEW § 21(f) AWARDS IN UNFAIR LABOR PRACTICE PROCEEDINGS ONLY FOR LACK OF JURISDICTION BECAUSE OF EXCLUSION BY LAW.

In Veterans Administration Central Office, Washington, D.C., et al., 27 FLRA 835 (1987), aff'd sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 850 F.2d 782 (D.C. Cir. 1988) (hereinafter, "VA Central Office") the Authority in a § 21(f) removal case held that the Veterans Administration did not commit an unfair labor practice by refusing to comply with an arbitrator's award because the agency was entitled to challenge the arbitrator's jurisdiction in an unfair labor practice proceeding and the Authority determined that the arbitrator lacked jurisdiction. In Department of Health and Human Services, Social Security Administration, 41 FLRA 755 (1991), aff'd sub nom., Department of Health and Human

Services, Social Security Administration v. FLRA, 976 F.2d 1409 (D.C. Cir. 1992) (hereinafter, "Social Security"), where the arbitrator was without contractual jurisdiction, the Authority refused to review contractual jurisdiction and found that failure to comply with the award violated §§ 16 (a)(1) and (8) of the Statute, stating, in pertinent part,

> ". . . VA Central Office is limited to cases involving the lack of jurisdiction by an arbitrator because of exclusions by law from the permissible coverage of a grievance procedure negotiated under the Statute. . . ." (41 FLRA at 768).

The Court of Appeals for the D.C. Circuit, in denying Social Security's petition for review and granting FLRA's application for enforcement, concluded,

> "The FLRA's determination that contractual limitations on an arbitrator's jurisdiction may not be raised in an unfair labor practice proceeding is a reasonable interpretation of its governing statute." (976 F2d at 1416).

See, also, U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Leavenworth, Kansas and American Federation of Government Employees, Local 85, 39 FLRA 1162, 1166-1167 (1991); U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 55 FLRA No. 46, 55 FLRA 293, 296 (1999).

C. RESPONDENTS DO NOT ASSERT THAT THE ARBITRATOR LACKED JURISDICTION TO AWARD ATTORNEY FEES BECAUSE OF EXCLUSION BY LAW.

Indeed, as noted above, Respondents do not challenge the arbitrator's jurisdiction for any reason. Nor is there anything in the Transportation Act which precludes the award of attorney fees. To the contrary, Respondents', "contrary to law" argument comes down to a single contention, namely, that because § 22(b) reads,

> ". . . The award may include the payment of backpay (as provided in section 5596 of this title)." (5 U.S.C. § 7122(b)) (Emphasis supplied)

that the Statute, i.e. Chapter 71 of Title 5, did not, and does not, make any provision for the payment of attorney fees but only for the payment of backpay; that the provisions of the Transportation Act exempt the FAA's new

personnel management system from most of Title 5 of the United States Code, and specifically from 5 U.S.C. § 5596 (Agency Exh. A, pp. 1-2; Agency P&A, pp. 8, 10-11); that because § 22(b) includes only backpay there is no specific statutory authority for FAA to pay attorney fees and the payment of attorney fees can only be made pursuant to specific statutory authorizations; and citing American Federation of Government Employees, Local 2419 and U.S. Department of Health and Human Services, National Institutes of Health, Division of Engineering Services, Maintenance Engineering Branch, 50 FLRA 128, 130 (1995); Laborers' International Union of North America, Local 1376 and U.S. Department of Health and Human Services, Public Health Service, Navajo Area Indian Health Service, 54 FLRA 700, 704 (1998), Respondents contend that the award of attorney fees was contrary to law. To bolster its position that FAA is not subject to the provisions of the Back Pay Act relating to attorney fees, Respondents assert, in essence, that because the Transportation Act exempts FAA from all of 5 U.S.C. § 7701, et al., it is not subject to 5 U.S.C. § 5596 (b)(1)(A)(ii) because that sub-section, which concerns attorney fees, is conditioned on standards established under 5 U.S.C. § 7701(g) to which FAA is not subject (Agency P&A, pp. 10, 13, 15). Further, Respondent asserts,

> ". . . Because the agency was granted almost complete autonomy in crafting a new personnel management system, it was free to provide for or not provide for attorney payments as it saw fit. . . ." (Agency P&A p. 10),

and, in fact, it specifically prohibited the payment of attorney fees under its new personnel management system, stating:

> "(g) Agency funds may not be used to pay either interest or attorney fees as the result of a decision in the FAA Grievance Procedure, the FAA Appeals Procedure, or the Executive System Appeals Procedure." (Agency Exh. A, Chapter II, par. 9 (g)).

Whether Respondents' contentions are meritorious or are without merit, and, for reasons set forth hereinafter, I deem the contentions to be without merit, they do not constitute a claim that the arbitrator lacked jurisdiction to award attorney fees because such award was precluded by law and, therefore, may not be challenged in an unfair labor practice proceeding.

Further, Respondents assert that because it has no other avenue of appeal they should be permitted to challenge the legality, i.e., contrary to law, of the award of attorney fees in this unfair labor practice proceeding. While it is true, as Respondents state (Agency P&A, p. 4), the Transportation Act exempted FAA from, ". . . 5 U.S.C. Chapters 43, 75 or 77. As a result, the agency lost the avenue previously available under 5 U.S.C. 7121(f) to seek judicial review of an arbitration award. . . ." It is also true, as Respondent states, that, under its Personnel Management System, an appellant may seek judicial review of a panel order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit but decisions of the panel are issued as final orders of the Administrator and, of course, he cannot appeal his own order (Agency P&A, pp. 4-5). The absence of a right to appeal does not require the Authority to review § 21(f) awards in unfair labor practice proceedings and it expressly declined to do so in Social Security, supra, (to challenge the conceded lack of contractual jurisdiction) and the Court of Appeals agreed, "The FLRA's determination that contractual limitations on an arbitrator's jurisdiction may not be raised in an unfair labor practice proceeding is a reasonable interpretation of its governing statute. . . ." 976 F.2d at 1416. Moreover, the Transportation Act permitted FAA to produce its own Personnel Management System free of the restraints of 5 U.S.C. Chapter 43, 75 and 77 and FAA gave itself no right of appeal. Accordingly, having waived its right of appeal, it ill-behooves Respondents to complain that they have no right to appeal. If they are displeased, FAA has the power to rectify its decision.

D. IN ANY EVENT, RESPONDENTS' "CONTRARY TO LAW" ASSERTIONS ARE WHOLLY LACKING IN MERIT.

Respondents' assertion that,

> "Chapter 71 of title 5 is silent with respect to the issue of attorney fees incurred during the processing of a grievance or arbitration . . . The plain language of section 7122(b) authorizes only back pay. It does not adopt all of the provisions of section 5596, merely those dealing with the narrow issue of backpay." (Agency P&A, p. 11)

is patently lacking in merit.

§ 21(e) of the Statute provides, in pertinent part, as follows:

> "(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems . . . may, in the discretion of the employee, be raised either under the appellate procedures, if any, . . . or under the negotiated grievance procedure, but not both. . . . (5 U.S.C. § 7121(e)(1)) (Emphasis supplied).

With respect to the burden of proof with which arbitrators must comply, § 21(e)(2) of the Statute provides:

> "(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure . . . an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable." (5 U.S.C. § 7121 (e)(2)).

> ["in an action based on unacceptable performance, . . . [§ 4303] is supported by substantial evidence" (5 U.S.C. § 7701(c)(1)(A)] (Emphasis supplied).

> ["in any other case is supported by a preponderance of the evidence." [§ 7512] (5 U.S.C. § 7701(c)(1)(B)] (Emphasis supplied).

§ 21(f) of the Statute provides, in relevant part, as follows:

> "(f) . . . In matters, similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters under the applicable appellate procedures." (5 U.S.C. § 7121(f)).

§ 22 of the Statute provides, in pertinent part, as follows:

> "(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award . . . (other than an award relating to a matter described in section 7121(f) of this title). . . .
>
> "(b) If no exception to an arbitrator's award is filed under subsection (a) of this section . . . the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title.)" (5 U.S.C. § 7122(a) and (b)). (Emphasis supplied).

It is significant that: (1) the amendment and the incorporation of the Back Pay Act in case of unfair labor practices and grievances was part and parcel of the enactment of the Statute, e.g., Sec. 701 of P.L. 94-454, 92 STAT. 1191, is Chapter 71 - Labor Management Relations/ and Sec. 702, 92 STAT. 1216, is 5 U.S.C. § 5596(b); (2) the specific reference in § 22(b) to "section 5596" means that all parts of 5 U.S.C. § 5596 are applicable. While, in the enactment of the Statute in 1978 only § 5596(b) was amended, P.L. 95-454, 92 STAT. 1216, application of all of § 5596 must be considered. For example, section (a) of 5596 defines, for the purpose of this section, "agency", which definition has, since 1978, been amended; a new subsection has, since 1978, been added as subsection (b)(2)(A), (B) and (C) (§ 5596(b)(2)(A), (B) and (C) ["An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest."] and the Authority has made clear that awards pursuant to § 22(b) under § 5596(b)(1)(A)(i) shall include interest. Defense Logistics Agency and American Federation of Government Employees, Local No. 2501, 31 FLRA 754 (1988); U.S. Department of Defense, Marine Corps Logistics Base, Barstow, California and American Federation of Government Employees, Local 1492, 37 FLRA 796, 797 (1990); previous subsection (b)(2) has been re-numbered as subsection (b)(3); previous subsection (b)(3) has been re-numbered as subsection (b)(4) and amended to include members of the Foreign Service Act of 1980; and a new subsection (c) has been added ["The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section" (§ (a)(2) "the Administra-tive Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28")]; (3) the integration of the provisions of

Chapter 71 and § 5596(b) is shown not only by the reference in § 22(b) to "section 5596"; but by the references in § 5596 to §§ 3 and 16 of the Statute and to the specific addition of the provision amending and/or or clarifying "appeal or an administrative determination" in the first sentence of § (b)(1) to "(including a decision relating to an unfair labor practice or a grievance)." Section 5596(b)(3) stated that, "grievance" and "collective bargaining agreement" have the meaning set forth in §§ 3 and 16 of the Statute; and further that, ". . . 'personnel action' includes the omission or failure to take an action or confer a benefit." (§ 5596(b)(3)) [now § 5596(b)(4)].

Plainly, Respondents are wrong in all respects. Chapter 71 is <u>not silent</u> with respect to attorney fees. To the contrary, § 22 specifically incorporates 5 U.S.C. § 5596 which, in turn, provided for back pay <u>and</u> reasonable attorney fees. Thus 5596(b)(1) provides, in relevant part that an employee who is found by appropriate authority 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, on correction of the personnel action, to receive . . .
>
> > "(i) an amount equal to all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned or received. . . if the personnel action had not occurred. . .; <u>and</u>
> >
> > "(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, <u>shall be awarded in accordance with standards established under section 7701(g) of this title</u>. . . ." (5 U.S.C. § 5596(b)(1)(A)) (Emphasis supplied).

Member Fraizer concurring in <u>Naval Air Development Center, Department of the Navy</u>, 21 FLRA 131 (1986), stated, "In light of this legislative history, it is clear that under the Civil Service Reform Act of 1978, the Federal Labor Relations Authority and arbitrators issuing awards under the

provisions of section 7121 of the Statute may award attorney fees. . . .” (21 FLRA at 155).

It is true, of course, that the award of reasonable attorney fees is not automatic with the award of pay, allowances or differentials under § 5596(b)(1)(A)(i), but is subject to standards established under 5 U.S.C. § 7701(g). As the Authority has stated,

> “. . . the award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g) [footnote omitted]. Section 7701(g) prescribes that for an employee to be eligible for an award of attorney fees, the employee must be the prevailing party. Section 7701(g)(1), which applies to all cases except those of discrimination, requires that an award of attorney fees must be warranted ‘in the interest of justice,’ that the amount must be reasonable, and that the fees must have been incurred by the employee. . .
>
> “The standards established under section 7701 (g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded. See, e.g., Allen v. U.S. Postal Service, 2 MSPB 582 (1980). . . .” International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680, 683-684 (1984). (Hereinafter, “IBEW, Hawaii”).

In United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, 32 FLRA 20 (1988), the Authority made it clear that attorney fees may be awarded to counsel who represent successful grievants in binding arbitration proceedings even if the grievant is not a “party” to the arbitration. Thus the Authority stated, in part, as follows:

> “. . . Under the Back Pay Act, an employee who has suffered an unjustified personnel action may or may not be a direct ‘party’ to the range of proceedings which can give rise to an award of attorney fees.

"For example, individual employees who are grievants in negotiated proceedings generally are not 'parties' to arbitration proceedings under the statute . . . Nonetheless, the Back Pay Act authorizes award of fees to counsel who represent successful grievants in binding arbitration proceedings. . . ." (id. at 25-26).

The fact that FAA is not subject to 5 U.S.C. Chapter 77 is immaterial. § 5596(b)(1)(A)(ii) provides, "(ii) reasonable attorney fees related to the personnel action . . . shall be awarded in accordance with standards established under section 7701(g) of this title . . ." (5 U.S.C. § 5596(b)(1)(A)(ii)). It is not Respondent that is thereby subject to § 7701(g) but, rather that attorney fees must be in accord with standards set forth in § 7701(g). As the Authority has stated,

". . . the requirements for awarding fees are set forth in 5 U.S.C. § 7701(g)(1). Additionally, we have established principles to guide us in reviewing fee requests . . . . We note that the Authority recently published proposed rules concerning the processing of applications for awards of attorney fees under the Act. See 53 Fed. Reg. 10885 (April 4, 1988). Until final regulations become effective, the Authority will continue to judge fee requests under the standards for awarding attorney fees provided in 5 U.S.C. § 7701(g)(1) and relevant court decisions.

. . .

"Under the Act, attorney fee payments may be required of the agency involved if the requirements set forth in 5 U.S.C. § 7701(g)(1) are met. See 5 U.S.C. § 5596(b)(1)(A)(ii). These requirements are (1) that attorney fees have been incurred; (2) the employee is the prevailing party in the action; (3) an award of attorney fees is warranted in the interest of justice; and (4) the fees are reasonable. . . ." Department of the Air Force, Headquarters, 832 D Combat Support Group, DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084, 1091, 1095 (1988).

See, also, United States Department of Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 48 FLRA 1281, 1291 (1994).

Accordingly, Respondents' Motion For Summary Judgment is denied and General Counsel's Motion For Summary Judgment is granted.

REMEDY

General Counsel seeks a nationwide posting to remedy the violation of Respondents' failure and refusal to comply with the Supplemental Award and Opinion of the Arbitrator. In support of its request, General Counsel points out that the FAA, through its Office of Chief Counsel, directed the FAA Region to refuse on behalf of FAA Prescott, Arizona, to pay the attorney fees directed by the award. Where higher levels of an agency direct subordinate levels not to comply with an arbitrator's award, such action violates the Statute. U.S. Department of Justice and Bureau of Prisons, Washington, D.C. and Federal Correctional Institute, Danbury, Connecticut, 20 FLRA 39 (1985). The direction not to pay attorney fees, at the direction of FAA's national office, demonstrates a nationwide policy of FAA not to pay attorney fees and such action has a chilling effect on all employees who may need to seek representation by attorneys to challenge unwarranted personnel actions by FAA through the provisions of the negotiated grievance procedure. Accordingly, I agree with General Counsel and will recommend a nationwide posting.

Having found that Respondent Federal Aviation Administration, Washington, D.C., Respondent Federal Aviation Administration, Western Pacific Region and Respondent Federal Aviation Administration, Prescott, Arizona, violated §§ 16(a)(8) and (1) of the Statute by the failure and refusal, individually and collectively, to comply with the Arbitrator's Award of attorney fees, it is:

ORDERED

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Federal Aviation Administration, Washington, D.C., its Western Pacific Region and its Prescott, Arizona, facility, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the final and binding Supplemental Award and Opinion of Arbitrator Norman Brand dated May 3, 1999, directing the Respondents to pay reasonable attorney fees in the amount of $20,910 to grievant Martin J.J. Dyer.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured to them by the Statute.

2. Take the following action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the Arbitrator's Supplemental Award and Opinion by paying the reasonable attorney fees in the amount of $20,910 to grievant Martin J.J. Dyer. The Respondents must comply within 60 days.

(b) Post at all Federal Aviation Administration facilities with employees in the bargaining unit represented by the National Association of Air Traffic Specialists, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Administrator, Federal Aviation Administration, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80207-3581, in writing, withing 30 days from the date of this Order, as to what steps have been taken to comply.

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 22, 2000
Washington, DC

**NOTICE TO ALL EMPLOYEES**
**POSTED BY ORDER OF THE**
**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Federal Aviation Administration, Washington, D.C., Federal Aviation Administration, Western Pacific Region and Federal Aviation Administration, Prescott, Arizona, have violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with the final and binding Supplemental Award and Opinion of Arbitrator Norman Brand dated May 3, 1999, directing us to pay reasonable attorney fees in the amount of $20,910 to grievant Martin J.J. Dyer.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

DATED: _____ BY:

_____
Administrator
Federal Aviation
Administration

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DE-CA-90680, were sent to the following parties:

_____

__

| **CERTIFIED MAIL & RETURN RECEIPT** | **CERTIFIED NOS:** |
|---|---|
| Steven B. Thoren, Esquire<br>Counsel for the General Counsel<br>Federal Labor Relations Authority<br>1244 Speer Boulevard, Suite 100<br>Denver, CO 80204-3581<br>**Phone: 303-844-5226 ext.14**<br>**Fax: 303-844-2774** | P 726 680 961 |
| Gwendolyn Marshall<br>Labor Relations Specialist<br>Federal Aviation Administration<br>P.O. Box 92007<br>World Postal Center<br>Los Angeles, CA 90009<br>**Phone: 310-725-7824**<br>**Fax: 310-725-6834** | P 726 680 962 |
| Jeffrey G. Letts, Esquire<br>36 Rebecca Court<br>Trenton, NJ 08628<br>**Phone: 609-538-1916**<br>**Fax: 609-538-1916** | P 726 680 963 |

DATED: May 22, 2000
Washington, DC