66 FLRA No. 53

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 506
(Union)

0-AR-4262
(63 FLRA 351 (2009))

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DECISION

October 26, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award on remand of Arbitrator James J. Sherman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

In his original award (original award), the Arbitrator determined that the Agency's argument that a fitness-for-duty examination[1] does not constitute an investigation was persuasive, but ordered the Agency, in the future, to allow an employee who requests Union representation to have a representative present during a fitness-for-duty examination. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 351-52 (2009) (*FCC Coleman*). In *FCC Coleman*, the Authority remanded the case to the parties for resubmission to the Arbitrator, absent settlement, to clarify whether, under § 7114(a)(2)(B) of the Statute, the grievant's fitness-for-duty examination constituted an examination of an employee by an Agency representative and was conducted in connection with an investigation. *Id.* at 354. The Arbitrator clarified, in a second award (clarification award), that the fitness-for-duty examination was not administered by Agency representatives. Clarification Award at 31, 32. Despite this finding, the Arbitrator then determined that the grievant was harassed and constructively discharged and awarded the grievant damages. *Id.* at 29-30, 32. For the reasons set forth below, we grant the Agency's exceeds authority exception and set aside the clarification award.

II. Background

A. Original Award

In its grievance, the Union claimed that the Agency wrongfully denied the grievant's request to have Union representation at a fitness-for-duty examination. *FCC Coleman*, 63 FLRA at 351. At arbitration, the Arbitrator noted that one of the relevant issues was "[w]hether the Agency violated the [g]rievant's rights when it refused her request for Union representation at her fitness[-]for[-]duty examination. If so, what is the proper remedy?" Exceptions, Attach. E at 1.

In his original award, the Arbitrator initially found that the Agency argued persuasively "that a fitness[-]for[-]dut[y] exam[ination] is not an 'investigation' within the meaning of that term in the contract or the law." *Id.* at 45. However, the Arbitrator maintained that a Union "representative should be present if an employee has reason to fear that the person providing the exam[ination] will not follow standard procedures whether due to lack of understanding of the employee's duties or possibly even bias." *Id.* at 48. Ultimately, the Arbitrator sustained the grievance and ordered the Agency, in the future, to allow an employee who requests Union representation to have a representative present during a fitness-for-duty examination. *Id.* at 54. The Arbitrator noted that, without further information, he was unable to award damages or other relief that the Union requested, and he retained "jurisdiction for [six] months to resolve any disputes if the [p]arties [were] unable to reach final agreement." *Id.*

B. Authority's Decision in 63 FLRA 351

The Agency filed an exception to the Arbitrator's original award. *FCC Coleman*, 63 FLRA at 351. As relevant here, the Agency asserted that "there [was] no evidence in the record that the fitness-for-duty

[1] The Agency required the grievant to undergo a fitness-for-duty examination in order to determine whether she could perform the duties of her position. *See* Exceptions, Attach. B at 3. The grievant's fitness-for-duty examination consisted of three different parts: (1) a physical examination; (2) a firearms examination; and (3) a psychological examination. *See* Exceptions, Attach. E at 7-15.

examination" constituted an examination or that the Agency conducted an investigation "within the meaning of § 7114(a)(2)(B) of the Statute." *Id.* at 352-53. The Agency cited National Labor Relations Board precedent indicating that, under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*), "an employee is not entitled to union representation during an employer-ordered fitness-for-duty exam[ination]." *Id.* at 352.

The Authority noted that, in order for the *Weingarten* right to be triggered, four criteria must be met: "(1) the meeting must be an examination of an employee by a representative of the agency; (2) in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation." *Id.* at 354. The Authority found that the Arbitrator made no factual findings regarding the first and second criteria set forth above.[2] *Id.* As a result, the Authority found that it was unable to determine whether the award was contrary to § 7114(a)(2)(B) of the Statute and that it would "remand the award to the parties for resubmission to the Arbitrator, absent settlement." *Id.*

C. Clarification Award

Following the remand, the parties resubmitted two issues to the Arbitrator, and hearings were held on those issues over a year and a half after the Authority issued its decision. Exceptions at 1-2, 4. At arbitration, the parties stipulated to the following issues: (1) "[w]as the [fitness-for-duty examination] an examination of an employee by a representative of the Agency"; and (2) "[was] the fitness[-]for[-]duty examination [conducted] in connection with an investigation?" Clarification Award at 2; Exceptions at 6. However, in his clarification award, the Arbitrator stated that, regardless of whether the above issues were answered in the affirmative, his retention of jurisdiction in the original award allowed him to raise an additional issue, namely "[w]hat [was] the appropriate remedy for the violation of the [g]rievant's statutory and/or contractual rights?" Clarification Award at 2.

The Arbitrator determined that it would be inappropriate and even unethical for Union representatives to attend fitness-for-duty examinations. *Id.* at 31. Moreover, the Arbitrator found that, although the Union persuasively argued that the grievant's fitness-for-duty examination was conducted in connection with an investigation, no one who conducted the examination was a representative of the Agency. *Id.* at 31, 32. According to the Arbitrator, because the fitness-for-duty examination was not administered by Agency representatives, the "*Weingarten* Doctrine" was not applicable. *Id.* at 32.

The Arbitrator went on to find that, in events preceding the grievant's request for a Union representative, the grievant was harassed by co-workers. *Id.* at 29-30. Also, the Arbitrator determined that the grievant was constructively discharged. *Id.* at 30. In this regard, the Arbitrator found that the grievant was unable to perform her duties after being harassed and that, but for the harassment, the grievant would "be psychologically fit to work at her old job." *Id.* In addition, the Arbitrator noted that, after the Agency proposed her removal, she left her position and obtained permanent disability. *Id.* at 29. However, the Arbitrator maintained that he seriously doubted "whether the extension of representation rights to her throughout the ordeal of her fitness-for-duty [examination] would have made any difference to the outcome." *Id.* at 30. Moreover, the Arbitrator used his retained jurisdiction in the original award to grant the grievant's request for restitution and awarded the grievant "top-up pay." *Id.* (indicating that "top-up pay" would provide the grievant "with her prior top rate of pay for the period . . . (when she was placed on enforced leave) until she actually received her first check for the full amount of her disability pay"); *see also id.* at 32.

III. Agency's Exceptions

The Agency contends that the Arbitrator exceeded his authority. *See* Exceptions at 6-12. The Agency claims that, in the clarification award, the Arbitrator was functus officio when he relied on his retention of jurisdiction in the original award. *See id.* at 10-11. Specifically, the Agency maintains that, because the Arbitrator retained jurisdiction for only six months after the issuance of his original award, "any retained jurisdiction had long since expired" before the hearing on remand. *Id.* at 11 n.8; *see also id.* at 10. Also, the Agency asserts that the Arbitrator's six-month period was not extended or prolonged because it filed exceptions to the original award. *Id.* at 11 n.7. Further, the Agency argues that the only jurisdiction that the Arbitrator had on remand "was the jurisdiction the parties gave him" which "was limited to the two issues stipulated to by the parties." *Id.* at 11.

Moreover, the Agency contends that the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration. *See id.* at 7-8. In this regard, the Agency asserts that the Arbitrator imposed a remedy to an issue not before him. *See id.* at 9-10. The Agency claims that the record clearly indicates that only the two

[2] The Authority noted that the Agency did "not except to the Arbitrator's finding that the grievant had a reasonable fear of discipline" and that "there [was] no dispute that the employee requested Union representation." *FCC Coleman*, 63 FLRA at 354 n.7.

stipulated issues were before the Arbitrator. *Id.* at 6-7; Exceptions, Attach. D at 6; Exceptions, Attach. C at 7-8, 60. According to the Agency, it was unnecessary for the Arbitrator to determine whether the grievant was harassed prior to her request for a Union representative or whether she was constructively discharged in order for him to address the two stipulated issues. Exceptions at 8 n.3. Additionally, the Agency asserts that the parties agreed that the Arbitrator should not decide the issue of potential damages until he "resolve[d] the *Weingarten* issue[,] and the Authority ultimately issue[d] a binding decision if [the Arbitrator's] second award [was] appealed." *Id.* at 9 n.4; *see also* Exceptions, Attach. D at 29 n.11 (noting the Union's position was that, "once a final and binding decision [was] made by the Authority[,] . . . and the Arbitrator's award [was] sustained, damages and other specified relief [would] be discussed at that time").

In addition, the Agency claims that the award is based on a nonfact. Exceptions at 13 n.10. According to the Agency, the parties only submitted testimony and evidence regarding the fitness-for-duty examination at arbitration, and, thus, "any knowledge [the Arbitrator] had of conduct that occurred prior to the exam[ination] was not a part of the record at the current hearing and should not have been considered by the Arbitrator." *Id.*

Finally, the Agency argues that the award is contrary to the Back Pay Act. *See id.* at 12-14. According to the Agency, the Arbitrator awarded a remedy without finding a violation of the parties' agreement or a violation of law, rule, or regulation. *Id.* at 13.

IV. Analysis and Conclusions

The Agency asserts that, because the Arbitrator's retention of jurisdiction in the original award had expired prior to the hearing on remand, the Arbitrator was functus officio when he relied on that retained jurisdiction to award the grievant "top-up pay" in the clarification award. *See* Exceptions at 10-11. Also, the Agency asserts that the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration on remand. *See id.* at 7-8. In this regard, the Agency claims that the Arbitrator imposed a remedy to an issue not before him. *See id.* at 9-10. For the following reasons, we find that the Arbitrator exceeded his authority in the clarification award when he disregarded a self-imposed limitation on his retained jurisdiction in the original award and when he resolved an issue not before him.

A. The Arbitrator was functus officio when he relied on his retained jurisdiction in the original award to award the grievant "top-up pay" in the clarification award.

Unless an arbitrator retains jurisdiction after issuance of an award, the arbitrator is without legal authority to take any further action with respect to that award without the joint request of the parties. *See Gen. Servs. Admin.*, 34 FLRA 1123, 1128 (1990) (finding that the arbitrator had no authority to reopen the award to determine a dispute over allocation of costs of the arbitration proceeding when he did not retain jurisdiction and both parties stipulated and agreed that they intended to place the issue before another arbitrator); *Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 FLRA 410, 415 (1988) (determining that the arbitrator exceeded his authority by reopening and reconsidering his original award, which had become final and binding where he did not retain jurisdiction over the matter and where there was no joint request by the parties); *cf. Soc. Sec. Admin.*, 34 FLRA 866, 870-71 (1990) (finding that the arbitrator was not functus officio because the record indicated that the parties agreed to confer authority on him to reopen the award for the receipt of evidence concerning the grievant's receipt of a within-grade increase and reassignment).

The retention of jurisdiction by arbitrators for the purposes of clarification and interpretation of an award and for overseeing the implementation of remedies is not unusual and has been approved by the Authority. *See Overseas Educ. Ass'n*, 31 FLRA 80, 93 (1988) (finding that the arbitrator properly retained jurisdiction to assist parties if they could not agree on procedures for implementing the award); *Patent & Trademark Office*, 15 FLRA 990, 993 (1984) (finding that the arbitrator did not exceed his authority by retaining jurisdiction to evaluate progress of bargaining). However, the Authority has held that an arbitrator must observe self-imposed limitations on his retention of authority. *See U.S. Dep't of Transp., Fed. Aviation Admin., Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825-26 (2010) (*FAA Renton*); *U.S. Dep't of Def., Dependents Sch.*, 49 FLRA 120, 123 (1994) (*Dependents Sch.*).

The Arbitrator, in his original award, retained "jurisdiction for [six] months to resolve any disputes if the [p]arties [were] unable to reach final agreement." Exceptions, Attach. E at 54. In his clarification award, the Arbitrator stated that, based on his retention of jurisdiction in the original award, he could award the grievant "top-up pay." Clarification Award at 30.

Because the Arbitrator limited his retention of jurisdiction to six months following the issuance of his

original award, he was required to abide by this self-imposed limitation on his retention of authority by asserting jurisdiction only within that time frame. *See FAA Renton*, 64 FLRA at 826 (finding that, because the arbitrator specifically limited his retention of jurisdiction to the remedy only after deciding the merits in the initial award, the arbitrator was without authority to revisit the merits of the case in a subsequent award); *Dependents Sch.*, 49 FLRA at 123 (noting that the arbitrator limited his authority to resolve any outstanding issues by requiring that a hearing be held on the issues not resolved by the parties and, thus, was without authority when he failed to hold a hearing); *cf. U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 65 FLRA 950, 951, 954 (2011) (determining that the arbitrator was not functus officio because she expressly retained jurisdiction to resolve disputes over the implementation of her remedy, and she asserted jurisdiction within the ninety-day period during which she had retained jurisdiction). Even if the six-month period is calculated from the date of the Authority's remand, the period expired before the hearing on remand. *See* Exceptions at 10. Consequently, the Arbitrator had no authority to award the grievant "top-up" pay based on his retention of jurisdiction in the original award. Accordingly, we find that the Arbitrator was functus officio when he relied on his retained jurisdiction in the original award to award the grievant "top-up pay" in the clarification award.

B. The Arbitrator exceeded his authority by resolving an issue that was not before him on remand.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

However, the Authority has held that an arbitrator's authority to fashion a remedy does not extend to issues that are not submitted to arbitration. *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002) (*U.S. Dep't of the Navy*). Moreover, the Authority has determined that, although arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them. *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 780 (2005) (then-Member Pope dissenting as to application).

Here, although the parties agreed to confer authority on the Arbitrator after his retention of jurisdiction had expired, they gave him limited authority on remand to address only the two stipulated issues. *See* Exceptions at 6-7 (noting that the parties agreed that only the two stipulated issues were before the arbitrator); Exceptions, Attach. C at 7-8, 14-16, 52-55, 60 (indicating that only the stipulated issues were before the Arbitrator on remand and that other issues put before him prior to the original award were not before him). As noted above, the parties stipulated that the only issues before the Arbitrator were: (1) whether the fitness-for-duty examination was "an examination of an employee by a representative of the Agency"; and (2) whether "the fitness[-]for[-]duty examination [was conducted] in connection with an investigation." Exceptions at 6; Exceptions, Attach. D at 6. The Arbitrator resolved the stipulated issues by determining that, although the Union persuasively argued that the fitness-for-duty examination was conducted in connection with an investigation, no one who conducted the examination was a representative of the Agency. Clarification Award at 31, 32. Moreover, the Arbitrator found that, because the fitness-for-duty examination was not conducted by Agency representatives, the "*Weingarten* Doctrine" was not applicable. *Id.* at 32. At that point, the Arbitrator had decided the merits of the issues submitted to him, found no violation, and, therefore, possessed no authority to direct a remedy. *See U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973 (2011); *U.S. Dep't of the Treasury, Internal Revenue Serv., Ogden Serv. Ctr., Ogden, Utah*, 63 FLRA 195, 197 (2009).

Although the Arbitrator determined that the Agency did not violate the "*Weingarten* Doctrine," he went on to award the grievant "top-up pay" because he determined that, prior to the grievant's request for Union representation, she was harassed by co-workers and, as a result, was constructively discharged. Clarification Award at 29-30, 32. The Arbitrator was not asked, or authorized, to resolve these other issues or to direct remedies concerning them. *See* Exceptions at 6-7 (noting that the Arbitrator was asked only to address the two stipulated issues); Exceptions, Attach. C at 7-8, 14-16, 52-55, 60 (indicating that the Arbitrator was not asked to, nor authorized to, address other issues that were discussed in relation to the original award); *see also U.S. Envtl. Prot. Agency, Region 2, N.Y.C., N.Y.*, 63 FLRA 476, 479 (2009) (*EPA*) (finding that, once the arbitrator resolved the merits of the stipulated issue and found that the agency did not violate the parties' agreement, he was not authorized to address other alleged violations of the parties' agreement). In fact, the parties specifically agreed that the Arbitrator should not address

the issue of potential damages in the clarification award.[3] *See* Exceptions at 9 & n.4; Exceptions, Attach. D at 29 n.11. Consequently, by further finding that the grievant was harassed and constructively discharged and awarding the grievant "top-up pay," the Arbitrator exceeded his authority by deciding, and awarding a remedy concerning, an issue not submitted to arbitration. *See NLRB, Tampa, Fla.*, 57 FLRA 880, 881 (2002) (determining that the arbitrator exceeded her authority by deciding, and awarding a remedy concerning, an issue not submitted to arbitration); *U.S. Dep't of the Navy*, 57 FLRA at 688-89 (same); *U.S. Dep't of Health & Human Servs., Food & Drug Admin., New Orleans, La.*, 54 FLRA 90, 95 (1998) (same).

Accordingly, we grant the Agency's exception.[4]

V. Decision

The award is set aside.

[3] In hearings held prior to the original award, the Union did request that the Arbitrator award the grievant damages. *See* Exceptions, Attach. E at 54 (noting that the Union requested that the Arbitrator award damages and other specified relief). However, as noted above, the Arbitrator's retention of jurisdiction from the original award expired before the hearing on remand.

[4] In light of this determination, we will not address the Agency's remaining exceptions. *See EPA*, 63 FLRA at 479 n.5 (finding that, because the Authority had determined that the arbitrator exceeded his authority, it did not need to address the agency's remaining exceptions).