

67 FLRA No. 69

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CENTRAL TEXAS
VETERANS HEALTH CARE SYSTEM
TEMPLE, TEXAS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2109
(Charging Party/Union)

DA-CA-12-0150

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DECISION AND ORDER

February 19, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Secretary of the U.S. Department of Veterans Affairs (Secretary) issued a determination that the subject matter of an arbitration award and an administrative law judge's (ALJ's) decision concerns or arises out of subjects specified in Title 38 of the U.S. Code. Under well-established Authority precedent, once the Secretary issues such a determination, the Authority lacks jurisdiction over the matter. We therefore remand the decision to the Authority's Office of Administrative Law Judges (OALJ) with instructions to vacate the decision and dismiss the case.

II. Background and Judge's Decision

The Union filed a grievance concerning overtime for nurses. An arbitrator issued an award sustaining the grievance. After the Respondent failed to comply with the arbitrator's award, the Authority's Office of the General Counsel (GC) issued a complaint alleging that the Respondent's actions violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute.

In response to the complaint, the Respondent contended that the award could not be enforced because the Authority lacked jurisdiction over the subject matter

at issue. The Respondent stated that it had requested a determination from the Secretary that the subject matter of the grievance and subsequent arbitration award "involved professional conduct or competence and the establishment, determination, or adjustment of employee compensation under [38 U.S.C.] § 7422(b)(1) and (3)"¹ (Title 38 determination). According to the Respondent, a Title 38 determination would deprive the Authority of jurisdiction over the case.

The Judge found that, although the Respondent had requested that the Secretary make a Title 38 determination, the Secretary had not yet done so. Noting that such a "determination is necessary to find [that] an arbitrator lacked jurisdiction to issue an award, as well as to divest the Authority of jurisdiction in" unfair labor practice (ULP) proceedings, the Judge found that: (1) the Respondent was required to comply with the award; and (2) the Authority had jurisdiction to resolve the ULP complaint.² Turning to the merits of the complaint, the Judge found that the Respondent had committed a ULP by failing to comply with the award.

The Judge transmitted her recommended decision, which is attached to this decision, to the Authority. Following the decision's transmittal, the Secretary issued a Title 38 determination regarding the subject matters at issue. As a result, the Respondent filed a motion with the Judge requesting that she vacate her decision and dismiss the case. The GC subsequently filed a motion with the Authority to remand the case to the OALJ to vacate the Judge's decision and dismiss the case because the Secretary's Title 38 determination deprives the Authority of jurisdiction over the matter. The Union filed an opposition to the GC's motion.

Subsequent to the GC filing its motion, the Authority's Office of Case Intake and Publication issued an order informing the parties that consideration of the GC's motion would be deferred because the Authority lacked a quorum at that time. Because the Authority now has a quorum, we resolve the GC's motion.

III. Preliminary Issue

Citing 5 C.F.R. § 2423.40, which sets forth the deadline for filing exceptions to a Judge's decision, the Union asserts that the GC's motion is untimely because the GC filed it after the time for filing exceptions in this matter had expired.³ The Union's argument fails. As an initial matter, the GC did not file exceptions; rather, the GC filed a motion to dismiss the Judge's decision. Accordingly, the regulations cited by the Union are

¹ Judge's Decision at 2.

² *Id.* at 8 (citations omitted).

³ See Union's Supp. Submission at 3.

inapplicable. Moreover, the GC's motion concerns the Secretary's determination that this matter arises under Title 38, an issue that goes directly to the Authority's jurisdiction. Arguments concerning the Authority's jurisdiction may be raised by a party at any stage of the Authority's proceedings,⁴ and may even be raised by the Authority sua sponte.⁵ Thus, the GC's motion is not untimely, and the issue regarding the Authority's jurisdiction is properly before us.

IV. Analysis and Conclusion: The Authority lacks jurisdiction over this matter.

The GC argues that the Authority should remand the case to the OALJ because the Secretary's Title 38 determination deprives the Authority of jurisdiction over the subject matter of the arbitration award and the Judge's decision.⁶

Although the authority of the Secretary to prescribe the hours and conditions of employment of Title 38 employees is subject to their right to engage in collective bargaining,⁷ such collective bargaining "may not cover . . . any matter or question concerning or arising out of . . . professional conduct or competence."⁸ Whether a matter or question concerns or arises out of professional conduct or competence "shall be decided by the Secretary . . . and [this determination] may not be reviewed by any other agency."⁹ Accordingly, once the Secretary determines that a matter or question concerns or arises out of professional conduct or competence, the Authority is deprived of jurisdiction over the matter or question at issue.¹⁰ The Authority has applied these principles in ULP cases involving failure to comply with arbitration awards that became final.¹¹ No party challenges any of this precedent.

Both the GC and the Union concede that the Secretary determined that the arbitration award and the Judge's decision "concern[] or aris[e] out of . . . professional conduct or competence."¹² Accordingly, based on this determination, the Authority lacks

jurisdiction over the subject matter of the award and the decision.¹³

In its opposition to the GC's motion, the Union contends that the Secretary's Title 38 determination is contrary to law.¹⁴ As stated above, however, the Secretary's Title 38 determination may not be reviewed by any other agency, including the Authority.¹⁵ As a result, we do not address this contention further.

Based on the above, we remand this matter to the OALJ with instructions to vacate the Judge's decision and dismiss the case.

V. Order

We remand this matter to the OALJ with instructions to vacate and dismiss.

⁴ *E.g.*, *U.S. Dep't of VA, VA Med. Ctr., Asheville, N.C.*, 57 FLRA 681, 683 (2002) (*VAMC, Asheville*).

⁵ *See, e.g.*, *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 423 & n.9 (1995).

⁶ *Id.*

⁷ 38 U.S.C. § 7422(a)

⁸ *Id.* § 7422(b); *see also AFGE, Local 221*, 64 FLRA 1153, 1154 (2010) (*AFGE*).

⁹ 38 U.S.C. 7422(d); *see also U.S. Dep't of VA Med. Ctr., Kansas City, Mo.*, 65 FLRA 809, 811 (2011) (*VAMC, Kansas City*).

¹⁰ *E.g.*, *AFGE*, 64 FLRA at 1154.

¹¹ *See, e.g.*, *VAMC, Asheville*, 57 FLRA at 683-84.

¹² GC's Motion at 1; *see also* Union's Supp. Submission at 2.

¹³ 38 U.S.C. § 7422(d); *AFGE*, 64 FLRA at 1154.

¹⁴ Union's Supp. Submission at 3.

¹⁵ *E.g.*, *VAMC, Kansas City*, 65 FLRA at 811.

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
CENTRAL TEXAS VETERANS HEALTH CARE
SYSTEM TEMPLE, TEXAS

Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2109

Charging Party

Case No. DA-CA-12-0150

Nora E. Hinojosa
For the General Counsel

Kenneth S. Carroll
For the Respondent

Clementine Ray
Kenneth E. Henson
On Brief, David E. Borer
Judith D. Galat
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose 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.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. part 2423.

On January 20, 2012, the American Federation of Government Employees, AFL-CIO, Local 2109 (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Department of Veterans Affairs (VA), Central Texas Veterans Health Care System, Temple, Texas (Respondent/Agency). The Regional Director of the Dallas Region issued a complaint and notice of hearing on May 16, 2012, claiming that the Respondent violated § 7116(a)(1) and (8) of the Statute by refusing to comply with an arbitration award.

On May 24, 2012, the Respondent filed its Answer to the complaint, in which it admitted certain facts but denied that the award could be enforced because the Authority lacked jurisdiction over the matters in the award. Also, the Agency filed a motion to abate (motion)

“pending a 38 U.S.C. § 7422 (§ 7422) determination by the Secretary” of the VA. (G.C. Ex. 1f at 1). In support of its motion, the Respondent claimed that it had filed a request with the Secretary on February 3, 2012, requesting a determination that such matters involved professional conduct or competence and the establishment, determination, or adjustment of employee compensation under § 7422(b)(1) and (3), which are excluded from collective bargaining and review by any other agency under § 7422(d). This request is still pending before the Secretary.

On June 1, 2012, the Charging Party filed objections to the Respondent’s motion. The Charging Party, among other things, contested the Respondent’s assertion that it was likely the Secretary would make a determination that the matters in the award were excluded from the collective bargaining process under § 7422. The General Counsel’s opposition to the Respondent’s motion, which was filed on June 15, 2012, was not considered because it was untimely filed under 5 C.F.R. § 2423.21(b)(1). On June 19, 2012, the Respondent’s motion was granted, and the hearing was postponed for three months to allow the Secretary to reply to the Respondent’s request.

The Charging Party filed a motion to request a hearing date , on September 12, 2012, in which it indicated that the Secretary had not rendered a § 7422 determination and claimed that the Respondent merely sought to further delay the processing of the ULP complaint. On September 14, 2012, an order to show cause (order) was issued, and a hearing was tentatively scheduled for November 8, 2012. The Agency responded to the order on September 18, 2012, asserting that, although it was probable that the Secretary would issue a § 7422 determination prior to November 8, 2012, the Agency was interested in settling this case and was willing to keep the proposed hearing date. The General Counsel also responded to the order, in which it agreed to the proposed hearing date.

The hearing was scheduled for November 8, 2012, but was later postponed indefinitely in response to the joint stipulation of undisputed facts filed by the parties on October 30, 2012. In the stipulation, the parties agreed that the charges, the complaints and notices of hearing, Respondent’s answers, all pleadings and orders in this matter, the stipulation and its joint exhibits, and the parties’ post-stipulation briefs constitute the entire record in this case and that no oral testimony is necessary or desired by any party as no material issue of facts exist. The parties further agreed to waive their right to a hearing before the Administrative Law Judge (ALJ). An order was issued cancelling the hearing on November 5, 2012. The General Counsel and Charging Party subsequently filed timely briefs that have

been duly considered. The Respondent did not file a brief in this matter.

Based upon the stipulation of facts and its attached exhibits, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The parties agreed to the following stipulation of facts:

1. The unfair labor practice complaint and notice of hearing was issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.
2. The Department of Veterans Affairs, Central Texas Veterans Health Care System, Temple, Texas (Respondent), is an agency under 5 U.S.C. § 7103(a)(3).
3. The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.
4. The American Federation of Government Employees (AFGE) Local 2109, (Union or Charging Party), is an agent of AFGE for the purpose of representing employees of Respondent within the unit described in paragraph 3.
5. The charge in Case No. DA-CA-12-0150 was filed by AFGE, Local 2109 (Charging Party), with the Dallas Regional Director on January 20, 2012.
6. A copy of the charge in Case No. DA-CA-12-0150 was served on Respondent.
7. At all times material to this complaint, Dr. Thomas C. Smith occupied the position of Director of the Central Texas Veterans Health Care System, Temple, Texas.
8. At all times material to this complaint, the person named in paragraph 7 was a supervisor and/or management official or an agent of a supervisor and/or management official under 5 U.S.C. §§ 7103(a)(10) and (11) at Respondent.
9. At all times material to this complaint, the person named in paragraph 7 was acting on behalf of Respondent.
10. AFGE and Respondent are parties to a collective bargaining agreement covering employees in the bargaining unit described in paragraph 3 which includes Articles 40 and 42, covering the arbitration and grievance procedures.
11. On February 14, 2011, Arbitrator Ed Bankston issued a decision and award in the matter of the arbitration between Department of Veterans Affairs, Central Texas Veterans Health Care System and the American Federation of Government Employees, AFL-CIO, Local 2109, FMCA No. 10-57821-3, finding that the Respondent violated the parties' collective bargaining agreement described in paragraph 10.
12. Arbitrator Bankston directed in his award that:
 - a. Each Title 38 hourly employee is awarded an amount, plus interest, to be paid for 50.25 hours at overtime rates for each month worked in the Medicine Service Clinic for up to 36 months due to the Agency's willful violations of FLSA, and pursuant to Attachment 2 of the Union Brief which is a tabular presentation of Union Ex. 16, all pursuant to terms and conditions of the Back Pay Act;
 - b. Ms. Susan E. Johnson is to be paid overtime pursuant to Paragraph [a] above, plus three (3) [h]ours travel time spent on behalf of the Agency in attendance at the VA conference at Brenham, TX;
 - c. Mr. Kenneth Henson is to be paid overtime pursuant to Paragraph [a] above;

- d. Ms. Kristine J.L. Burns is to be paid for 416 hours at overtime rates, plus interest, pursuant to the Back Pay Act, as shown by Union Ex. 14, and Union brief, Attachment 1;
- e. The January 8, 2010 Memorandum of Job Expectations issued to Ms. Johnston, over the signature of Dr. Harper, is found to be reprisal for her actions in claiming overtime compensation and is to be purged of any and all employment records. It is considered null and void and of no effect with respect to the schedule, conditions and expectations outline[d] in the memorandum;
- f. The Agency is hereby ORDERED to expand its data base such as to capture, record and maintain records of any and all future requests for overtime compensation in order to bring its actions into compliance with 5 CFR 551.402(b). The Agency needs to track disapproved overtime requests as well as approved, so that a comprehensive, verifiable and accurate history of total overtime work is readily available;
- g. The Agency is hereby ORDERED to CEASE AND DESIST its wrongful, unlawful surveillance and reprisal of Mr. Henson's union activities and to refrain from threats and intimidation of Mr. Henson and other Union members for their Union activities;
- h. The Union is awarded reasonable attorney's fees for having successfully prosecuted this grievance;
- i. Title 38 employees are each entitled to compensation at overtime rates for all prior attendance at Chief of Staff luncheon meetings for the 36 months prior to the date of this award;
- j. For its willful and bad faith violation of the contract and law, the Agency is ORDERED to pay an amount equal to the unpaid back wages as liquidated damages;
- k. The Agency is ORDERED to post notices in conspicuous places accessible to employees throughout the facility (break rooms, bulletin boards, etc.) for a period of six (6) months detailing the substance of this grievance and remedies of the Award;
- l. Your arbitrator retains jurisdiction over the award for purposes of interpretation, implementation, clarification or such other purpose as requested by the parties.
13. On August 31, 2011, the Authority dismissed in part and denied in part exceptions to the award described in paragraphs 11 and 12 in *United States Department of Veterans Affairs, Central Texas Veterans Health Care System, Temple, Texas*, 66 FLRA 71 (2011).
14. Since August 31, 2011, the Respondent failed to perform the acts ordered by Arbitrator Bankston described in paragraph 12.
15. The General Counsel contends that by the conduct in paragraph 14, the Respondent refused to comply with the Arbitrator's award described in paragraphs 11, 12 and 13 as required by 5 U.S.C. §§ 7121 and 7122.
16. The General Counsel contends that by the conduct described in paragraphs 14 and 15,

17. Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (8).
18. The Respondent contends that the subject of the arbitration award, the Authority's decision, and this complaint are facially and as a matter of law outside the subject matter jurisdiction of the arbitrator and the Authority, in that the subject matter is within the jurisdiction of the Secretary, Department of Veterans Affairs under 38 U.S.C. § 7422.

ISSUES

The parties agreed to the following stipulation of issues:

1. Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by refusing to comply with the Arbitrator's award?
2. Whether the subject matter of the arbitration award, the Authority's decision, and this complaint, is outside the subject matter jurisdiction of the Authority under 38 U.S.C. § 7422?

POSITION OF THE PARTIES

General Counsel

The General Counsel contends that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with Arbitrator Bankston's award and the Authority's decision upholding that award. In support of its contention, the General Counsel claims that, because the Authority dismissed in part, and denied in part, the Agency's exceptions to the award, and the Respondent did not appeal that decision, the award became final and binding. Further, the General Counsel maintains that the Respondent has admitted that it refused to implement the award.

In addition, the General Counsel argues that the Respondent's affirmative defense, which challenges both the Authority's, and the arbitrator's, jurisdiction over the matters in the award, does not establish otherwise. In this regard, the General Counsel claims that, under Authority precedent, a party is precluded from collaterally attacking an arbitration award during enforcement proceedings. The General Counsel also contends that Article 42, Section 4 of the parties' agreement prohibits the Respondent from raising its affirmative defense for the first time in these ULP proceedings because that

provision requires a party to assert a claim of nongrievability or nonarbitrability no later than the third step of the grievance procedure. Finally, the General Counsel maintains that Article 42, Section 2C, Note 2 of the parties' agreement provides that a grievance is not precluded until "the Secretary, or a lawfully appointed designee[,] . . . determines . . . that the grievance concerns or arises out of one or more" of the exemptions listed in § 7422(b) and that the Secretary has not made such a determination. (Jt. Ex. 4 at 164-65).

As remedy, the General Counsel requests that the Respondent be ordered to cease and desist and to comply with the award. Additionally, the General Counsel asks that the Respondent be ordered not only to post a notice, signed by the Respondent's Director, for sixty consecutive days at locations where notices to employees are customarily posted but also to electronically transmit the notice to all of its employees.

Charging Party

The Charging Party asserts that because the Respondent's affirmative defense is meritless, the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with the award. In support of its assertion, the Charging Party claims that under Authority precedent a § 7422 determination by the Secretary or a lawfully appointed designee is necessary to divest the Authority of jurisdiction in ULP enforcement proceedings and that, as a result, the Authority does not lack jurisdiction here because the Secretary has not made such a determination. Similarly, the Charging Party argues that the parties' agreement and advice issued by the VA provide that § 7422 does not act as a jurisdictional bar unless the Secretary, or designee, determines that a particular matter concerns or arises out of one of the § 7422(b) exemptions. Further, the Charging Party maintains that, based on the advice, which states that the VA Office of General Counsel will review a request for a § 7422 determination and submit a decision paper to the Secretary's designee for consideration within two to eight weeks, it is unlikely that the Secretary or designee will make a § 7422 determination.

Also, the Charging Party claims that the Respondent's assertions concerning § 7422 are untimely under Article 42, Section 4 of the parties' agreement because that provision precludes a party from asserting a claim of nongrievability or nonarbitrability after the third step of the grievance procedure. Finally, the Charging Party asserts that the matters in the award do not concern "the establishment, determination, or adjustment of employee compensation" or "professional conduct or competence" within the meaning of § 7422(b)(1) and (3). (38 U.S.C. § 7422(b)).

DISCUSSION AND ANALYSIS

Even If the Respondent's Affirmative Defense May Be Considered in Resolving the Complaint, the Respondent Has Failed to Establish that It Did Not Violate § 7116(a)(1) and (8) By Failing to Comply With the Award

In this case, it is undisputed that the Respondent has not complied with the award. It is also undisputed that the Respondent challenged neither the Authority's nor the arbitrator's jurisdiction during the grievance or arbitration proceedings or before the Authority in its exceptions to the award. Rather, the first point at which the Respondent asserted that § 7422 divested both the Authority and the arbitrator of jurisdiction over the matters in the award was as a defense to the ULP proceedings initiated in this case in response to its non-compliance with the award.

The Authority has long held that once an arbitration award becomes final and binding, it normally must be complied with and failure to do so constitutes a violation of § 7116(a)(1) and (8) of the Statute. *E.g., U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296-97 (1999). An award becomes final and binding when no exceptions are timely filed or when timely-filed exceptions are denied by the Authority.

As a general matter, in ULP proceedings for enforcement of a final and binding arbitration award, the award is not subject to collateral attack, and the Authority does not review the merits of the award. *E.g., id.* However, the Authority has held that claims of statutory impediments to an arbitrator's authority can be raised to defeat finality in a ULP proceeding. *See Dep't of Health & Human Servs., SSA*, 976 F.2d 1409, 1414 (D.C. Cir. 1992) (concluding that the Authority properly considered the existence of a statutory, as opposed to a contractual, bar to the arbitrator's jurisdiction in ULP proceedings for enforcement of a final and binding award); *cf. U.S. Dep't of Agric., Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 981 (2005) (in reviewing exceptions to an arbitration award where the issue of the arbitrator's statutory jurisdiction is presented to the Authority, it is required to address the issue regardless of whether the issue was also presented to the arbitrator). Additionally, parties can raise arguments concerning the Authority's jurisdiction at any stage of the Authority's proceedings. *E.g., U.S. Dep't of Veterans Affairs, VAMC, Asheville, N.C.*, 57 FLRA 681, 683 (2002) (*VAMC Asheville*).

I find that even assuming the Respondent may raise its affirmative defense in these proceedings based on the precedent cited above, the Respondent has failed to establish that it did not violate § 7116(a)(1) and (8) by failing to comply with the award.

The Secretary's authority to prescribe by regulation the conditions of employment of Title 38 bargaining unit employees listed in 38 U.S.C. § 7421(b) is subject to their right to engage in collective bargaining in accordance with Chapter 71 of Title 5. 38 U.S.C. § 7422(a). Section 7422(b) provides, however, that "[s]uch collective bargaining (and any grievance procedures provided under a collective bargaining agreement) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title." 38 U.S.C. § 7422(b). Section 7422(d) also states that the Secretary shall determine whether a matter concerns or arises out of professional conduct or competence, peer review, or employee compensation and that such a determination "is not itself subject to collective bargaining and may not be reviewed by any other agency." 38 U.S.C. § 7422(d)(3). Moreover, based on the language of § 7422, the Authority has held that, once the Secretary, or a lawfully appointed designee, makes a § 7422(d) determination concerning a particular matter, the Authority is deprived of jurisdiction over that matter, *e.g., VAMC Asheville*, 57 FLRA at 683, and may not review the determination of whether the matter concerns or arises out of an exemption listed in § 7422(b). *E.g., AFGE, Local 2145*, 61 FLRA 571, 575 (2006) (*Local 2145*).

Here, it is undisputed that neither the Secretary nor a designee has made a § 7422(d) determination. Also, it is unlikely that the Secretary, or designee, will make such a determination. In this regard, the Respondent initially filed its request that the Secretary make a § 7422(d) determination on February 3, 2012. And the Secretary or designee failed to make such a determination during the three months that these ULP proceedings were held in abeyance.

Further, Authority precedent clearly establishes that a § 7422(d) determination by the Secretary or designee regarding a particular matter is necessary not only to find that an arbitrator lacked jurisdiction to issue an award concerning that matter but also to divest the Authority of jurisdiction in ULP enforcement proceedings. *See Local 2145*, 61 FLRA at 575 (finding that, if the Secretary did not determine that the grievant's reassignment arose out of an exemption listed in § 7422(b), then the arbitrator, on remand, should decide the merits of that portion of the

grievance); *see also* *Dep't of Veterans Affairs, VAMC, Tulsa Outpatient Clinic, Tulsa, Okla.*, 2001 WL 36023235, * at 3-4 (Jan. 11, 2001) (deciding that, in the absence of a § 7422(d) determination, the Union was entitled to engage in collective bargaining, and the Authority had jurisdiction to resolve the alleged ULP); *cf.* *VAMC Asheville*, 57 FLRA at 683 (concluding that the Authority was deprived of jurisdiction over a particular matter when the Secretary's designee made a § 7422(d) determination concerning that matter). Additionally, based on the standards and principles of interpreting collective bargaining agreements applied by arbitrators and the federal courts, *see, e.g., U.S. Dep't of Veterans Affairs*, 57 FLRA 515, 519 (2001), Article 42, Section 2C, Note 2 of the parties' agreement clearly provides that an arbitrator is not deprived of jurisdiction to decide a grievance unless the Secretary or designee decides that the grievance concerns or arises out of an exemption listed in § 7422(b). (Jt. Ex. 4 at 164-65). Consequently, because the Secretary or designee has not made a § 7422(d) determination, the Respondent was required to comply with the award, and the Authority has jurisdiction to resolve the ULP complaint.

While both the General Counsel and the Charging Party assert that the Respondent is prohibited from raising its affirmative defense based on Article 42, Section 4 of the parties' agreement which precludes a party from asserting a claim of nongrievability or nonarbitrability after the third step of the grievance procedure, the Authority has held that parties are not estopped from asserting that an arbitrator lacks statutory jurisdiction to decide a grievance merely because they have not complied with agreement provisions concerning when arbitrability issues may be raised. *U.S. Dep't of Justice, U.S. Marshals Serv.*, 66 FLRA 531, 535 (2012) (finding that the Agency was not estopped from asserting that the grievance was substantively nonarbitrable under § 7121(c)(5) merely because it did not comply with an agreement provision requiring it to raise such a claim during a particular step of the grievance process); *AFGE, Local 1923*, 66 FLRA 424, 425 (2012).

Also, even though the Charging Party challenges the Respondent's affirmative defense by arguing that the matters in the award do not concern the exemptions listed in § 7422(b)(1) and (3), only the Secretary or designee has exclusive authority to make such a determination. *See AFGE, Local 2328*, 66 FLRA 149, 151 (2011) (denying the union's claims regarding employees' entitlement to retroactive pay under the parties' agreement because the designee's determination -- that compensating certain Title 38 employees on the basis that the agency failed to follow its own policy constituted the establishment, determination, or adjustment of employee compensation under § 7422(b) -- was unreviewable by

the Authority); *Local 2145*, 61 FLRA at 575 (indicating that the Secretary has exclusive authority to determine whether a matter falls within the meaning of § 7422(b)). As a result, I decline to reject the Respondent's affirmative defense on these bases.

Therefore, because the Respondent failed to comply with the Arbitrator's award, I find that the Respondent violated § 7116(a)(1) and (8) of the Statute.

Remedy

The General Counsel proposed a recommended remedy requesting that the Respondent be ordered to comply with the award. Also, the General Counsel asks that the Respondent be ordered to cease and desist from certain activities and to post a notice, signed by the Respondent's Director, for sixty consecutive days at locations where notices to employees are customarily posted. A traditional remedy awarded in cases where a party fails to comply with a final award is an order requiring that party to comply with the terms of the award. *See U.S. Customs Serv., Wash., D.C.*, 39 FLRA 749, 759-60 (1991); *U.S. Dep't of the Air Force, Carswell AFB*, 38 FLRA 99, 107-08 (1990). Also, under current Authority precedent, an order requiring a party to cease and desist and post a notice to employees on bulletin boards and other places where notices to employees are customarily posted is considered a traditional remedy that is ordered in virtually all cases where a violation is found. *See NTEU*, 64 FLRA 443, 449 (2010); *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*F.E. Warren*). Because I have found that the Respondent has violated the Statute as alleged in the complaint, I find this portion of the General Counsel's recommended remedy appropriate.

However, the General Counsel also requests that the Respondent electronically transmit the notice to all of its employees. Requiring that the notice be distributed electronically is a nontraditional remedy. *See U.S. Dep't of Justice, FBOP, FCI, Florence, Colo.*, 59 FLRA 165, 173-74 (2003) (*FCI Florence*). The standard that the Authority applies in determining whether to order a nontraditional remedy is as follows:

[A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

Id. at 174 (quoting *F.E. Warren*, 52 FLRA at 161) (citations & internal quotation marks omitted).

In *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 50 n.4 (2012), the Authority found that electronic dissemination of a notice was appropriate because the respondent's primary way of communicating with employees was through its computer system and the alleged ULP concerned the respondent's failure to bargain over computer access. In this case, the General Counsel presented no arguments in support of its request that the notice be electronically transmitted to employees. Moreover, nothing in the record establishes that requiring the Respondent to distribute the notice electronically "is reasonably necessary and would be effective to recreate conditions and relationships with which the violation interfered or to effectuate the purposes and policies of the Statute." *FCI Florence*, 59 FLRA at 174. Thus, I find that ordering electronic transmission of the notice is not appropriate in this case.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Veterans Affairs, Central Texas Veterans Health Care System, Temple, Texas, shall:

1. Cease and desist from:
 - (a) Failing or refusing to comply with the final and binding arbitration award issued by Arbitrator Ed Bankston on February 14, 2011.
 - (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.
2. (a) Take the following affirmative action in order to effectuate the purposes and policies of the Statute:
 - (b) Comply with the arbitration award of Arbitrator Ed Bankston issued on February 14, 2011.
 - (c) Post at its facility where bargaining unit employees represented by the Union are located, 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

Director of the Department of Veterans Affairs, Central Texas Veterans Health Care System, Temple, Texas, and shall be posted and maintained for sixty (60) consecutive days thereafter in 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.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued Washington, D.C., March 1, 2013

SUSAN E. JELEN
Administrative Law Judge

