70 FLRA No. 132

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
(Respondent)

and

FEDERAL EDUCATION ASSOCIATION
(Charging Party)

WA-CA-16-0016

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DECISION

June 28, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, we conclude that an unfair-labor-practice (ULP) charge filed, to enforce a twelve-year-old arbitration award, five years after the Agency notified the Union that it could not, and would not, fully implement the award, is untimely.

On October 6, 2015, the Charging Party (Union) filed a ULP charge alleging that the Respondent (Agency) failed to comply with a 2003 arbitration award. Based on that charge, the Acting Regional Director (RD) of the Federal Labor Relations Authority's (FLRA's) Washington Regional Office issued a complaint alleging that the Agency violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

In the attached decision, an FLRA Administrative Law Judge (the Judge) determined, as relevant here, that the Union's ULP charge was timely. The main question before us is whether the Judge erred in making that determination. Because the Union did not file the charge within six months of the date on which the Agency informed the Union that it could not comply with the award, we reverse the Judge's decision and dismiss the complaint.

[1] 5 U.S.C. § 7116(a)(1), (8).

II. Background and Judge's Decision

A. Background

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

On November 7, 2003, Arbitrator Daniel Brent issued an award finding that the Agency failed to provide its employees with sufficient information related to their pay. As a result, in a November 12, 2003 award, the Arbitrator directed the Agency to modify its payroll system "so that all bargaining[-]unit employees receive with every payment a clear, fully understandable explanation of what is included."[2]

From 2004 to 2010, the Arbitrator held several "implementation hearings" with the parties to discuss how the Agency would comply with the Arbitrator's directive.[3] In March 2010, the Arbitrator sent the Agency a letter articulating the specific revisions that the Agency was required to make to its payroll system in order to comply with his earlier awards. The Agency contacted its payroll service provider, the Defense Finance and Accounting Service (DFAS), and asked it to make those revisions.

On April 30, 2010, DFAS responded to the Agency, declining to make all of the Arbitrator's directed revisions. In its response, DFAS asserted that certain revisions were "not available,"[4] "not allowed,"[5] would require additional funding to implement,[6] or would "not serve a useful purpose."[7] DFAS further noted that some of the information that was necessary to implement the revisions was "not maintain[ed]" in the payroll system[8] and "[could not] be accurately computed."[9]

On May 3, 2010, the Agency forwarded DFAS's response to the Union and the Arbitrator. A few months later, during an August 18, 2010 meeting, the Agency and DFAS presented to the Union and the Arbitrator an updated version of the payroll system. After the presentation, the Union "demonstrated to everyone that the system did not satisfy the [a]ward."[10]

Nevertheless, the Arbitrator continued to hold implementation hearings with the Agency and the Union

[2] Joint Ex. 2 at 5.
[3] Joint Ex. 5 at 4.
[4] Agency Ex. 2 at 1.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 2-3.
[9] *Id.* at 3.
[10] Judge's Decision at 8.

for roughly five years. During a May 13, 2015 implementation hearing, the Agency notified the Arbitrator that his "perpetual jurisdiction" had placed the Agency in an "untenable position."[11] The Agency asserted that it had addressed the "feasibility" of the Arbitrator's directed revisions in its May 3, 2010 letter, informing both the Arbitrator and the Union that some of those revisions would "not be made."[12]

On August 10, 2015, the Arbitrator issued an additional award, concluding that the Agency had failed to comply with his earlier awards.

On October 6, 2015, the Union filed the ULP charge at issue in this case. And, on February 11, 2016, the RD issued the complaint.

B. Judge's Decision

Before the Judge, the Agency contended that the ULP charge was untimely. The Judge noted that under § 7118(a)(4)(A) of the Statute, the Union had six months from the occurrence of the alleged ULP to file the charge.

The Judge found, as relevant here, that the earliest date on which the Agency failed to comply was May 13, 2015 – when the Agency informed the Arbitrator that his perpetual jurisdiction had placed it in an untenable position. According to the Judge, before that date, the Union "had [no] reason to believe" that the Agency would not comply.[13] As the Union filed its ULP charge within six months of May 13, 2015, the Judge concluded that the charge was timely.

Accordingly, the Judge addressed the merits of the complaint and, ultimately, he concluded that the Agency violated § 7116(a)(1) and (8) of the Statute.

The Agency filed exceptions to the Judge's decision, and the FLRA's General Counsel filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Union's ULP charge was untimely under § 7118(a)(4)(A) of the Statute.

The Agency argues that the Union failed to timely file the charge.[14] Specifically, the Agency contends that the Union should have filed its failure-to-comply ULP charge within six months of May 3, 2010, when the Agency informed the Union that DFAS would not implement some of the Arbitrator's directed revisions.[15]

Section 7118(a)(4)(A) of the Statute states that "no complaint shall be issued on any alleged [ULP] which occurred more than [six] months before the filing of the charge with the Authority."[16] In failure-to-comply cases, the six-month period begins to run when, as relevant here, one party expressly notifies the other that it will not comply with the obligations required by an award.[17]

Here, the Arbitrator's March 2010 letter articulated the specific revisions that the Agency needed to make to the payroll system in order to comply with the November 2003 awards.[18] It is undisputed that the Agency notified the Union on May 3, 2010 that DFAS *would not* implement, for various reasons, some of the revisions that the Arbitrator directed in that letter.[19] And, just a few months later, on August 18, 2010, the Union "demonstrated to everyone that the [payroll] system did not satisfy the [a]ward."[20]

Based on the above evidence, we find that, on May 3, 2010, the Agency expressly notified the Union that it could not, and would not, fully comply with the awards. We also find that, on August 18, 2010, the Union expressly acknowledged that the Agency had not complied with the awards.

We are encouraged that our dissenting colleague finally agrees that § 7116(d) means something and requires parties to choose between negotiated grievance and statutory ULP procedures. It is apparent that our colleague questions whether the Union here chose the right forum. But this is not a case where we need to address whether § 7116(d) would preclude the enforcement action as a statutory ULP. The fact of the matter is that it was *the Union* which chose to pursue

[11] Joint Ex. 4 at 2.
[12] *Id.* at 1.
[13] Judge's Decision at 13.
[14] Exceptions at 4-5.
[15] *Id.* at 5.
[16] 5 U.S.C. § 7118(a)(4)(A).
[17] *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 150 (2005); *see NTEU v. FLRA*, 392 F.3d 498, 500-01 (D.C. Cir. 2004).
[18] Joint Ex. 5 at 7-9 (the Arbitrator's March 2, 2010 letter); *id.* at 4 ("My letter to the parties dated March 2, 2010, articulated more precisely the information that must be conveyed."); Judge's Decision at 15 (stating that while the awards were "ambiguous as . . . initially issued in 2003, the March 2010 [l]etter . . . removed those ambiguities" by "provid[ing] considerably more detail on what information was needed for [the Agency] to satisfy its obligation").
[19] Agency Ex. 2 at 1-2 (stating, among other things, that some of the Arbitrator's directed revisions were "not available" or "not allowed"); *see also* Judge's Decision at 7 (finding that DFAS, in its response, stated that "some of the required items were not available").
[20] Judge's Decision at 8.

enforcement of the twelve-year-old arbitration award through statutory ULP procedures. The problem with that choice is that it was made five years too late. Whether that was the right choice is not a question that we must answer.

As the Union failed to file its ULP charge within six months of May 3, 2010, the charge is untimely under § 7118(a)(4)(A). Consequently, we dismiss the complaint.[21]

IV. Order

We dismiss the complaint.

[21] *See Veterans Admin. & Veterans Admin. Med. Ctr., Lyons, N.J.*, 24 FLRA 255, 256-57 (1986) (upholding judge's dismissal of ULP complaint as untimely under § 7118(a)(4)(A)).

Member DuBester, dissenting:

I disagree with the majority's determination to dismiss the General Counsel's unfair-labor-practice (ULP) complaint against the Agency. In the majority's view, the Union's ULP charge was untimely. Rather, I agree with the Judge's detailed factual findings and thorough analysis, and would find the Union's ULP charge timely. I also agree with the balance of the Judge's recommended decision, finding that the Agency committed a ULP by failing to comply with the Arbitrator's award. And I would adopt the Judge's decision to resolve the case.

The majority's decision fails to consider, or even acknowledge, the most significant evidence in the case. This evidence, discussed in detail by the Judge, establishes that the Union's ULP charge was timely filed.[1] But taking a truncated view of the record, the majority finds that the Union should have known in May 2010 that the Agency would not comply with the Arbitrator's award, and should have filed its ULP charge at that time.[2] The majority relies on the Agency's submission in May 2010 of an update letter to the Arbitrator and the Union, with comments by the Defense Finance and Accounting Service (DFAS), that *DFAS*[3] could not make all the changes directed by the Arbitrator.

However, a preponderance of the evidence in the record, discussed by the Judge but ignored by the majority, shows that the Union properly waited until 2015 to file its ULP charge. This evidence shows that from May 2010 through May 2015, the Agency repeatedly assured the Union that it was working towards compliance with the award, and that the Agency would continue to work on making the changes.[4] Further, consistent with this, the Arbitrator continued to hold "implementation hearings" with the parties to effectuate compliance with the award.[5] In short, there is simply nothing in the record that would establish that the Union had any reason to believe that the Agency would not comply with the award until May 2015, when the Agency advised the Arbitrator that the Agency had exhausted its compliance efforts, and asked the Arbitrator to find the

[1] *See* Judge's Decision at 6-10, 12-14.

[2] Majority at 4.

[3] *Id.* The majority relies on DFAS' assertion that it could not implement some of the changes. DFAS, however, is a separate activity in the Department of Defense, and is not a party in this case. *See* Judge's Decision at 7 (record citation omitted). And although DFAS provides payroll services to the Agency, the Agency separately administers its own system of employee data that employees can access. *See id.* at 4 (record citation omitted).

[4] Judge's Decision at 9, 13 (record citations omitted).

[5] *Id.* at 6 (internal quotations omitted) (record citation omitted).

Agency in compliance with the "spirit and intent" of the award.[6]

The majority's decision, notable for its failure to consider crucial evidence in the case, is notable for an additional reason. The majority has made clear its intent to prevent "forum shopping" under § 7116(d) of the Statute.[7] Under § 7116(d), issues may be raised under a negotiated grievance procedure or under the statutory ULP procedure, but not under both procedures. It is therefore ironic that the majority, in this case, would have the Union seek compliance with the Arbitrator's award in another forum, by filing a ULP charge, at the same time the parties were actively engaged in working out compliance issues in proceedings before the Arbitrator.

Because the majority's decision fails to consider crucial evidence in this case, and is therefore arbitrary, I dissent.

[6] *Id.* at 9; *see also* Joint Ex. 4 at 2.

[7] *See, e.g., U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 515-16 (2018) (noting that Congress intended to discourage forum shopping in enacting § 7116(d), and therefore finding grievance barred when union chooses to file same basic issue in earlier-filed ULP charge).

Office of Administrative Law Judges

UNITED STATES DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
RESPONDENT

AND

FEDERAL EDUCATION ASSOCIATION
CHARGING PARTY

WA-CA-16-0016

Sarah J. Kurfis
Douglas J. Guerrin
For the General Counsel

Jefferson D. Friday
For the Respondent

William H. Freeman, Jr.
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On November 7 and 12, 2003, Arbitrator Daniel Brent issued an award[1] directing the United States Department of Defense Education Activity (the Respondent, Agency, or DoDEA[2]), among other things, to provide employees with an explanation of the payments and deductions included in their leave and earnings statements (LES). The arbitrator also retained jurisdiction to resolve any compliance disputes or to clarify or modify the remedies. Jt. Ex. 1 at 46; Jt. Ex. 2 at 6. Subsequently, the parties conducted numerous implementation hearings and meetings with the arbitrator to address the Agency's compliance efforts, and on March 2, 2010, Arbitrator Brent enumerated a series of "revisions and improvements" that the Agency was required to make to the LES in order to comply with the Award. Jt. Ex. 5 at 7. The Agency sought to comply with the Award by trying to convince its payroll service provider, the Defense Finance and Accounting Service (DFAS), to implement the changes listed in the March 2, 2010 letter. Although DFAS did make some of these changes, it would not make all of them. Accordingly, on May 13, 2015, the Agency notified Arbitrator Brent that it had done all it could do to comply, and it asked him to "accept the upgrades to the LES . . . as meeting the spirit and intent" of the Award. Jt. Ex. 4 at 2. On August 10, 2015, Arbitrator Brent issued a Final Award, finding that the Agency had failed to comply with either the 2003 Award or his March 2, 2010 letter, and he relinquished any further jurisdiction. Two months later, the Federal Employees Association (the Union), the employees' collective bargaining representative, filed an unfair labor practice charge.

This case presents two issues. First, did the Union file the charge in a timely manner? I find that the charge was timely, because the arbitrator retained jurisdiction during the compliance phase; the Agency repeatedly assured the Union that it was taking steps to comply; and the Union worked in good faith with Agency officials to effectuate compliance, until the Agency gave up in August of 2015.

Second, did the Agency comply with the Final Award? I conclude that the arbitrator has already answered this question and ruled that the Agency has failed to comply. The Agency chose not to challenge the arbitrator's findings by filing exceptions to the Final Award, and it cannot pursue those objections here. In any case, the changes made by the Agency to employees' LES do not substantially satisfy the requirements of the 2003 Award. The Respondent also argues that it should be excused from complying further, because it was blocked by DFAS from implementing the changes required by the arbitrator. But, as noted already, if the Agency sought to argue that the arbitrator was asking it to perform actions that it had no power to do, it should have attacked the Final Award directly through exceptions to the Authority, not collaterally after that award was final. Therefore, the Respondent's failure to comply with the Final Award constituted an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Statute, 5 U.S.C. §§ 7101-7135, and the revised Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

The Union filed a ULP charge against the Respondent on October 6, 2015. GC Ex. 1(a). After investigating the charge, the Acting Regional Director of the Washington Region of the FLRA issued a Complaint

[1] The Arbitrator issued the award in two parts: the portion issued on November 7, 2003, consisted primarily of a detailed "Discussion and Analysis" of the facts and his conclusions (Jt. Ex. 1); the portion issued on November 12, 2003, was titled "Interim Award" and specified more precisely what the Respondent was ordered to do. (Jt. Ex. 2). I will refer to these documents jointly as the Award, as did the Authority when it denied the Respondent's exceptions to the Award. (Jt. Ex. 3).

[2] DoDEA was then known as Department of Defense Dependent Schools, or DoDDS, and the arbitrator continued to refer to the Respondent as DoDDS throughout the arbitration proceedings. I will refer to both entities as DoDEA.

and Notice of Hearing on behalf of the General Counsel (GC) on February 11, 2016, alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with an arbitration award. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on March 7, 2016, denying that it violated the Statute. GC Ex. 1(d).

On April 5, 2016, a hearing in this case was held in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and examine witnesses. The General Counsel and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under 5 U.S.C. § 7103(a)(3). GC Exs. 1(c) & 1(d). It has approximately 15,000 employees who teach military dependents in Department of Defense schools across the world. Tr. 18, 106. The Union represents about 4,000 of these employees in Europe and the Pacific.[3] Tr. 23-24. The Union is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative for a unit of employees appropriate for collective bargaining employed by DoDEA. The Union and the Agency are parties to a collective bargaining agreement (CBA) covering these employees. GC Exs. 1(c) & 1(d).

DoDEA teachers who work overseas receive several types of compensation. First, they receive a salary (on a separate schedule from the GS scale) that is based on their experience, academic degree, and the number of college credits they have earned. Tr. 18, 78. Employees can move into higher "pay lanes," and thus earn more money, by obtaining a higher degree (bachelor's, master's, or doctorate) or earning a specified number of college credits (15 or 30 credits). For example, an employee at step 1 with a bachelor's degree and no additional college credits earns $41,295 annually. Resp. Ex. 17. However, if that same employee obtains 15 additional college credits, then he or she will move into the next pay lane and earn an additional $1,330. *Id.*

Employees also receive a Post Allowance, which is meant to cover the additional cost of living overseas. Tr. 48. To calculate the Post Allowance, one must first go to a website to find the "nominal percentage" for the employee's work location. Then, using tables published by the Department of State, an individual uses the nominal percentage, salary, and family size to determine the Post Allowance. Tr. 140. The Post Allowance can change as often as every two weeks. Tr. 48. Additionally, employees may receive a Living Quarters Allowance (LQA) to reimburse them for rent and utility expenses. Tr. 39-40. According to part 132.5 of the Department of State Standardized Regulations, employees must submit a Standard Form 1190 (SF-1190) with their actual or estimated expenses to receive a reimbursement.[4] Tr. 59-60. Thereafter, employees must provide the actual expenses, along with copies of receipts, upon request by the Agency. Employees cannot receive more than the "maximum allowable [rate]," which is based on the employee's location and family size. Tr. 40-41. Employees pay these expenses in local currency but are reimbursed in U.S. dollars, so their reimbursement is based on the foreign exchange rate that is published by the Department of State every two weeks. Tr. 41.

Employees may also be eligible to receive a Temporary Quarters Subsistence Allowance (TQSA) to reimburse them for temporary living expenses. Tr. 58-59. For example, employees transferring to another area will be reimbursed for the expenses they incur to live in a hotel before they find permanent housing. Tr. 58-59, 160. To receive reimbursement, employees must submit their receipts online along with a SF-1190 form. Tr. 59-60. Also, like the LQA, the TQSA reimburses them in U.S. dollars, so an exchange rate is utilized to determine the appropriate reimbursement. Tr. 59.

The Agency also makes payroll deductions for the Federal Employee Health Benefits (FEHB), Federal Employee Group Life Insurance (FEGLI), and the Thrift Savings Plan (TSP). Tr. 68-69, 70, 77; Jt. Exs. 6 & 7. Sometimes, it will deduct money to pay various types of employee debts, the vast majority of which are overpayments made by the Agency to employees. Tr. 61.

DFAS, another activity in the Department of Defense, provides payroll services for DoDEA. Tr. 23. According to a witness, all Department of Defense activities are required to use DFAS for their payrolls. Tr. 103. DoDEA is a relatively small customer of DFAS, since DFAS provides payroll services for 800,000 to 1,000,000 employees of agencies within the Department of Defense as well as for outside agencies

[3] The Union represents most of the employees in Europe; however, another union represents employees in the Mediterranean District. Tr. 23-24.

[4] Allowances are calculated in accordance with the Department of State Standardized Regulations. Tr. 187; Resp. Ex. 14 at 1.

like the Department of Health and Human Services and the Department of Veterans Affairs. Tr. 23, 102.

In 2005 or 2006, DFAS implemented the Smart Leave and Earnings Statement (Smart LES) program for its customers. Tr. 27, 90, 104-05.[5] The Smart LES is a partially interactive online version of an employee's LES that is available to employees once they set up their individual account in the MyPay system on the DFAS website. Tr. 27-28, 147-48. Employees can also access some information about their health and life insurance and retirement benefits through another DFAS-administered system, the Employee Benefits Information System (EBIS). Tr. 146, 147. DoDEA separately administers its own system of employee data that employees can access through the MyBiz website. Tr. 169.

An agency may request changes to the Smart LES system by submitting a System Change Request (SCR) to the MyPay Configuration Control Board (CCB). Tr. 102, 103.[6] During their quarterly meetings, members of the CCB (comprised of administrators from the principal activities that are serviced by DFAS) vote on whether to approve the SCR and what priority the change will receive. Tr. 102, 105, 114. DoDEA is not a large enough customer to be entitled to a vote on the CCB. Tr. 114-15. Smart LES obtains payroll information from the Defense Civilian Pay System (DCPS), which is also maintained by DFAS. Put another way, DCPS is the system that maintains payroll information and Smart LES is the system that conveys that information to employees. There is a separate change control board that is responsible for approving any changes to DCPS. Tr. 135; Resp. Ex. 1 at 4.

In 2002, the Union filed a grievance alleging that DoDEA failed to properly pay eight employees. On November 7 and 12, 2003, Arbitrator Brent issued his Award, the first part of which explained his rationale in detail (Jt. Ex. 1) and the second part of which clarified his remedy. Jt. Ex. 2. After noting that the instant grievance was preceded by a several-year history of similar grievances and problems, reflecting "persistent and pervasive systemic defects in [the Agency's] accounting and payroll systems" (Jt. Ex. 1 at 9), the arbitrator concluded that the Agency had "repeatedly failed not only to pay its employees correctly . . . , but also to provide accurate documentation sufficient for employees to determine what they are being paid and the basis for the computation of the payment." *Id*. at 16. He found that "employees are routinely provided with payments without meaningful explanation of how the payments were derived . . . ." *Id*. at 18. With regard to the individual grievants, Arbitrator Brent found that they were improperly paid; he ordered the Agency to conduct audits of their records and to pay backpay as appropriate. *Id*. at 20-40. Furthermore, to correct the systemic deficiencies in the leave and earnings statements provided to employees, he concluded that "DFAS or some other entity of the Department of Defense must modify its computer programs or other procedures by which bargaining unit employees are paid to provide a clear, fully understandable explanation of what is included in each check." *Id*. at 41. Specifically, the "parameters" of the payroll calculations "must be communicated to the employee receiving the payment, whether on a stub or statement accompanying each check or by a separate communication referencing the check number and the amount accompanying every paycheck or electronic direct pay deposit . . . ." *Id*. at 41-42. Arbitrator Brent directed the Agency to submit a proposal to revise the payment system within sixty days and to implement the new system within ninety days unless he granted an extension. *Id*. 1 at 45. The arbitrator retained jurisdiction to resolve any dispute related to the Award. Jt. Ex. 1 at 46.

In the November 12, 2003 portion of the Award, Brent expanded and clarified the elements of relief for the individual grievants, as well as the systemic relief for all bargaining unit employees. Jt. Ex. 2. In this latter respect, he explained what he meant by requiring that all employees receive "a clear, fully understandable explanation of what is included[]" in their paycheck:

> For example, the nature of the payment, the period represented by the payment, the date of the document submitted for payment, the actual exchange rate of foreign currency upon which the payment was predicated, and the number of units [for example, days or hours] times the applicable rate, whether interest is included, the period covered by the interest, the rate of interest, and the arithmetic computing the interest must be shown for each item.

Id. at 5-6. He again retained jurisdiction to clarify or modify the remedy. *Id*. at 6.

The Respondent filed exceptions to the Award, arguing (among other things) that the arbitrator exceeded his authority by requiring it to modify its current payroll system or to create a new one. *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 60 FLRA 24 (2004) (*DoDEA*). First, it argued that only the Chief Financial Officer of the Department of Defense, not the Respondent, could

[5] The Smart LES system was implemented independently by DFAS, and not as a result of the Brent arbitration award. Tr. 26-27.

[6] In testimony, this entity is called the "Change Control Board" (Tr. 102), but the board's October 14, 2010 minutes refer to it as the "Configuration Control Board." Resp. Ex. 4.

make the changes. It further argued that the Award violated its right to assign work. The Authority denied the Respondent's exceptions because the Award gave the Respondent the discretion to determine how to comply with its obligation to provide the required information to employees. *Id*. at 26-27.

After the Authority's decision, Brent held several "implementation hearings" with the Respondent and the Union to discuss the Respondent's progress in complying with the award. Tr. 26, 90. Eventually, the Respondent satisfied its obligation to conduct audits and reimburse the eight grievants. Tr. 20-22. Thereafter, the parties focused on the Respondent's efforts to comply with its obligation to provide more information to employees.

On February 24, 2010, during one of the implementation hearings, Laura Wilmot, a Human Resources Specialist, discussed the Smart LES program (which had not existed at the time of the Initial Award) with Brent and William Freeman, the Union's representative. Jt. Ex. 5 at 7. On March 2, 2010, Brent sent a letter (the "March 2010 Letter") to Freeman and Wilmot describing what changes needed to be made to Smart LES for it to comply with the award. *Id*. at 7-9. He noted that the overall format of the Smart LES was acceptable, but more information was necessary; he then proceeded to identify exactly what changes needed to be made.

In the March 2010 Letter, Brent told DoDEA[7] that it needed to create links on the LES – which, when pressed, would supply employees with additional details – for the LQA, TQSA, Post Allowance, TSP, Pay Lane, FEGLI, FEHB, and debt collection. *Id*. at 8. Regarding the LQA, for instance, such a link should show the employee's "monthly rent, the annual rent, the annual rent divided by the number of pay periods per year, as well as this amount per pay period multiplied by the applicable exchange rate, and cite both the applicable exchange rate and the location for which the rent is being paid, meaning the city and country." *Id*. Further, the employee should see the "calculation showing the monthly rent times twelve divided by the number of pay periods times the exchange rate." *Id*. The system should also provide the amount paid for utilities, the location, the period covered by the payment, the exchange rate applied, and a reconciliation of any difference. The arbitrator was similarly specific in identifying the additional information that was required for each of the other links that needed to be added to the Smart LES. *Id*. at 8-9. He reaffirmed that it was up to DoDEA to determine how best to implement these modifications, but that it must advise him and the Union within sixty days of its plans to implement the changes. Jt. Ex. 5 at 7.

On April 15, 2010, DoDEA sent a memo to DFAS, describing the changes to Smart LES that were identified by Brent in the March 2010 Letter.[8] Tr. 107-09; Resp. Ex. 1. On April 30, 2010, DFAS sent a two-part response to DoDEA. In the first part, DFAS explained at considerable length that it did not consider itself or any other DoD activity or customer to be bound by the Award; DoDEA had not consulted with DFAS or DoD regarding the arbitration proceeding, and DFAS considered the Award binding only on DoDEA. Resp. Ex. 1 at 1-3. But "as a courtesy to you [DoDEA] as a customer[,]" DFAS attached a second part of its response ("Information Paper, Smart LES Modifications Requested") (*id*. at 4-6), which set forth DFAS's opinion as to the feasibility of the "eight significant changes that DFAS would need to make to the Smart LES" in order to comply with Brent's Award. *Id*. at 1, 3. DoDEA, in turn, forwarded the second part of DFAS's response to the Union and the arbitrator, along with a cover letter dated May 3, 2010; but DoDEA did not share the first part of DFAS's response with Brent and the Union. Tr. 109-10; Resp. Ex. 2.[9]

In its Information Paper, DFAS identified the eight categories of information that DoDEA (in accordance with the Award) had requested to add to the Smart LES, and DFAS then offered its own "comments" regarding the feasibility of DFAS providing that information. Resp. Ex. 2 at 2-4. It indicated that many of the items required by the arbitrator were already provided in the Smart LES; it also agreed that some of the required items were not available. DFAS asserted that some of these missing items were the subject of System Change Requests, but these changes might not be implemented for two years or more, if ever. *Id.*

For instance, regarding the LQA, the Information Paper indicated that the DCPS system shows the daily and annual rates for quarters and utilities, but not the monthly rates. It noted that there were plans to create an LQA worksheet that would provide employees with more information, but those changes would not be

[7] In the March 2010 Letter, the arbitrator indicated that the parties had "discussed at the implementation hearing . . . [that] DoDDS in conjunction with DFAS, will undertake to facilitate and implement these revisions to the current Smart LES format . . . ." Jt. Ex. 5 at 7.

[8] The text of the April 15 letter is not in evidence; however, it was referred to by DFAS when DFAS responded to DoDEA on April 30, 2010. Resp. Ex. 1 at 1.

[9] It is also apparent that when DoDEA forwarded the "Information Paper" to Brent and the Union, it deleted the "Important Notice" at the start of that attachment, in which DFAS again disavowed any intent to be bound by the Award or any willingness to take any action specified in the Award. *Compare* Resp. Ex. 1 at 4 *with* Resp. Ex. 2 at 2.

implemented for at least two years. Resp. Ex. 1 at 4; Resp. Ex. 2 at 2. It did not address the remaining LQA information requested by Brent. Similarly, the Information Paper stated that there was a plan to provide the effective date, family size, rate, days, location, percentage, and amount for the Post Allowance, but the changes had not been funded. Resp. Ex. 1 at 5; Resp. Ex. 2 at 3. It also noted that an employee's initial eligibility date for the Post Allowance is not maintained in the DCPS system, nor is the employee's location or currency rate for the TQSA. Moreover, an employee's SF-1190 information is maintained by DoDEA's Human Resources Office rather than by DFAS or DCPS. It commented further that displaying a message that an employee is not entitled to TQSA would not benefit the vast majority of DFAS customers. *Id*. Information about debt collection is maintained in a separate database that is linked to DCPS, but employees do not have access to the database. DFAS did not state whether the requested information could be added to the Smart LES system. The Information Paper claimed that the Smart LES system shows most, but not all of the FEHB information required by the arbitrator, but the DCPS system does not maintain information regarding the annual cost of FEHB premiums. Resp. Ex. 1 at 5-6; Resp. Ex. 2 at 3-4. As for FEGLI information, DFAS asserted that the annual cost of premiums could not be displayed, because the premium is calculated based on the employee's biweekly earnings. DFAS also claimed that an employee can obtain a description of the FEGLI deduction by clicking on a link in Smart LES. Resp. Ex. 1 at 6; Resp. Ex. 2 at 4. DFAS further asserted that the TSP information required by the arbitrator is already shown in the Smart LES. *Id*. Finally, the Information Paper stated that the Smart LES already provides a code for the employee's pay lane and step, but the DCPS does not maintain data regarding the employee's level of education or years of experience. *Id*.

When DoDEA's Wilmot forwarded the DFAS Information Paper (as redacted, *supra* note 9) to the arbitrator and the Union on May 3, 2010, she said her Agency had recently learned that the Smart LES provides links to more information that they had realized at their February 24 meeting. She asserted that it now appeared that "the SMART LES in its current form, indeed, has most of the structure and functions you require." Resp. Ex. 2 at 1. She offered to meet with them to discuss any concerns.

On August 18, 2010, Elizabeth Dieppa-Wells, a DFAS employee who works on the Smart LES team, gave another presentation of Smart LES to Brent and Freeman. Tr. 112; Resp. Ex. 8 at 2. Freeman testified that while DoDEA and DFAS officials insisted then that Smart LES met all the arbitrator's requirements, he demonstrated to everyone that the system did not satisfy the Award. Tr. 30. According to another participant, Dieppa-Wells told the attendees at the presentation that Smart LES could do anything they wanted, but it would come at a price and it needed to be approved. Tr. 112.

Around August 30, 2010, DoDEA submitted a proposal (drafted by Wilmot) to the MyPay CCB to make the changes outlined in the March 2010 Letter. Tr. 118; Resp. Ex. 3. On October 10, 2010, the CCB approved the changes. Resp. Ex. 4 at 1. The CCB deferred the question of what priority to give the SCR. *Id.*; Tr. 120. DFAS still needed to design, develop, and test the changes before they could be implemented. Resp. Ex. 5; Tr. 121-22. At its next meeting, however, in February of 2011, the MyPay CCB decided to rescind its approval of the DoDEA-initiated SCR, because it did not want to make its other clients pay for the maintenance costs. Tr. 123-24. Around this same time, Bradley Carver, DoDEA's Deputy Human Resources Director, got personally involved in trying to get these changes approved. Tr. 101. He attended the CCB meeting in May of 2011 and advised the Board that DoDEA might be willing to pay for the development and maintenance of these changes, but that he needed an estimate of the costs. Tr. 124. The CCB reapproved the SCR, pending DFAS's cost estimate and DoDEA's confirmation that it would pay those costs. Resp. Ex. 8.

On June 16, 2011, Dieppa-Wells gave Carver and Wilmot a rough estimate of the total costs of development and maintenance. Resp. Ex. 7 at 4. She also told Carver that the Smart LES team could not do anything further until Carver convinced the group responsible for DCPS to provide the payroll information to the Smart LES group. Resp. Ex. 7 at 1, 3; Tr. 129. Sometime in 2012, Marcia Hawkins, the individual responsible for DCPS, told Carver that her group would not provide the information. Tr. 133. In other words, the Smart LES team was willing to make the changes necessary to provide the information to employees but the DCPS team would not provide the payroll information to Smart LES.

According to Carver, he and other DoDEA officials continued to discuss the proposed Smart LES changes with DFAS (and presumably DCPS) on a regular basis, but he did not provide any additional details about these conversations. Tr. 138-39. In the spring of 2013, DoDEA HR Specialist Pamela Chisley submitted the exact same change request (this time to the DCPS Board) that had been submitted to the MyPay Board in 2010. Tr. 137; Resp. Ex. 9. The record is silent as to the fate of the request.

Meanwhile, DoDEA, the Union, and Arbitrator Brent continued to hold implementation meetings regarding the Award, at least once a year between 2010

and 2015. Tr. 96. Despite their repeated setbacks in achieving any breakthrough with the DFAS/DCPS bureaucracy, DoDEA officials repeatedly told the Union that it was working on compliance. Tr. 93-94, 134-37. For example, sometime in 2013, during one of these hearings, Freeman told Phil Brown, the Agency's representative at the time, that he was concerned that the Respondent was not going to comply with the award. Tr. 97. Brown responded by assuring Freeman that he wanted to make these changes and that he was working on it. Tr. 92, 97-98.

On May 13, 2015, at the final implementation hearing, Agency Representative Victor Cooper hand-delivered a letter to Arbitrator Brent and Freeman, describing DoDEA's efforts to comply with the March 2010 Letter. Jt. Ex. 4. In the letter, Cooper asked the arbitrator to find that DoDEA has complied with the "spirit and intent" of the Award. Freeman testified that only at this point did it become clear to him that DoDEA was not going to comply with the Award. Tr. 35. Therefore, he asked Arbitrator Brent to issue a final award terminating his jurisdiction over the case. Tr. 37.

On August 10, 2015, the arbitrator issued his Final Award, stating that "it has now become apparent that DoDDS is either unable to unwilling to implement the changes I have ordered . . . ." Jt. Ex. 5 at 4. He found that the Respondent "has been in non-compliance with the Arbitrator's Award and subsequent orders since ninety days after the FLRA decision . . . ." *Id.* at 5. He concluded by incorporating all his prior orders, particularly the March 2010 Letter (*id*. at 7-9), and relinquishing jurisdiction of the case.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Respondent has violated § 7116(a)(1) and (8) of the Statute by failing to comply with the 2003 Award and the 2015 Final Award. It insists that the Union's charge was filed in a timely manner.

The Final Award was issued on August 10, 2015; because the Respondent did not file any exceptions, the GC submits that it became final and binding on September 10, 2015. *See* 5 C.F.R. § 2425.1(b). The GC asserts that the six-month period for the Union to file a ULP charge began when the Respondent refused to comply with that award, and it cites *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 150 (2005) (*IRS*), for this premise. Although the GC does not pinpoint a specific date on which the Respondent refused to comply, it notes that at no point since the Final Award has the Agency provided employees with a clear statement of earnings, as the arbitrator ordered. GC Br. at 9. Moreover, since the Union filed its charge less than a month after the Final Award became final, the GC concludes that the charge was undoubtedly timely. The GC rejects the Respondent's argument that the Union knew as early as 2010 that the Agency would not comply with the 2003 Award. The GC cites testimony showing that DoDEA officials continued to push DFAS to make the changes in the LES ordered by the arbitrator from 2010 until (and even after) the August 10, 2015 Final Award. *Id*. at 10; Tr. 134-39, 145. Therefore, the GC insists that the Union was justified in waiting until after the Final Award to file its ULP charge.

On the merits of its Complaint, the General Counsel contends that the Respondent has failed to comply with the Award and the Final Award. The GC asserts that in his Final Award, the arbitrator rejected the Respondent's argument that it had complied with the 2003 Award. After holding numerous implementation hearings between 2003 and 2010, the arbitrator ruled that the Smart LES did not meet the standards set by the Award, and the March 2010 Letter specified those steps the Agency needed to take to comply. Jt. Ex. 5 at 7-9. Since then, the Agency has argued that it has done all it can to comply with the arbitrator's directions, but the Final Award makes it clear that the arbitrator rejected that argument. *Id*. at 5. The GC alleges that since the Final Award was issued, the Agency has not taken any affirmative steps to comply. GC Br. at 9. Moreover, the GC asserts that the Agency's argument that it cannot comply is merely an attempt to relitigate the merits of the Final Award. *Id*. at 10. DoDEA must find another way to comply with the Final Award if DFAS cannot provide the requested information. *Id*. at 11.

As a remedy, the General Counsel asks for an order directing the Respondent to comply with the Award and the Final Award. It also urges that the Respondent be directed to post a notice, signed by its General Counsel, in all areas where bargaining unit employees represented by the Union are employed, and to email the notice to all bargaining unit employees represented by the Union.

Respondent

The Respondent contends that the Complaint should be dismissed because the charge was not filed in a timely manner. Further, it claims that it has complied with a reasonable interpretation of the Award.

The Respondent asserts that the charge was filed several years too late. Resp. Br. at 18. It states that the Union should have known within a few months that DoDEA would not comply with the Award when it failed

to implement the changes demanded by the arbitrator in his March 2010 Letter. Furthermore, the Union knew on May 3, 2010, that DFAS had refused to make some of the changes requested by the arbitrator. *See* Resp. Ex. 2 at 1.

The Respondent also contends that it complied with a reasonable interpretation of the Award, because employees could access most of the required information through Smart LES, in combination with other websites. Resp. Br. at 6, 13. It insists that providing some of the information on its website is consistent with its right to use its discretion to determine how to comply with the Award. *Id*. at 13, 15, 16. *See DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3 (2003) (*FCI Marianna*).

DoDEA further argues that it made significant efforts to comply with the Award, but that it was faced with "severe bureaucratic difficulties" and that there were "practical technical limitations on [its] ability to do what DFAS has not agreed to do." Resp. Br. at 17. It noted that it is required to use DFAS as its payroll service provider. *Id*. at 5. Furthermore, DoDEA merely has read-only access to payroll information; therefore, it cannot export the data necessary to prepare its own reports. *Id.* at 13.

Nonetheless, the Respondent claims that the improvements it made to the LES system ensure that employees receive a clear explanation of their pay. For example, regarding Post Allowances, employees have access to information regarding the location, rate, the number of days that they received the allowance, and family size in the MyPay system. *Id*. at 13-14. Smart LES identifies whether an employee has a major or minor debt, the type of debt, and the amount of debt that was withheld for that pay period and YTD. *Id*. at 14. It also provides a phone number that employees can call if they have any questions. The Smart LES system specifies the amount of money withheld for FEHB and FEGLI during the pay period and YTD and includes a code for the type of FEHB coverage. Employees can find out what the code means by checking EBIS and MyBiz. They can also find out what FEGLI plan they have by accessing the MyBiz webpage. Smart LES does not include the annual cost of the FEGLI plan because this information is not available, as it can change based on the employee's circumstances. *Id*. at 14-15. Smart LES also indicates the percentage of pay or the dollar amount (depending on the employee's election) withheld for TSP. Respondent further explains that although it could not convince DFAS to describe the employee's pay lane on the LES, Smart LES does include the employees' pay lane codes; employees can go to the DoDEA website and use the code to find out what pay lane they are in. *Id*. at 15-16. Similarly, while DFAS never implemented any of the LQA changes requested by the arbitrator, the Respondent has put the maximum allowable LQA rates on its website. *Id*. at 16. The Respondent states that it cannot provide individual LQA calculations without access to the DFAS system. Finally, Smart LES displays the amount of TQSA paid to an employee; although it does not provide any additional information regarding TQSA, this is because DFAS does not maintain that information.

The Respondent acknowledges that the information provided to employees in Smart LES, in combination with other sources, is not precisely what the arbitrator ordered, but it argues that "employees now receive a clear explanation of their pay information," to paraphrase the arbitrator's own words. *Id*. at 13; *see also* Jt. Ex. 1 at 41; Jt. Ex. 2 at 5. A fair reading of *FCI Marianna* would recognize that the Respondent has complied with the Award. Furthermore, in the face of the refusal of DFAS and the appropriate control boards to implement more extensive changes to the Smart LES, the Respondent is simply unable to do anything more than it has already done. Resp. Br. at 12-13.

ANALYSIS AND CONCLUSIONS

The Charge Was Timely

Generally, under § 7118(a)(4)(A) of the Statute, a charge must be filed within six months of the alleged unfair labor practice. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., El Paso, Tex.*, 65 FLRA 422, 424 (2011). Prior to its decision on remand in *IRS*, the Authority had held that in arbitration compliance cases, the ULP occurs when the arbitration award becomes final. 61 FLRA at 147. But the Authority yielded to the rationale of the D.C. Circuit, which ruled that an a party does not necessarily refuse to comply with an award when it becomes final; accordingly, the time period for filing a ULP charge does not necessarily begin on that date. *Id*. at 150; *see NTEU v. FLRA*, 392 F.3d 498, 500 (D.C. Cir. 2004). Instead, determining when the alleged ULP occurred involves an examination of what the award requires and what the respondent's actions are, following the award. *IRS*, 61 FLRA at 150. First, a party may violate the award if it explicitly refuses to comply. Second, a violation occurs if the award identifies a specific deadline, and the deadline passes with no action taken toward implementation. *Id*. Third, if there is no deadline to comply, then the Authority will determine when the party should have complied, by considering the specific facts of the case, such as the time and effort necessary to comply and what efforts were made by the parties to communicate the status of compliance. *Id*.

Looking at the facts of this case, I find that the Union filed its ULP charge within six months of the date DoDEA refused to take further action to comply with the

Award. Although the Authority upheld the Award in June of 2004, the Union did not sit idly by between then and the arbitrator's Final Award in August of 2015, as the Respondent now seems to suggest. Starting shortly after the Authority upheld the Award, the Union, the Agency, and Arbitrator Brent regularly conducted implementation hearings to discuss the Agency's compliance efforts. Tr. 26. During these meetings, Agency officials repeatedly assured the Union and the arbitrator that it was working to implement the changes the arbitrator had ordered. Tr. 32, 33, 94, 95, 97-98. First they focused on getting the eight named grievants paid the amounts due to them, and the required payroll audits performed; then they began to address how to implement the class relief ordered – that is the changes to the Agency's leave and earnings statements to fix the systemic defects identified by the arbitrator. Tr. 26. It was at this point that the compliance process slowed considerably, but at no point until 2015 did the Agency tell the Union that it would not comply; on the contrary, Agency officials continued to tell the Union that they were hopeful of making further changes in the Smart LES system.

The Respondent now argues that when the Union received the Information Paper on May 3, 2010, the Union should have known that DoDEA would not comply with the Award. Resp. Br. at 18. However, neither DoDEA nor DFAS indicated in May 2010 that they would not comply with the Award. In its May 3, 2010, cover letter to the arbitrator, enclosing DFAS's Information Paper, DoDEA asserted that the Smart LES already provided employees with "most of the functions" required by the arbitrator, and that DFAS was making further changes to the system to provide additional information to employees. Resp. Ex. 2 at 1. In other words, the Agency stated in 2010 that it had implemented many of the changes required by the arbitrator, and that it was working on making additional changes. Based on the May 3 letter, the Union could reasonably have been hopeful that DoDEA and DFAS were actively (if slowly) working to comply with the Award – especially since DoDEA had deleted from the Information Paper the portions in which DFAS criticized DoDEA for participating in the arbitration and disavowed any DFAS responsibility for implementing the changes required by the arbitrator.

Indeed, DoDEA did not abandon its compliance efforts after receiving the Information Paper. On the contrary, it submitted a request to the CCB to make the additional changes to Smart LES that were required by the Award. Resp. Ex. 3. As Carver testified, DFAS's Dieppa-Wells told the parties in August 2010 (just a few months after the Union received the Information Paper) that Smart LES could do anything the parties wanted it to do. Tr. 112. Carver and other DoDEA officials also continued to keep the parties updated on its progress and to assure the Union that it would comply. The MyPay CCB actually approved the changes necessary to implement the Award in October of 2010, and when the CCB rescinded that decision the next year, Carver and other officials continued to negotiate with DFAS to find ways of making the changes. Resp. Exs. 4-9.

The Respondent essentially finds fault with the Union for its willingness to trust the Respondent. However, there is no evidence that DoDEA was deceiving the Union or that the Union had any reason to believe, prior to May of 2015, that the Agency would not eventually comply. It was evident to everyone that the DoD bureaucracy was complex and moved slowly, and that the changes being advocated could not be made with the click of a mouse. The Union did see evidence that DoDEA was trying to move that bureaucracy, and it cannot be faulted for allowing that process to proceed.

This all changed on May 13, 2015, when DoDEA's representative submitted a letter asking the arbitrator to declare the Respondent in compliance with the Award and declaring that it could do nothing further to change Smart LES. Jt. Ex. 4; *see also* Tr. 35. At that point, Freeman recognized that DoDEA would not pursue additional changes, but he did not file a ULP charge because the arbitrator still held jurisdiction over the grievance, and he wished to exhaust the arbitration process before filing a charge. Tr. 37. This is significant, because the arbitrator could still have modified the Award, extended the deadline for compliance, or continued to work with the parties to try to resolve the dispute. However, once the Final Award was issued, declaring the Agency noncompliant and relinquishing jurisdiction (Jt. Ex. 5), the Union's only further recourse was to file a ULP charge.

A threshold problem in identifying when the Agency actually refused to comply with the Award stems from a "chicken and egg" type of question: is the Respondent's ULP based on its refusal to comply with the 2003 Award or the 2015 Final Award? The Complaint alleges that since August 10, 2015, the Respondent "has failed to perform the acts ordered by Arbitrator Brent" in both awards. GC Ex. 1(c), ¶11. The problem is compounded by the fact that the Final Award did not require anything different than the 2003 Award. The Final Award simply ruled that the Respondent had failed to comply with the 2003 Award, as it was clarified by the March 2010 Letter. This conceptual problem, however, is made academic by the extensive (albeit incomplete and ultimately unsuccessful) efforts of both the Union and DoDEA between 2003 and 2015 to comply with the 2003 Award. DoDEA did not give up on complying until it submitted its May 13, 2015 letter. That letter could reasonably be construed as an explicit refusal to do anything further to comply, but it also

constituted an appeal by the Agency to the arbitrator to find that DoDEA had complied with the Award. It was for this reason that the Union waited until after the arbitrator issued his Final Award before filing its ULP charge.

It could reasonably be said that the Respondent committed its alleged ULP when it sent its letter on May 13, 2015. It was at that point that DoDEA explicitly gave up on making further changes to the LES and said it could do nothing more. But such a finding would fix the ULP on a date when the parties' arbitration process was still ongoing, and would start the Union's six-month filing period three months before the Final Award was issued. Alternatively, it could also reasonably be said that the Respondent's refusal to comply with either the Award or the Final Award only became apparent after September 10, 2015, when Respondent chose not to file exceptions to the Final Award and failed to take any further steps to comply. But regardless of which date is used here, the October 6, 2015 ULP charge was filed less than six months thereafter. Therefore, the charge was timely.

The Respondent Did Not Comply With the Award

An agency violates § 7122(b) of the Statute, thereby violating § 7116(a)(1) and (8), when it fails to comply with all or part of an award. *U.S. Dep't of the Air Force, Carswell AFB, Tex.*, 38 FLRA 99, 105 (1990). However, if the award is ambiguous, an agency does not violate the Statute if its actions are consistent with a reasonable construction of the award. *FCI Marianna*, 59 FLRA at 4. The Authority has repeatedly stated that a party cannot use an unfair labor practice proceeding to collaterally attack the merits of the award. *Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA*). To allow a party to litigate matters that go to the merits of the award "would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards." *Id*. Quoting the Second Circuit, the Authority stated that it was the intent of Congress "that the awards of arbitrators, when they become final, are not subject to further review by any other authority or administrative body." *Id*. (quoting *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 29 (2d Cir. 1986)).

In his Award in this case, Arbitrator Brent directed DoDEA to provide "a clear, fully understandable explanation of what is included" in each employee's LES. Jt. Ex. 1 at 41; Jt. Ex. 2 at 5-6. Although the two components of the 2003 Award were short on specifics as to exactly what needed to be contained in the LES, the March 2010 Letter provided considerably more detail on what information was needed for DoDEA to satisfy its obligation. The March 2010 Letter specified exactly what information the LES needed to contain regarding the LQA, the TQSA, the Post Allowance, the TSP, FEGLI, and FEHB, the Pay Lane, and Debt Collection. Jt. Ex. 5 at 8-9. As the Respondent correctly notes, the arbitrator stated (and the Authority agreed) that DoDEA retained the discretion to determine *how* it would provide the information. Jt. Ex. 2 at 6; Jt. Ex. 5 at 7; *DoDEA*, 60 FLRA at 27. Therefore, it was not required to rely on Smart LES alone to provide the requested information. The explanation of how the various elements of an employee's paycheck are calculated "must be communicated to the employee receiving the payment, whether on a stub or statement accompanying each check or by a separate communication referencing the check number . . . ." Jt. Ex. 1 at 41. However, the Respondent did not have any discretion to determine *what* information it would provide.

Thus, while the Award was ambiguous as it was initially issued in 2003, the March 2010 Letter (issued as part of the process of implementing the Award) removed those ambiguities. Between 2010 and 2015, DoDEA and DFAS implemented some of the LES changes required by the Award, but in May 2015, DoDEA said it could make no additional changes and asked the arbitrator to rule that it had complied. Incorporating his March 2010 Letter into his Final Award, the arbitrator clearly and unambiguously ruled against the Respondent. He stated that the March 2010 Letter "articulated more precisely the information that must be conveyed. . . . Neither DoDDS nor its payroll supplier, DFAS, has complied." Jt. Ex. 5 at 4. Having been rebuked by the arbitrator at that point, Respondent could have filed exceptions to the Final Award, but it chose not to do so. The Final Award therefore became final in September of 2015, and I cannot review the merits of the arbitrator's decision.

To be clear, the issue before me now is not whether the Respondent complied with the March 2010 Letter – that, essentially, was the position DoDEA took with the arbitrator in its May 2015 letter. If the Respondent wished to pursue that argument and show that it had indeed (or at least functionally) changed the LES to provide employees with a fully understandable explanation of how their pay and allowances are calculated, it needed to do so by filing exceptions to the Final Award. Yet in this ULP proceeding, DoDEA continues to assert that its "improvements [to the LES] . . . constitute compliance with a reasonable interpretation of" the Final Award. Resp. Br. at 10. Its point-by-point analysis of how the items appearing on employees' LES compare to the requirements of the March 2010 Letter would have been more appropriate as exceptions to the Final Award, or if the Union had filed its ULP charge prior to May 2015. But when the arbitrator issued his

Final Award, he reviewed the Agency's changes to the LES and ruled that those changes did not comply with his earlier rulings. Since the Final Award is indeed final and binding now, the only remaining issue for me is whether the Respondent has complied with the Final Award.[10] The record establishes that DoDEA has not made any further changes in the LES since August 10, 2015; therefore, it has violated § 7116(a)(1) and (8) of the Statute.

For the reasons stated above, the merits of the Final Award are not subject to further review. However, in case the Authority should disagree with that conclusion, I will evaluate the Respondent's assertion that because the Smart LES provides employees with virtually all of the information required by the arbitrator, it complied with the Award. I will address each of the categories of pay and allowances which were covered in the March 2010 Letter.

Post Allowance. In the March 2010 Letter, the arbitrator directed DoDEA to create a digital link for the Post Allowance which, when clicked, would identify the employee's location, the nominal COLA percentage applicable to the payment, the "effective since" date applicable to the payment, and the dates covered by the payment. Jt. Ex. 5 at 8.

Almost all of this information is now available to employees, either on their LES or in MyPay, the same website the employees use to see their Smart LES. Tr. 49-53, 157-58; Jt. Exs. 6 & 7; Resp. Ex. 10. However, the nominal percentage is not displayed.[11] The nominal percentage is important for employees to know when they refer to their LES, because it is the number on which the allowance is calculated. The Agency has a link to a website that the employees can use to find out their nominal percentage, but employees have to navigate through several pages before they can find the link. Unless employees know where to look, they will not be able to find the information easily. Tr. 140.

Living Quarters Allowance. The arbitrator required that the LES specify the monthly rent, annual rent, the applicable exchange rate, and the city and country for which the rent is being paid. The LES is also required to show the annual rent divided by the pay periods per year multiplied by the applicable exchange rate, as well as the utilities paid, the location, the period covered by the payment, and the exchange rate. The Agency is also supposed to reconcile any difference between the amount reimbursed and the amount requested by the employee. Jt. Ex. 5 at 8.

Smart LES provides the total LQA payment and the number of days the LQA was paid. Jt. Exs. 6 & 7. Also, employees can readily find their location because it is the same as the Post Allowance. Tr. 56; Resp. Ex. 10. However, the LES does not provide any of the remaining information, nor does it distinguish between rent and utilities. Although employees can go to a website to find the maximum allowable rate for their location (Tr. 150, 156-57), this does not help employees whose allowable expenses are lower than the maximum rate. The only way for employees to confirm they were paid properly is to request an audit, but in his Award, the arbitrator noted that there is a significant audit backlog. Tr. 150; Jt. Ex. 1 at 38. Therefore, the possibility of seeking an audit does not provide employees a meaningful method of keeping track of whether they are being paid correctly on a regular basis. The missing information deprives employees of a fully understandable explanation of how their allowance is calculated.

Temporary Quarters Subsistence Allowance. The March 2010 Letter required DoDEA to identify whether an employee is entitled to a TQSA, the location, the amount paid for each location, the amount the employee requested in his or her SF-1190, the applicable currency, the exchange rate, and the dates covered by the payment. Jt. Ex. 5 at 8.

In practice, however, Smart LES does not display anything to indicate that an employee is not entitled to TQSA. Jt. Ex. 6, 7; Tr. 60. Additionally, other than providing the TQSA amount paid, Smart LES does not provide any of the remaining information required by the Award. Tr. 160. Although employees can find the maximum allowable TQSA reimbursement (Tr. 192-93), that does not help employees (as noted above) who are trying to find out if they were properly reimbursed for their actual expenses. Therefore, because the LES does not meaningfully enable employees to understand how their payment was calculated, the Respondent did not comply with this aspect of the Award.

Debt Collection or Reimbursement. If the Agency withholds money from an employee's paycheck to repay a debt, then the Award requires the Agency to identify the creditor, the type of debt, the period of time

[10] Unlike the situation in *FCI Marianna*, the Final Award in this case is not ambiguous; it cannot be interpreted to permit DoDEA to issue leave and earnings statements in their current form. While the arbitrator in *FCI Marianna* did not define some of the fundamental terms used in the award, the March 2010 Letter specified exactly what needed to be provided in the LES, and the Final Award expressly found that DoDEA failed to comply with his earlier orders. *Compare FCI Marianna*, 59 FLRA at 4-5 *and* Jt. Ex. 5.

[11] Freeman testified that he believed the Smart LES specified the nominal rate at one point in time, but the payroll statements offered into evidence (Jt. Exs. 6 & 7 and Resp. Ex. 10) do not include that information. Tr. 52-53.

covered by the debt, the original balance, the current balance, the type of repayment, the period of repayment, and the amount deducted from the paycheck. If the employee receives a refund, then the Agency must provide similar information. Furthermore, the Agency cannot use a minus sign in front of the number to indicate that it is a credit; instead it must specifically state that it is a credit. Jt. Ex. 5 at 8.

Smart LES displays the amount deducted for a pay period, the type of debt, the original balance and the current balance. Jt. Ex. 6. However, the type of debt is not entirely clear. According to the Smart LES example provided by the parties, the Agency is recovering an "allowance correction debt in accordance with 5 U.S.C. 5514." Jt. Ex. 6 at 2. It does not identify the specific type of allowance (Post, TQSA, or LQA) that is being recovered. Tr. 165. Some additional information is provided by debt letters sent to employees. The sample debt letter offered into evidence provides information on repayment, but it does not provide any additional explanation of what the debt is for. Resp. Ex. 11. Moreover, employees will not receive this type of letter if the debt is "caught" within four pay periods or if it is less than $50. Tr. 164. Therefore, some employees will have little or no explanation of their debt or how the deduction was calculated.

Furthermore, refunds continue to be reported as "debts" with a negative sign in front of the amount. Tr. 64; Jt. Ex. 6. As noted by the Union, many employees do not realize that this means that it is a credit, not a debt. Tr. 64. Also, there is no evidence that employees receive any of the remaining information regarding refunds. Therefore, the Respondent has not complied with this part of the Award.

FEHB and FEGLI. The Award requires the Agency to show the annual cost of FEHB and FEGLI plans and the amount deducted that pay period. For FEHB deductions, the Agency must indicate whether the plan covers an individual or the employee's entire family, and for FEGLI deductions, the LES must identify it as a deduction for life insurance. Jt. Ex. 5 at 8.

In practice, Smart LES only shows the amount withheld that pay period. Jt. Exs. 6 & 7. Although the Respondent has a webpage describing what FEGLI means, employees have to search for it. Resp. Ex. 13. Smart LES provides code for the FEHB plan but employees will need to go to MyBiz, EBIS, or the OPM website to learn what that code means and what plan they have. Tr. 168. In other words, employees can find some of the missing information, but they have to search for it themselves. And contrary to the Award, the LES does not show the annual cost of the FEGLI or FEHB plans.

TSP. The Award requires that the LES display the percentage or amount withheld for TSP and identify that the deduction is for TSP. Jt. Ex. 5 at 9. Smart LES provides this information (Jt. Ex. 7), and Freeman acknowledged that the Agency has complied with this part of the Award. Tr. 77.

Pay Lane. Finally, the Award requires that the LES identify the employee's pay lane and the number of years of service; moreover, the pay lane should be identified "in plain language [for instance, B.A. or M.A. plus thirty credits], not in code." Jt. Ex. 5 at 9.

Smart LES displays a code for the employee's pay lane. Jt. Exs. 6 & 7. Employees must search the Respondent's website to find the pay tables in order to find out what the code means. Tr. 174; Resp. Ex. 17. Furthermore, Smart LES displays the employee's "step" in the pay schedule, but not the number of years of service used to determine the step. Jt. Exs. 6 & 7.

In summary, employees can obtain some of the required information directly from their Smart LES or by going to other websites. However, as discussed above, employees still do not have access to many of the details the arbitrator required. After considering the Agency's argument that this was the best it could do, the arbitrator concluded that the Agency had not complied with his Award. It would be inappropriate for me to second-guess the arbitrator's interpretation of his own decision, both of which involved complex factual issues. The issue before me is whether the Respondent complied with the Final Award. Since the arbitrator himself has already concluded that the Respondent failed to comply with the 2003 Award (as clarified by the March 2010 Letter), and the Respondent has done nothing further to comply subsequent to the issuance of the Final Award, the answer is clear.

The Respondent argues that it should be excused from further compliance due to "severe bureaucratic difficulties" and the "practical technical limitations" on its "ability to do what DFAS has not agreed to do." Resp. Br. at 17. In essence, the Respondent claims that it did everything it could, but DFAS (particularly DCPS) would not cooperate. In the *FAA* case, the agency similarly defended its conduct and challenged an arbitration award, claiming that it had tried to comply but had been prevented by the City of Denver from doing so. 55 FLRA at 295, 297. The Authority rejected that argument, stating that once the award became final, it could not be collaterally attacked. *Id*. at 297. If DoDEA wished to argue that it was impossible for it comply with the Final Award, or that it does not have the authority to take the actions ordered by the arbitrator, it should have pursued them in exceptions to the Final Award, rather than now.

Notwithstanding my conclusion above, I think everybody would be missing the point of this case, and would be begging to repeat their frustrations endlessly, if the parties do not work collaboratively and creatively to find a meaningful solution to the problems identified by the arbitrator. The Union has sought, since the mid-1990s, to obtain understandable leave and earnings statements for their employees, who work around the world in positions that entitle them to types of pay and allowances that are not typical for most federal employees. These employees must not only check to make sure they are receiving the correct pay and allowances, but they must also be able to understand how those payments and allowances were calculated. The arbitrator found in 2003 that the LES did not provide employees with enough information to verify the accuracy of their paychecks and that this violated the parties' CBA. To its credit, DoDEA has acknowledged their employees' plight, and since at least 2010 it made significant efforts to comply with the 2003 Award. The arbitrator placed the responsibility on DoDEA to find a way to modify the automated systems that issue employees' LES so that employees would receive the necessary information. He recognized that DoDEA would likely need to work with "DFAS or some other entity of the Department of Defense" to make these systemic modifications (Jt. Ex. 2 at 5), but DoDEA was free to provide the required information to employees "by a separate communication" if necessary. Jt. Ex. 1 at 41. DoDEA seems to have reached a dead end in obtaining the cooperation of DFAS, so it is incumbent on all the parties to find alternative means of complying with the arbitrator's mandate. Simply issuing orders or submitting bureaucratic requests will not break the deadlock. I only have the ability to issue an order, but the parties will need to work creatively and cooperatively to find ways to provide the employees with the information they need.

In conclusion, the Respondent violated § 7116(a)(1) and (8) when it failed to comply with the Final Award, as required by § 7122(b) of the Statute.

REMEDY

In order to remedy the unfair labor practice, I will order the Respondent to comply with the Final Award, to post a notice to employees, and to electronically distribute the notice to all bargaining unit employees represented by the Union.

As the General Counsel correctly notes, the Authority generally requires that a notice of unfair labor practice be signed by the highest official of the agency or activity responsible for violating the Statute. GC Br. at 11 (citing *Social Security Admin.*, 64 FLRA 293, 297 (2009)). The GC asserts that the Respondent's General Counsel is that official, but it offers no explanation of why that is true. The Respondent's official website identifies the Director as the head of the agency, and in light of the worldwide organization of the Respondent's many schools and bargaining unit employees, the Director would seem to be the appropriate official to sign the notice. Moreover, in light of the well-documented difficulties in achieving any sort of compliance with the many previous orders in this case and in coordinating with other DoD activities, I find that the agency head should sign the notice. Furthermore, in accordance with the Authority's decision that ULP notices should be posted on bulletin boards and distributed to employees electronically, I will order both methods of distribution. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Defense Education Activity, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the Final Award of Arbitrator Daniel Brent issued on August 10, 2015.

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

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

(a) Comply with the Final Award of Arbitrator Daniel Brent issued on August 10, 2015, by ensuring that employees have access to the required payroll information on or with their leave and earnings statements.

(b) Post at its facilities where bargaining unit employees represented by the Federal Education Association 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, Department of Defense Education Activity, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., November 30, 2016

_____
RICHARD A. PEARSON
Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Department of Defense Education Activity, violated the Federal Service Labor-Management Relations Statute (the 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 Award of Arbitrator Daniel Brent issued on August 10, 2015.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL comply with the Final Award of Arbitrator Daniel Brent issued on August 10, 2015, by ensuring that employees have access to the required payroll information on or with their leave and earnings statements.

_____
(Respondent/Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for sixty (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 Acting Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street, N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.