

70 FLRA No. 185

U.S. AGENCY FOR GLOBAL MEDIA¹
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-5367
0-AR-5390

DECISION

November 16, 2018

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 are called upon to again define the limits to an arbitrator's prerogative to unilaterally extend her own jurisdiction.

In a March 2018 award, Arbitrator Suzanne R. Butler found that she had the authority to resolve an overpayment-waiver dispute (the current dispute) because it fell within her retained remedial jurisdiction from a 2011 award. Then, in a June 2018 award, the Arbitrator held that the Agency should have waived the collection of overpayments to six employees (the grievants). The Agency filed exceptions to both awards.

We find that the current dispute does not fall within the Arbitrator's retained jurisdiction because the parties had fully implemented the 2011 award's remedies before the Arbitrator asserted jurisdiction over the current dispute. Because she exceeded her authority in holding to the contrary, we set aside both awards.

II. Background and Arbitrator's Awards

In 2011, the Arbitrator issued an award finding that the Agency violated the parties'

collective-bargaining agreement when it conducted a reduction in force (the RIF award). As remedies, she directed the Agency to reinstate previously terminated employees and make them whole. Further, she expressly retained jurisdiction over any remedial-implementation disputes.

The Agency agreed to provide reinstatement-eligible employees with backpay in several installments. The affected employees received all of the backpay to which they were entitled by the end of 2016. However, the Agency overpaid the grievants because it had miscalculated the amounts owed to the grievants. When the Agency discovered the errors, it initiated collection procedures to recover the overpayments, and the grievants asked the Agency to waive collection. The Agency denied those requests.

The Union then contacted the Arbitrator and asked that she exercise her retained jurisdiction from the 2011 award, characterizing the collection actions as remedial-implementation disputes. In March 2018,² a full seven years after her 2011 award in the RIF case, the Arbitrator assumed jurisdiction and issued an award finding that the Agency's denial of waivers for the grievants was "clearly a remed[ial]-implementation dispute" over which she retained jurisdiction.³ In April, the Agency filed exceptions to the March award, and in May, the Union filed an opposition to the Agency's exceptions.⁴

Then, in June, the Arbitrator issued another award directing the Agency to waive the collection of overpayments to the grievants. In July, the Agency filed exceptions to the June award, and the Union filed an opposition to the Agency's exceptions.⁵

We consolidate these two cases – concerning the March and June awards – for decision here.⁶

² All further dates are 2018.

³ March Award at 1.

⁴ The Authority docketed the March-award filings as Case No. 0-AR-5367.

⁵ The Authority docketed the June-award filings as Case No. 0-AR-5390.

⁶ See *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Bryan, Tex.*, 70 FLRA 707, 708 (2018) (addressing exceptions to an arbitrator's first and second awards in a single decision).

¹ During the pendency of this case, the Agency changed its name from the Broadcasting Board of Governors to the U.S. Agency for Global Media.

III. Analysis and Conclusion: The Arbitrator exceeded her authority.

In its exceptions to both awards,⁷ the Agency argues that the Arbitrator exceeded her authority because this dispute concerns the Agency's denials of requests to waive the overpayments and has nothing whatsoever to do with the Arbitrator's retained jurisdiction from the 2011 award.⁸ Thus, the Agency argues that the Arbitrator violated the doctrine of *functus officio*.⁹

The Authority has recognized that, after issuing an award, an arbitrator may retain jurisdiction in order to oversee remedial implementation.¹⁰ As relevant here, the doctrine of *functus officio* means that, once an arbitrator has accomplished the designated purpose of his or her office, the arbitrator has no further authority.¹¹ Put another way, all disputes must have an end, as also must an arbitrator's jurisdiction.

In the March award, even the Arbitrator recognized that the employees who were entitled to relief under the 2011 award *had already received* everything needed to make them whole.¹² In other words, the employees had received the remedy that the Arbitrator had ordered and the only purpose for which the Arbitrator

had retained jurisdiction.¹³ The Arbitrator awarded backpay, and the Agency paid all backpay. At that point, any retained jurisdiction came to an end.¹⁴ Consequently, the Arbitrator violated the doctrine of *functus officio* when she unilaterally reasserted jurisdiction over the Agency's decision to deny the employees' requested waivers of overpayment.¹⁵

For these reasons, we set aside the awards.¹⁶

IV. Decision

We set aside the awards.

⁷ The March award did not resolve the merits of the current dispute, so the exceptions to the March award were interlocutory. But because the June award resolved the dispute's merits, the interlocutory status of the exceptions to the March award is moot. *Id.* at 708 n.10 (finding that, where second award resolved any outstanding questions from first award, interlocutory status of exceptions to first award was moot).

⁸ We reject the Union's contention that the Authority's Regulations bar consideration of this argument. Opp'n to Exceptions to Final Award at 17 (citing 5 C.F.R. §§ 2425.4(c), 2429.5). The Agency presented it to the Arbitrator before she issued the March award, and the argument was still pending before the Authority – as part of the Agency's exceptions to the March award – when the Arbitrator issued the June award.

⁹ Exceptions to March Award at 10-11; Exceptions to June Award at 14-18.

¹⁰ *E.g.*, *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000).

¹¹ *E.g.*, *NTEU, NTEU Chapter 33*, 44 FLRA 252, 263 (1992) (*NTEU*) (citing *Navy Pub. Works Ctr., Norfolk, Va.*, 35 FLRA 93, 96 n.1 (1990)).

¹² March Award at 1 (referring to "bargaining[-]unit employees who were *reinstated and made whole* as part of the remed[ies] awarded" in the RIF award (emphasis added)). Contrary to the dissent's assertion, Dissent at 5, the Arbitrator did not retain jurisdiction to arbitrate further disputes between the parties after the Agency reinstated the grievants and paid them all of the backpay to which they were entitled. As we noted above, the Arbitrator herself recognized that the grievants have already been *reinstated and made whole*. March Award at 1. Thus, the dissent is quibbling with the Arbitrator's own findings in the March award.

¹³ *See NTEU*, 44 FLRA at 263.

¹⁴ *Cf. U.S. DOD, Educ. Activity, U.S. DOD Dependents Sch.*, 70 FLRA 718, 720 (2018) (Member DuBester dissenting) (where Back Pay Act limited the power to award attorney fees to cases involving the loss of "pay, allowances, or differentials," fee awards in cases that did not involve such losses were unlawful).

¹⁵ *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302-03 (2011) (where arbitrator retained jurisdiction for "six months" following issuance of his award, his attempt to exercise jurisdiction more than six months after the award violated the doctrine of *functus officio*).

¹⁶ Because we are setting aside the awards on this basis, we need not address the Agency's other arguments. *See* Exceptions to March Award at 8-9 & n.4 (essence exception), 13-14 (bias exception); Exceptions to June Award at 11-13 (essence exception), 18-20 (bias exception), 20-29 (contrary-to-law exception), 27 (nonfact exception), 29 (exceeded-authority argument besides *functus officio*). And we express no opinion on the merits of any other pending grievance or unfair-labor-practice disputes mentioned in the parties' filings. *E.g.*, Exceptions to June Award at 9 & n.6.

Member DuBester, dissenting:

The overpayment-waiver issue in this case is directly related to the Arbitrator's initial backpay remedy in her 2011 award. Accordingly, in my view, the Arbitrator properly exercised her retained jurisdiction regarding implementation of that initial award. Contrary to the majority, I would uphold the Arbitrator's award currently before the Authority on exceptions.

In her 2011 award, the Arbitrator expressly retained jurisdiction over *any* dispute that might arise concerning *implementation of the remedy*.¹ Authority precedent holds that where an arbitrator retains jurisdiction to resolve disputes over *implementation* of an award, the arbitrator may issue a supplemental award resolving such disputes.² Such supplemental awards do not violate the principle of *functus officio* because the arbitrator has authority to act within his or her retained jurisdiction to resolve remedy-implementation disputes.³

This is a remedy-implementation dispute. The issue over which the Arbitrator exercised her retained jurisdiction flows directly from the parties' attempts to implement her initial award.⁴ Moreover, the affected employees will not know the final nature of their individual remedies until the overpayment-waiver issue is finally resolved. Because the Arbitrator's award addresses, and finally resolves, this issue, she did not exceed her authority.⁵

¹ 0-AR-5390, Agency Ex. 4, November 2011 Award at 94.

² *NTEU*, 70 FLRA 57, 61 (2016) (*NTEU*) (holding that arbitrator did not exceed authority by retaining jurisdiction and resolving dispute related to implementation of award); *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 954 (2011) (*FAA*) (holding that arbitrator was not *functus officio* in issuing supplemental award because she expressly retained jurisdiction to resolve any disputes over implementation of award's remedy); *AFGE, Local 1156 & Laborers' Int'l Union, Local 1170*, 57 FLRA 602, 603 (2001) (*AFGE*) (same).

³ See *NTEU*, 70 FLRA at 61; *FAA*, 65 FLRA at 954; *AFGE*, 57 FLRA at 603.

⁴ The record shows that the parties continued to calculate the backpay owed to the affected employees until 2016, when the Agency issued six employees "overpayment" notices. Award at 6. The Agency had appealed the 2011 Award to the Authority, which denied the Agency's exceptions, and then to the DC Circuit, which dismissed the petition for review. The terminated employees were not reinstated until March, 2015. *Id.* at 2.

⁵ The applicable statute provides that an agency may waive claims arising from erroneous overpayments where collecting these debts "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584. Thus, the waiver issue goes to the heart of the Arbitrator's initial remedy. Interpreting § 5584, (Award at 14-15) the Arbitrator finds that the Agency did not treat the six overpaid employees equitably, in part because the overpayments stemmed from the Agency's "wrongfully-motivated, illegal . . .

The majority errs when it states that "the employees who were entitled to relief under the 2011 award had already received everything needed to make them whole."⁶ I disagree. To be made whole, what the employees are entitled to, but had not yet received, includes a final resolution of all remedy-related issues.⁷ And it was to finally resolve such issues that the Arbitrator retained jurisdiction.

Accordingly, because the Arbitrator did not exceed her authority, I would deny the Agency's exception and uphold the award.

RIF." *Id.* at 14. Accordingly, she finds that it would not be in the best interest of the government to collect these debts. *Id.* at 14-15.

⁶ Majority at 3.

⁷ Contrary to the majority (Majority at 3 n. 12), the Arbitrator's reference to employees who were "made whole" is not a legal determination at odds with her finding that she could exercise her retained jurisdiction. To understand an award, we review the arbitrator's findings and conclusions.