72 FLRA No. 74

U.S. DEPARTMENT
OF DEFENSE EDUCATION ACTIVITY
(Respondent/Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Charging Party/Union)

WA-CA-16-0016
(70 FLRA 654 (2018))

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DECISION AND ORDER
ON REMAND

June 25, 2021

_____

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

I. Statement of the Case

This case is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Federal Education Association v. FLRA* (*FEA*).[1] In that decision, the court reversed the Authority's determination, in *U.S. DOD Education Activity* (*DODEA*),[2] that the Union untimely filed its unfair-labor-practice (ULP) charge under § 7118(a)(4)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[3]

Consistent with the court's finding that the "charge was timely," and the court's order that the Authority "address the merits of the . . . charge,"[4] we now consider the Agency's sole exception to the merits of the attached Administrative Law Judge decision. For the following reasons, we reject the Agency's exception.

II. Background and Judge's Decision

This case has a long procedural history, dating back to 2002. That year, the Union filed a grievance alleging that the Agency had "engaged in a persistent pattern of failing to pay or to apprise [certain] bargaining[-]unit employees of their correct . . . payments to which they [were] contractually or legally entitled."[5]

On November 7, 2003, Arbitrator Daniel Brent issued his first of four awards concerning the Union's grievance. In it, he found 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."[6]

To remedy the Agency's violations of the parties' collective-bargaining agreement and federal law, the Arbitrator directed the Agency to "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 [payment]."[7] The Arbitrator asserted that the Agency could select the mode of compliance,[8] and he provided compliance options, such as: (1) work with the Defense Finance Accounting Service (DFAS)—a separate DOD component that administers the Agency's online payroll system (Smart LES system)—to provide the information; (2) work with "some other entity" of the DOD to provide the information;[9] (3) communicate the payment information "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 into the employee's bank account";[10] (4) transmit the information "by e-mail";[11] or (5) "elect to introduce payroll forms that can be machine read . . . from which information submitted by an employee can be automatically scanned and entered into a payroll computer."[12]

On November 12, 2003, the Arbitrator issued a second award. The Arbitrator again directed the Agency, "DFAS[,] or some other entity of the [DOD] . . . [to] create or modify its computer programs or other procedures by which bargaining[-]unit employees are paid so that all bargaining[-]unit employees receive with every payment a clear, fully understandable explanation of what is included."[13] In addition, the Arbitrator expanded on the type of payment information that the

[1] 927 F.3d 514 (D.C. Cir. 2019) (*FEA*).
[2] 70 FLRA 654 (2018) (then-Member DuBester dissenting), *pet. for review granted in part, rev'd & remanded sub nom. FEA*, 927 F.3d at 522.
[3] 5 U.S.C. § 7118(a)(4)(A).
[4] *FEA*, 927 F.3d at 522.
[5] Joint Ex. 1, First Award (First Award) at 3. The Union identified, as examples, eight underpaid teachers in Germany.
[6] *Id.* at 16.
[7] *Id.* at 41.
[8] *Id.* at 42.
[9] *Id.* at 41.
[10] *Id.* at 41-42.
[11] *Id.* at 42.
[12] *Id.*
[13] Joint Ex. 2, Second Award (Second Award) at 5.

Agency must provide to employees,[14] and he reiterated that the Agency could select the mode of compliance.[15]

The Agency filed exceptions to the second award, arguing that the Arbitrator exceeded his authority by directing the Agency or DFAS "to modify its computer system" because the Agency did not have the authority to make any such modification.[16] In 2004, the Authority denied the Agency's exceptions, holding that the award did not "mandate the specific format for how the information must be provided to employees"[17] and, instead, the award gave the Agency the "discretion in deciding what actions must be taken in order to provide unit employees with a clear explanatory statement of payments."[18]

Following the Authority's 2004 decision, the parties began implementation hearings with the Arbitrator. In March 2010, after one such implementation hearing, the Arbitrator sent a letter to the parties (the third award)[19] memorializing that the Agency had agreed to work "in conjunction with DFAS . . . to facilitate and implement the[] revisions to the current Smart LES" system.[20] In order to bring that system into compliance with the awards, the Arbitrator instructed the Agency to create links that, when pressed by an employee, would supply information about that employee's living-quarters allowance; temporary-quarters-subsistence allowance; post allowance; thrift-savings-plan contributions; pay lane; federal employees' group life insurance; federal employees health benefits; and debts and repayment obligations. For each of these eight categories of information, the Arbitrator also instructed the Agency to include particular details.

As examples, for debts and repayment obligations, the Arbitrator directed the Agency to create a link that shows "the nature of the debt . . . the period of time covered by the debt, the total dollars originally due, the type of repayment, the period covered by the repayment, the remaining balance[,] and the amount deducted this pay period."[21] For federal employee health benefits, the Arbitrator stated that "the user should see the annual cost to the employee, the cost deducted per pay period, and the type of coverage (self or family)."[22] And, for living quarters allowance, the Arbitrator stated that the link should show, among other things, 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."[23]

In addition, the third award stated that the Agency retained discretion "to determine how best to effectuate these modifications."[24] The Agency did not file exceptions to this award.

After receiving the third award, the Agency sent a memo to DFAS outlining the modifications that the Arbitrator directed. In response, DFAS provided the Agency with an analysis of the feasibility of the changes, noting that some of the information was already provided by the Smart LES system, some of it would eventually be included, if funded, and some might never be included. At an August 2010 implementation hearing, a DFAS official explained "that pretty much anything [the Agency] wanted[, DFAS] could do in the [S]mart LES [system], realizing there's a cost associated with it and [the Agency] still has to get approval" from a Configuration Control Board (CCB).[25] The DFAS official offered to help the Agency draft its request to the CCB, and the Agency submitted a request in late 2010. At a CCB meeting in May 2011, the CCB approved the request pending the Agency agreeing to pay for the changes.[26] An Agency representative stated that the Agency was "willing to pick up the cost."[27]

Between 2010 and 2015, the parties continued to engage in yearly implementation hearings. During that time, the Agency allegedly "repeatedly assured" the Union and the Arbitrator that it was working toward compliance with the award.[28] By 2015, the Agency had not made all of the changes, and it sent the Arbitrator a

[14] *Id.* at 5-6 (stating that the Agency should provide "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").
[15] *Id.* at 6.
[16] *U.S. DOD Educ. Activity, Arlington, Va.*, 60 FLRA 24, 25 (2004) (*DOD*).
[17] *Id.* at 27.
[18] *Id.* (noting that the "Agency's discretion in this regard is evidenced by the language of the award which requires the Agency to select its 'mode of compliance' in order to 'create or modify its computer programs *or other procedures*'").
[19] *FEA*, 927 F.3d at 517 (noting that the letter was, in effect, the Arbitrator's third award).
[20] Joint Ex. 5, Attach., Third Award at 7.
[21] *Id.* at 8.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 7.
[25] Tr. at 112.
[26] *Id.* at 134.
[27] Agency Ex. 8, Correspondence between Agency and DFAS officials, at 2.
[28] Judge's Decision at 9, 13 (citing Tr. at 93-97 ("[W]e were being constantly assured that . . . [the Agency was] working on it.")).

letter requesting that he find the Agency in compliance with the "spirit and intent" of the award.[29]

On August 10, 2015, the Arbitrator issued his fourth, and final, award. In this award, he concluded that the Agency continued to provide insufficient explanations of payments to employees. As a result, he relinquished further jurisdiction over the matter but again noted that the Agency could "comply with [the a]ward . . . by enlisting other Department of Defense agencies or by undertaking to provide the requisite information independently by issuing a supplemental document."[30] The Agency did not file exceptions to the final award.

On October 6, 2015, the Union filed a ULP charge with the Federal Labor Relations Authority's (FLRA's) Office of the General Counsel (GC) alleging that the Agency violated the Statute by failing to comply with a final and binding arbitration award. The matter proceeded to a hearing before an FLRA Administrative Law Judge. As relevant here, the Judge addressed two questions: whether the Union timely filed the ULP charge, and whether the Agency had complied with the Arbitrator's awards.

On the first question, the Judge determined that the Union had timely filed its ULP charge within six months of learning that the Agency would not comply with the award.

On the second question, the Judge addressed the Agency's contention that the changes it had made to the Smart LES system, throughout the years, "constitute[d] compliance with a reasonable interpretation" of the awards.[31] As relevant here, the Judge noted that under Authority precedent, "if [an] award is ambiguous, an agency does not violate the Statute if its [compliance] actions are consistent with a reasonable construction of the award."[32] Applying that framework, the Judge rejected the Agency's contention, finding that "while the [a]ward was ambiguous as it was initially issued in 2003, the March 2010 [l]etter [(or third award)] . . . removed those ambiguities" by providing the Agency with a list and description of the eight categories of information to be included in the explanation of payments.[33]

After comparing the information provided by the current Smart LES system to the information required by the awards, the Judge determined that "employees still do not have access to many of the details [that] the [A]rbitrator required."[34] Accordingly, the Judge concluded that the Agency violated § 7116(a)(1) and (8) of the Statute by failing to comply with the awards.

In 2016, the Agency filed exceptions to the Judge's decision, and the GC filed an opposition. In *DODEA*, the Authority reversed the Judge's decision as to question one, finding that the Union failed to timely file its ULP charge within six months of the alleged violation, as required by § 7118(a)(4)(A). Because the Authority overturned the Judge's decision on that basis, it did not address the Agency's exception to the merits of the Judge's decision.

In *FEA*, the D.C. Circuit overturned the Authority's determination that the ULP charge was untimely, and the court remanded the matter "for the Authority to address the merits."[35]

III. Analysis and Conclusion: We decline to consider the Agency's sole exception to the Judge's decision because that exception constitutes an impermissible collateral attack on a final and binding award.

The Agency does not contest that it failed to fully comply with the award, and it defends its noncompliance on only one substantive basis. Specifically, the Agency asserts that the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Marianna, Florida* (*FCI*)[36] "required" the Judge "to consider the Agency's compliance based upon a 'reasonable construction of the award.'"[37] In this regard, the Agency alleges that the remedy from the second award—directing the Agency to "create or modify its computer programs or other procedures by which all bargaining[-]unit employees receive with every payment a clear, fully understandable explanation of what is included"—was ambiguous.[38]

The Authority has consistently held that it will not review the merits of an arbitration award in a ULP proceeding, because "to allow a respondent to litigate matters that go to the merits of the award would circumvent [c]ongressional intent with respect to statutory review procedures and the finality of arbitration awards."[39] Consequently, in a ULP proceeding regarding a failure to comply with an arbitration award such as this,

[29] Joint Ex. 4 at 2.
[30] Joint Ex. 5, Final Award (Final Award) at 5.
[31] Judge's Decision at 15-16.
[32] *Id.* at 14 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3, 4 (2003) (Member Pope dissenting)).
[33] *Id.* at 15.
[34] *Id.* at 19.
[35] *FEA*, 927 F.3d at 522.
[36] 59 FLRA at 4.
[37] Exceptions Br. at 6-7 (quoting *FCI*, 59 FLRA at 4).
[38] *Id.* at 5-6 (quoting Second Award at 5).
[39] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex Coleman*, 67 FLRA 632, 635 (2014) (*Coleman*) (quoting *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA*)).

"a party cannot . . . use an exception to the Judge's decision enforcing the award to challenge the merits of the award."[40]

Here, the Arbitrator issued the second award in 2003.[41] By challenging the remedy from that award as ambiguous, the Agency is effectively contesting an eighteen-year-old arbitration award. As noted above, the Agency filed exceptions to the second award, and, in 2004, the Authority denied those exceptions.[42] In its 2004 exceptions, the Agency raised several arguments *specifically related to* the remedy requiring the Agency to "create or modify its computer programs or other procedures."[43] However, at that time, the Agency did *not* allege that this awarded remedy was incomplete, *ambiguous*, or contradictory to make implementation impossible.[44] Its attempt to do so through this ULP proceeding, as a basis for defending its failure to comply with the awards, represents a collateral attack on a final and binding arbitration award.[45] Accordingly, consistent with the statutory review procedures mentioned above, we reject the Agency's sole exception to the merits of the Judge's decision.[46]

Although unnecessary, we consider the Agency's ambiguity argument and find it unavailing for at least two reasons.

First, contrary to the Agency's assertion, the Judge was not "required" to measure the Agency's compliance based on the Agency's interpretation of the awards.[47] *FCI* plainly states that the reasonable-construction test for compliance applies only "[w]hen the award is ambiguous."[48] And here, the Judge found that while the 2003 award may have been ambiguous as issued, the Arbitrator's March 2010 letter (or third award) "specified *exactly* what [the Agency] needed to . . . provide[]" to employees in order to comply with the awards.[49]

The record evidence supports the Judge's finding. In the third award, the Arbitrator identified eight categories of information related to employee pay,[50] and for each category, the Arbitrator directed the Agency to provide specific information. For example, for the debts-and-repayment-obligations category, the Arbitrator stated that the payroll system should

> show[] the user the following information: the nature of the debt (meaning to whom owed and for what), the period of time covered by the debt, the total dollars originally due, the type of repayment, the period covered by the repayment, the remaining balance and the amount deducted this pay period. If the [employee] is being paid a refund, similar information should be shown. A negative deduction should be explicitly annotated as a credit using a verbal explanation in addition to simply placing a minus sign in front of the number.[51]

The Arbitrator provided similarly detailed directions for each of the other seven categories.[52]

After receiving the third award, the Agency never indicated—until this ULP proceeding—that it found any particular directive ambiguous. Instead, as

[40] *Id.*
[41] Second Award at 6.
[42] *DOD*, 60 FLRA at 27.
[43] *Id.* at 25 (summarizing Agency's argument that Authority should set aside that awarded remedy "on the grounds that the Arbitrator exceeded his authority and that this portion of the award is contrary to law").
[44] *Id.* at 25-26.
[45] *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000) ("An award becomes final and binding when there are no timely exceptions filed or when timely-filed exceptions are denied by the Authority."). The Agency did not file exceptions to the Arbitrator's third or fourth awards. As a result, those awards also became final and binding on the parties. *See* 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed under subsection (a) of this section during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding."). To the extent that the Agency's exceptions challenge the merits of those awards, we reject those challenges for the same reason that we reject the Agency's arguments pertaining to the second award. *See U.S. Dep't of VA, Northport VA Hosp., Northport, N.Y.*, 67 FLRA 325, 326 (2014) (dismissing exceptions because they were not filed before the award became final and binding).
[46] *See FAA*, 55 FLRA at 297 ("[T]he [agency's] claim that it is not able to comply with the award constitutes an impermissible collateral attack on the award itself, and we reject it as such."); *see also Coleman*, 67 FLRA at 635 (denying exception to Judge's decision that challenged remedy from an earlier arbitration award).
[47] Exceptions Br. at 6-7.
[48] *FCI*, 59 FLRA at 4; *see also Dep't of the Treasury, IRS, Austin, Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1316 (1992) ("Where an arbitration award is ambiguous, the Authority examines whether the agency's construction of the award is reasonable in determining whether the agency adequately complied with the award.").
[49] Judge's Decision at 16 n.10 (emphasis added).
[50] Third Award at 8 (referring to the (1) living quarters allowance, (2) temporary quarters subsistence allowance, (3) post allowance, (4) thrift savings plan contributions, (5) pay lane, (6) federal employees' group life insurance, (7) federal employees health benefits, and (8) debts and repayment obligations).
[51] *Id.*
[52] *See id.* at 8-9; *see also supra* Section II at 3-4.

noted above, the Agency sent the third award to DFAS;[53] allegedly assured the Union and the Arbitrator that it was working toward compliance;[54] submitted a request to the CCB to make changes to the Smart LES system;[55] and stated that it was willing to pay for the required changes.[56] Even in the Agency's final letter to the Arbitrator—in which it asserted that it would not make any further changes to employees' leave and earnings statements—the Agency did not allege that any of the prior awards were ambiguous.[57] In sum, the Agency's own conduct undermines its claim that it now considers the remedy from the second award ambiguous.

Based on this evidence, we find that the third award remediated any ambiguity created by the second award. And because the award was not ambiguous, the Judge did not err in failing to apply the reasonable-construction standard in *FCI* reserved for ambiguous awards.

Second, as part of its ambiguity argument, the Agency notes that it retained "discretion" in complying with the awards.[58] Although true, the Agency's discretion was limited to selecting *how* to provide employees with the required explanatory payment information. The Arbitrator consistently instructed the Agency that it was not obligated to work with DFAS in order to comply: in the first award, the Arbitrator provided multiple compliance options, including transmitting the information to employees "by e-mail";[59] in the second award, the Arbitrator noted that the Agency could comply by working with DFAS "*or* some other entity," and the Agency could "create *or* modify" "computer programs *or* other procedures";[60] and, in the fourth award, the Arbitrator reiterated that the Agency could have complied by "provid[ing] the requisite information *independently* by issuing a supplemental document."[61]

The Agency fails to explain how any of those instructions are ambiguous; nor does the Agency identify any particular arbitral finding that it alleges grants the Agency discretion to decide *what* explanatory payment information to provide employees. Moreover, the Agency does not claim that it ever attempted to comply with the awards in a manner other than through the Smart LES system, with the assistance of DFAS—despite being repeatedly informed that it could "select its 'mode of compliance.'"[62] In fact, the evidence establishes that the Agency "agreed"[63] to work "in conjunction with DFAS . . . to facilitate and implement . . . revisions to the current Smart LES" system in order to comply with the award.[64] Given this evidence, the Judge correctly determined that the awards did not permit the Agency to decide what payment information to provide[65]—and the discretion that the awards *did* grant the Agency was unambiguous.[66]

Based on the above, we reject the Agency's sole exception to the Judge's decision.

IV. Order

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of 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.

[53] Judge's Decision at 7.
[54] *Id.* at 9.
[55] *Id.* at 8.
[56] Agency Ex. 8 at 2.
[57] *See* Joint Ex. 4 at 2.
[58] Exceptions Br. at 6-7 (arguing that "[w]hile the Arbitrator's 2003 award directed the Agency to improve the [leave and earnings statements], the Agency retained discretion to determine how to implement the changes").
[59] First Award at 41-42.
[60] Second Award at 5 (emphasis added).
[61] Final Award at 5; *see also* Judge's Decision at 15 ("[The Agency] was not required to rely on [the] Smart LES [system] alone to provide the requested information."); *DOD*, 60 FLRA at 27 ("Under the award, the Agency has discretion in deciding what actions must be taken in order to provide unit employees with this explanatory statement of payments.").
[62] *DOD*, 60 FLRA at 27 (quoting Second Award at 5-6).
[63] Agency Ex. 2 at 1 (Agency acknowledging that at a February 24, 2010 implementation hearing, it "*agreed* to facilitate and attempt to implement the revisions to the current S[mart] LES format" (emphasis added)).
[64] Third Award at 7.
[65] Judge's Decision at 15 (concluding that the Agency "did not have any discretion to determine *what* information it would provide" to employees).
[66] Even now, the Agency has the option of deciding *how* to provide employees with the requisite payment information.

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 FLRA. 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 Regional Director, Washington Region, FLRA, in writing, within thirty (30) days of the date of this Order, as to what steps have been taken to comply.

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

The Federal Labor Relations Authority (FLRA) 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.

_____
(Agency/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 Regional Director, Washington Region, FLRA, whose address is: 1400 K Street, N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.

Member Kiko, concurring:

I join the decision and order because it sufficiently demonstrates that we must reject the Agency's only merits-based exception to the Judge's decision. I write separately to echo the sentiment put forth by the Judge: If the Agency has truly "reached a dead end" in obtaining the cooperation of DFAS, then it is incumbent on *both* parties to find alternative means of complying with the Arbitrator's awards.[1]

The Defense Finance Accounting Service (DFAS) administers far more than the Agency's payroll system. It "pays all [Department of Defense (DOD)] military personnel, retirees, and annuitants; civilians for all of DOD; and additional federal customers. DFAS is also a shared services provider, . . . with customers such as the Executive Office of the President, the Department of Energy, the Department of Veterans Affairs, the Department of Health and Human Services, and the U.S. Agency for Global Media."[2] In 2020, DFAS managed ninety-eight million general ledger accounts, paid 6.6 million customers, processed 137.3 million pay transactions, and managed 1.27 trillion in military retirement and health benefit funds.[3]

Despite its responsibilities as a service provider to other entities, and despite it not being an immediate party to this dispute, DFAS made a good-faith effort to modify the Agency's online payroll system (Smart LES system) to comply with the Arbitrator's awards. The evidence shows that a DFAS official attended an implementation hearing, with the Arbitrator and parties, to provide a demonstration of the Smart LES system.[4] Another DFAS official offered to, and did, help the Agency submit a system change request to the Configuration Control Board.[5] And DFAS provided the Agency with a six-page analysis of the feasibility of the changes required by the award.[6]

But where DFAS shined, the Agency faltered. In its 2004 exceptions to the second award, the Agency contested only the portion of the award that directed the Agency to modify its payroll *computer* programs. At that time, the Agency never asserted that it was incapable of providing the payroll information through other means. After the Authority denied the exceptions, the first and second awards became final and binding. When the Arbitrator issued his third award – in which he specifically directed the Agency to work with DFAS[7] – the Agency filed no exceptions whatsoever. Again, that award became final and binding. The fourth award, too, became final and binding after the Agency failed to file exceptions.

Perhaps it is impossible for the Agency to finish what it started and fully comply with the awards. It appears that DFAS has done all that it is willing to, and the record at least indicates that DFAS maintains control over payroll data in a manner that would preclude the Agency from providing such data to employees without DFAS involvement.[8] This evidence suggests that the Agency could not simply email the payment information to the employees,[9] or otherwise provide the information "independently," as the Arbitrator stated.[10] But, the Agency has not shown, let alone argued, this – despite having several opportunities. I will not speculate as to how the Authority would have treated such an explicit argument, but it could have been compelling, especially if presented alongside evidence demonstrating that full compliance was truly impossible, with *or without* the assistance of DFAS. As the Agency did not make that argument, or even assert that they tried to comply with the award without DFAS assistance, the Authority must deny the exception.[11]

Although I agree with this decision and order, I emphasize – to both parties – that the order here does not obligate the Agency to either modify the Smart LES system or work in conjunction with DFAS. If the Agency is unable to comply with the awards without DFAS's assistance, then it may be necessary to modify what is required to comply.[12]

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[1] Judge's Decision at 19.

[2] *Defense Finance and Accounting Service, Working Capital Fund, Agency Financial Report FY20*, 5 (2020), https://www.dfas.mil/Portals/98/Documents/Pressroom/AboutDFAS/201223-D-BO258-1001-AFR.pdf?ver=yfbtS0ubwqzvAnw0Hn_ovg%3d%3d.

[3] *Id.* at 7.

[4] Tr. at 112.

[5] *See id.* at 103-04; Judge's Decision at 5.

[6] Agency Ex. 1.

[7] Joint Ex. 5, Attach., Third Award at 7.

[8] Tr. at 141-50 (Agency Human Resources Director testifying that "DFAS does not grant people like me access into their system where I could run a query and pull data down").

[9] *See* Joint Ex. 1, First Award at 42 (listing emailing information as a possible means of compliance).

[10] Joint Ex. 5, Final Award at 5.

[11] *See* 5 C.F.R. § 2423.40(a)(2) (noting that exception to a Judge's decision "shall set forth . . . the issues to be addressed; and a separate argument for each issue, which shall include a discussion of applicable law"), § 2423.40(d) ("Any exception not specifically argued shall be deemed to have been waived.").

[12] *See U.S. Dep't of Transp., FAA, Nw. Mountain Reg., Renton, Wash.*, 55 FLRA 293, 299-300 (1999) (Chair Segal concurring) (modifying Judge's order where compliance with original terms of award was not feasible).

Member Abbott, dissenting:

I have noted before that the Authority is often called upon to draw distinctions – distinctions that turn on very thin lines. This case is but one more of these instances.

The Authority has long held that parties may not collaterally attack an arbitral award. I believe that this "black letter law" is correct. What is not so clear, however, is when an argument in an unfair-labor-practice (ULP) case charging the agency for failing to comply with an arbitral award: (1) is *just* a collateral attack on a prior arbitral award, and (2) when it presents a valid defense to the ULP complaint.

The majority fails to recognize this distinction. The majority takes a very narrow view of the circumstances from which the Authority will conclude that an agency presents a valid defense, rather than a collateral attack.[1] Thus, agencies are precluded from properly defending themselves against a charge that they have failed to comply with an arbitral award. Therefore, I disagree with the majority when they characterize the Agency's arguments as simply a collateral attack on the Arbitrator's award. It would conclude that the Agency's arguments are a valid defense and not a collateral attack.

This case perfectly illustrates this distinction. The record reflects the that the Agency made any number of good faith efforts to comply with the Arbitrator's award. The Agency worked with both the Defense Finance Accounting Service (DFAS) and Configuration Control Board (CCB) to modify the payroll system in order to provide employees with the information outlined by the arbitrator.[2] When neither DFAS nor CCB was willing to pay the cost to modify the payroll system, the Agency even agreed to cover the costs of the changes in order to move the project forward in accordance with the arbitrator's requirements.[3] It was not until May 13, 2015 that it became clear that the Agency would be unable to comply fully with the award.[4] On that day, during the last implementation hearing, the Agency presented a letter that outlined its efforts to comply with the award and asked the Arbitrator to find that it had complied with the spirt and intent of the award.[5] The Agency also submitted to the Arbitrator a notice of impossibility. Nevertheless, the Arbitrator found that the Agency failed to comply, and the Union filed its ULP charge based on the Arbitrator's conclusion that the Agency had not complied. The Agency argued in its defense that it had complied to the extent that it could on those aspects over which it, rather than DFAS, had control. Thus, the Union was quite aware, even before the Arbitrator's final award, that it was impossible for the Agency to comply with certain aspects of the Arbitrator's award. Consequently, the Agency was not attacking the Arbitrator; it was *defending itself* against the ULP.

This is not the first instance that a federal union has challenged how an agency's payroll system operates when the system is operated and maintained by a source outside of the agency's control. Many agencies look to finance centers such as DFAS to run their payroll services either as part of a business center or because higher echelons have mandated that these services be transferred. And, yet, in DOD, many grievances and complaints have been filed that constitute nothing more than unions' disagreement with DOD's decision to transfer all of its finance systems to DFAS. These, in my view, are the true "collateral attacks."

In the end, this entire case rests on the Agency being charged with a ULP for failing to implement changes to a system over which it had no control. It did what it could to comply until it became impossible. Accordingly, the Agency's arguments are defenses against the ULP, not collateral attacks on the Arbitrator's award.

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[1] "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 . . . . 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* [*HHS*], *SSA* [*v. FLRA*], 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.* [*USDA*], *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* [*VA*], *VAMC, Ashville, N.C.*, 57 FLRA 681, 683 (2002)." *U.S. Dep't of VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 67 FLRA 269, 275 (2014).

[2] Agency Ex. 2; Agency Ex. 3.

[3] Tr. at 126-27; Agency Ex. 7 at 2.

[4] Joint Ex. 4.

[5] The Union representative testified before the Administrative Law Judge that "this was the first time that it became crystal clear to us that DFAS was not going to cooperate." Tr. at 35.

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.