OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, ALLEN PARK, MICHIGAN

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 933, AFL-CIO

Charging Party

Case Nos.
CH-CA-20021
CH-CA-20164
CH-CA-20821

Roland L. Bessette

Counsel for the Respondent

Susanne S. Matlin and

Peter A. Sutton

Counsel for the General Counsel, FLRA

Renate Klass

Counsel for the Charging Party

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in Case No. CH-CA-20021 and CH-CA-20164 alleges that Respondent (VAMC Allen Park) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations

Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (8)[1], by failing to comply with an arbitrator's award dated August 17, 1990 which became final on April 11, 1991.

The award, among other things, required Respondent to pay environmental differential pay (EDP) to certain employees since 1978 until asbestos exposure was abated and to identify employees and produce certain records and documentation within 45 days.

Respondent's answer denied the violations. Respondent asserted that employees known to be eligible for EDP were paid through November 13, 1989 and that the process could not be completed within 45 days.

The complaint in Case No. CH-CA-20821 alleges that Respondent violated section 7116(a)(1) and (8) of the Statute by failing to take actions required by an arbitrator's final award dated June 23, 1992. The award, among other things, required Respondent to continue payment of EDP to unit employees after April 11, 1991 and to pay attorney fees.

Respondent's answer denied the alleged violations. Respondent asserted, among other things, that the award is a nullity and no employee has been exposed to hazardous levels of asbestos. Respondent claimed that the arbitrator lacked jurisdiction, including the fact that the Charging Party had filed unfair labor practice charges concerning the same matters.

A hearing was held in Detroit, Michigan. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.[2] The Respondent, Charging Party and General Counsel filed helpful briefs. 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 American Federation of Government Employees (AFGE) is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the U.S. Department of Veterans Affairs. The Charging Party (Union) is an agent of AFGE for the purpose of representing unit employees at VAMC Allen Park (G.C. Ex. Nos. 1(c) and 1(e)).

The Union filed a grievance in 1986 concerning certain unit employees' entitlement to EDP. Because the grievance was not resolved, the parties submitted it to Arbitrator William M. Ellmann for resolution. (Tr. 35-36).

The Arbitrator issued an arbitration award on April 7, 1987. (G.C. Ex. 2). The issue before the Arbitrator was whether the grievants were entitled to EDP for exposure to asbestos under Federal Personnel Manual (FPM) Supplement 532-1, and, if so, for what period of time payment was warranted. (G.C. 2 at 6; G.C. 3 at 2). The Union asked for EDP from July 1978, that it continue until the facility is cleaned up, and that the arbitrator maintain jurisdiction (G.C. Ex. 2 at 8, 10). The Arbitrator noted that Respondent "has begun a broadly based cleanup program" and "is making a conscientious effort to ride [sic] the surroundings of

asbestos" (Ibid at 4). Respondent acknowledged that it had a duty to pay EDP if the levels of asbestos exceeded the agency standard and if protective devices would not relieve the problem. Respondent argued that if entitlement to EDP was found, it should not go back beyond 30 days before the grievance was filed. (Id. at 7). The Arbitrator found "that any exposure subjects the employee to this difficulty and justifies payment of the pay differential." The actual award was:

> I award the union and its members individually EDP and charge management and the union with determining the damage since 1978. If any dispute arises over the payment, I will hear those claims. I further charge management with the completion of its clean up program no later than six months from the date of this opinion. I maintain jurisdiction to assure myself the claims have been resolved and that the cleanup program is completed. I also retain the right to issue a direct order to cleanup the premises should it become necessary. (Id. at 13).

Respondent filed exceptions to this award with the Authority. Upon review, the Authority in Allen Park Veterans Administration Medical Center, Allen Park, Michigan, 28 FLRA 1166 (1987) (VAMC Allen Park I) (G.C. Ex. 3; Tr. 36) remanded the award, finding that Arbitrator Ellmann did not adequately explain his award of EDP. The Authority stated:

> [T]he award is remanded to the parties for the purpose of requesting the Arbitrator to clarify his award to address fully and in accordance with this decision whether the requirements for the payment of EDP for exposure to asbestos contained in Category 16 of Appendix J have been met in this case. Speci-fically, the Arbitrator is to provide a fully articulated, reasoned discussion based on quanti-tative, objective factors as to whether the amounts of airborne asbestos present at the Activity during the time period in question were at levels which may have exposed employees to potential illness or injury and, if so, whether protective devices or safety measures taken by the Activity did not practically eliminate the potential for such personal illness or injury. 28 FLRA 1170-71.

Pursuant to the Authority's remand, Arbitrator Ellmann issued another award on June 18, 1988. (G.C. Ex. 4). The Respondent argued before the Arbitrator that EDP is only required when air samples reflect 0.1 asbestos fibers per cubic centimeter (0.1 f/cc). The Arbitrator rejected the Respondent's arguments. In rejecting Respondent's proposed threshold level of 0.1 f/cc for EDP, the Arbitrator held ". . . as a matter of law and fact that there is no quanti-tative threshold level below which exposure will not have the potential of illness or injury and that asbestos diseases are dose-responsive." (Ibid at 15); that "EPA finds that there is no

safe level of exposure to asbestos." (Id. at 17); that "The United States National Institute for Occupational Safety and Health (NIOSH) agree that asbestos creates a potential for illness and injury, and further that data available to date provides no evidence for a threshold level. Virtually all levels of asbestos demonstrated an excess of asbestos-related diseases." (Id.); and that "While EDP liaability [sic] can be ended by providing protective devices or instituting safety measures, the facility has not provided such devices or instituted any significant safety measures. . . . I, there-fore, find that protective devices and safety measures have not removed and have not practically eliminated the potential for illness or injury." (Id. at 20). As a remedy, he stated that wage grade employees represented by the Union were entitled to EDP since 1978, interest on backpay, and attorney fees. He also maintained jurisdiction over the matter (Id. at 20-21). He referred to his opinion of April 7, 1987, noting that he had set forth that:

. . .

(2) The agency was charged to complete its internal asbestos clean-up program no later than six months from the date of the award.

(3) Jurisdiction was maintained to resolve disputes over the back EDP awarded and to reserve the right to directly order an asbestos cleanup at the activity. (Id. at 14).

Respondent filed exception to this award with the Authority. Respondent incorporated its exceptions filed in VAMC Allen Park I and requested the Authority to rule on those exceptions. Respondent did not take exceptions to the retention of jurisdiction by the Arbitrator. (G.C. Ex. 5 at 1-2, 6).

On February 28, 1990, the Authority in Allen Park Veterans Administration Medical Center, 34 FLRA 1091 (1990) (VAMC Allen Park II) upheld the June 18, 1988 award of EDP retroactive to 1978 with interest except for the award of attorney fees. The Authority set aside the fee award without prejudice to the Arbitrator's consideration of the issue on a timely union motion. The Authority found that the Arbitrator's award on remand complied with the Authority's instructions, as follows:

In summary, the Arbitrator's award on remand complies with the Authority's instructions to provide a fully reasoned decision on the application of the requirements of Appendix J. The Arbitrator stated in a fully articulated opinion and award that he was convinced by the evidence presented that there is a potential for asbestos-related disease to occur at any level of exposure and that there is no safe threshold level of exposure. In the absence of a mandated quantitative level set by applicable law or regulation or otherwise agreed to by the parties, that finding constitutes an appropriate determination of quantitative levels for purposes of entitlement to EDP

under Appendix J.

> The Arbitrator found that asbestos was present at the Activity, that the grievants had been exposed to amounts of airborne asbestos which would expose them to potential illness, and that protective devices and safety measures had not practically eliminated the potential for illness or injury. These findings have not been shown to violate law or applicable regulation. Accordingly, the Agency's exceptions present no basis for finding the award deficient or for modifying the award in the manner requested by the Agency. (G.C. Ex. 5 at 11).

On April 2, 1990 the Union requested that Respondent proceed to implement the award. On May 24, 1990 Respondent disputed the Union's interpretation of employees covered by the award. Thereafter, the parties jointly requested the Arbitrator to issue an award addressing this and other issues related to coverage. (G.C. Ex. 5(a) at 1; Tr. 37). In an Agency statement submitted to the Arbitrator on June 29, 1990, one of the four issues presented by Respondent was:

> 4. What Is the Duration of the Payment of EDP Under the Arbitration Award? (G.C. Ex. 5(a) at 2).

As to this issue, Respondent represented to the Arbitrator the following:

> IV. PAYMENT OF EDP TO THE 65 GRIEVANTS CONTINUES UNTIL ABATEMENT
>
> The original arbitration award directed payment of EDP to the 65 grievants until their exposure to airborne asbestos is abated. Thus, until such abatement, whether through removal, encapsulation or protective devices, the VAMC will continue to pay EDP to grievants in accordance with the FPM Supplement. (Id. at 9).

On August 17, 1990 the Arbitrator issued his supplemental opinion and award. He noted that "The VA is in agreement [that EDP continue to accrue until asbestos is abated] but only as to the 65 employees." (G.C. Ex. 6 at 4). He found "[t]hat EDP continues to accrue to all Local 933 represented employees until asbestos is abated." (Id. at 11). The Arbitrator found that more than 65 employees as deemed entitled to EDP by the Agency should receive EDP from July 26, 1978 to that time. He determined how EDP was payable; when EDP was payable; the rate for EDP for overtime, holidays and Sunday work; EDP payments were to be factored into and contri-butions made for retirement benefits; backpay and interest were to be separately identified; EDP continued to accrue until asbestos was abated; and that he was "empowered under contract to award, determine appropriate remedies including reasonable attorney fees, and to retain jurisdiction to decide disputes." The August 17, 1990, award, directed as follows:

[1] EDP is to be paid to all wage grade employees represented by Local 933 since July 26, 1978, including current Engineering, Warehouse, Building Management, Dietetics-kitchen and laundry employees. It is also to be paid to those who have quit, retired, become disabled, promoted, transferred, died, etc. regardless of the nature of their tour (part-time, intermit-tent, detailed, regular or temporary status.)

2 That EDP is payable based on the total number of hours and pay status on the date of exposure (rather than on the basis of hours of specific exposure.)

3 That EDP is to be paid for all annual and sick leave paid for a day on which the employee also spent some time actually working at VA Medical Center.

4 That EDP is to be paid for premium pay previously issued for overtime, holiday and Sunday work and also paid presently and in the future for premium work.

5 That the VA is directed within 45 days to identify all Local 933-represented wage grade employees who have worked at the Allen Park Medical Center since July 26, 1978 and that the VA shall produce records which would indicate the basis for the calculation of each employee's total number of hours in pay status since July 26, 1978, total number of hours for which overtime, holiday and Sunday work was paid and total number of hours of paid annual and sick leave days on which work was also performed and documentation concerning the effect of EDP on each employee's retirement and pension contributions and accounts.

6 I retain jurisdiction. (G.C. Ex. 6 at 12-13).

Respondent filed exceptions to the August 17, 1990, award with the Authority contending, in part, that the Arbitrator had exceeded his authority.

While the Respondent's exceptions to the August 17, 1990, award were pending before the Authority, the Respondent, the Union and the arbitrator generated several items of correspondence. (G.C. Ex. 7-15). The Respondent indicated on November 27, 1990, that it would begin partial compliance with the arbitration award, i.e. payment of EDP to the 65 employees which Respondent conceded were under the award. (G.C. Ex. 7). The Union maintained that even the Respondent's limited actions were not in compliance with the award (G.C. Ex. 8). On February 28, 1991, the Respondent for the first time advised the Union that asbestos exposure was abated on November 13, 1989. (G.C. Ex. 9). Among other questions posed and documents requested by the Union, the Union sought justification for the Respondent's assertion. (G.C. Ex. 13).

On April 11, 1991, the Authority ruled on the Respondent's exceptions to the August 17, 1990 award in VAMC Allen Park III, 40 FLRA 160. (G.C. Ex. 16; Tr. 38). The Authority rejected Respondent's principal issue on appeal, namely the allegation that the Arbitrator's award was confined to 65 employees. The Authority held another issue, the status of temporary employees, in abeyance pending the outcome of a unit clarification petition. As to the Arbitrator's authority, the Authority concluded that Respondent failed to establish that the Arbitrator had exceeded his authority by issuing his August 17, 1990 Supplemental Award. The Authority stated, in part, "The matter was placed before the Arbitrator at the joint request of the parties for a supplemental award to resolve the issue of coverage. Matters can properly be reopened by an arbitrator at the joint request of the parties to provide clarification." 40 FLRA at 169. Furthermore, the Authority acknowledged that the arbitrator had retained jurisdiction, noting, "The retention of jurisdiction by arbitrators for the purpose of clarification and interpretation of an award and the overseeing the implementation of remedies is not unusual and has been approved by the Authority." 40 FLRA 170.

As noted above, in late 1990 Respondent conceded that at least 65 engineering employees were entitled to EDP back pay and interest. (G.C. Ex. 7; Tr. 40, 45). Thus, while its exceptions on other issues were pending, Respondent did commence implementation in the fall of 1990 of the Arbitrator's Award at least as to the 65 individuals. The 65 individuals have since become known as "Group I". (Tr. 45-46). On or about November 26, 1990 the Union received a package of materials relating to calculation of back pay and interest for those 65 individuals. (Tr. 39; G.C. Ex. 8). At about this time, Respondent also commenced issuing back pay checks and interest checks to these 65 individuals. (Tr. 45; G.C. Ex. 8).

After Respondent's exceptions were rejected on April 11, 1991, it began to implement the Supplemental Award as to employees and former employees beyond the original 65 employees. (Tr. 46). Respondent then paid EDP and interest to additional employees and former employees, who have since been referred to as Groups II, III and IV, in 1991. (Tr. 46). At the hearing Respondent indicated that it has since paid some other individuals. (Tr. 49).[(3)]

Respondent stipulated during the hearing that it did not identify all employees entitled to EDP and produce records and documentation within 45 days as ordered in paragraph 5 of the Arbitrator's award. Respondent contended that the efforts required made it impossible to do so. (Tr. 44). The identification of former employees and retirees who had worked at the facility since July 26, 1978 was a lengthy process involving, among other things, the placing of newspaper notices. (G.C. Ex. 26 at 2; G.C. Ex. 27 at 2-3, G.C. Ex. 28). After names were collected from a variety of sources, personnel folders had to be secured and reviewed to determine entitlement to EDP. (G.C. Ex. 28 at 3). The Agency could not have completed the process within 45 days.

Respondent's refusal to pay EDP for any time after November 13, 1989 and related failures to provide requested information lead to Charge Nos. CH-CA-20021 on October 10, 1991 and CH-CA-20164 on January 4, 1992. (G.C. Ex. 1(a) and (b)).

On May 1, 1991 the Arbitrator asked the parties the status of their negotiations on "cleaning up the facility." He stated that the "latest decision of the review board also has relevance on that issue as well as . . . the issue of determining damages unless you were to agree on all fronts." (G.C. Ex. 18). He later advised them, "The issue beside EDP is simply that the facility has to be cleaned up. I have retained jurisdiction throughout this case to assure myself it has to be done." (G.C. Ex. 19; Tr. 61-62).

By letter dated May 6, 1991 Respondent's Counsel wrote the Arbitrator, "[H]earings on the issues of abatement and damages will not be productive until such time as the parties have either exhausted their attempts at resolution or have identified the areas of dispute." (G.C. Ex. 20). The Union's Counsel advised the Arbitrator on October 15, 1991 that the parties were "continuing their efforts to narrow issues and examine the VA's allegation of asbestos abatement . . .". (G.C. Ex. 30).

On January 2, 1992 the Arbitrator scheduled a hearing for February 11, 1992 and asked for a report on the status of the matter at that time. (G.C. Ex. 32, Tr. 64).

On January 20, 1992 Respondent notified the Arbitrator that it considered his role to be functus officio. Respondent rejected his authority to schedule a hearing "as a collection tactic or for any other reason." Respondent claimed that "no hearing for clarification of any aspect of the award is requested or necessary" and that he had no authority to schedule hearings relating to damages, the removal of asbestos, or for making additional findings, and no power to issue subpoenas. Respondent stated that a subpoena the Arbitrator had issued against the Agency at the request of the Union was further evidence of his bias against the Agency. Respondent also questioned the Arbitrator's previous fee invoices. (G.C. Ex. 36).

On February 6, 1992 the Union advised the Arbitrator that it would attend the hearing prepared to address "questions concerning interpretation and matters affecting the orderly and expeditious interpretation of your Award." (G.C. Ex. 38).

On February 10, 1992 Respondent reiterated its basis for refusing to attend the hearing and, in addition, claimed that the Union's unfair labor practice charges of October 9, 1991 and January 9, 1992 constituted a statutory election of remedies in accordance with section 7121 of the Statute. (G.C. Ex. 39).

Arbitrator Ellmann convened the hearing on February 11, 1992. The Union was represented, but the Respondent was not. (Tr. 65). The Union submitted a post-hearing brief with exhibits. (G.C. Ex. 42). The Union took the position that Respondent was bound as a matter of law to pay EDP through April 11, 1991 and that the enforcement aspect of that issue was pending before the Authority. (G.C. Ex. 42).

`The Arbitrator scheduled another hearing for May 5, 1992 on the question of whether asbestos is abated at the facility. (G.C. Ex. 43-46). The Respondent again objected to the arbitrator preceding to conduct a hearing on the abatement of asbestos for the reasons previously enumerated. (G.C. Ex. 36 and 47).

The Respondent was informed by the Arbitrator of the date of the hearing and urged to attend (G.C. Ex. 48) and informed of the date post-hearing briefs were due (G.C. Ex. 49). Respondent was given a copy of the Union's post-hearing brief and motion for attorneys fees. (G.C. Ex. 51).

On June 23, 1992, Arbitrator Ellmann issued another award on EDP. (G.C. Ex. 52; Tr. 67). He noted that "the VA failed to present any evidence on the sole issue before the arbitra-tor whether the airborne asbestos hazard has been abated since April 11, 1991." (G.C. Ex. 52 at 2). The award provided, in pertinent part, as follows:

> I find that my jurisdiction continues, and that the FLRA has by its earlier determination approved such continuance.
>
> I find that there is no abatement of asbestos at the VA facility to this date, and specifically during the period from April 12, 1991 to the present.
>
> I find that the union's counsel is entitled to the sum of $9450 (Ninety-four hundred and fifty dollars) for services rendered May 6, 1991 through May 20, 1992, and that the government shall make payment within thirty days.
>
> I find that payment of EDP shall continue unabated. (Id. at 9).

Respondent took no exceptions to the award pursuant to section 7122(a) of the Statute. (G.C. Ex. 1(l). On July 2, 1992 the Union requested that Respondent comply with the award. (G.C. Ex. 53; Tr. 69). Respondent has paid no EDP and no attorney fees pursuant to the June 23, 1992 Award. (Tr. 69-70).

Respondent's failure to do so lead to the Union's charge in Case No. CH-CA-20821.

Barbara Watkins, Assistant Medical Center Director, VAMC Allen Park, testified that she established the November 13, 1989 abatement date. She stated:

> At the time I was aware of the arbitral's [sic] decision, we needed to retrospectively go back and determine a date which we felt the facility had been abated. I chose the date at the time that I had a new engineer. The former engineer had stepped over to a new position, and I felt comfortable

with the new engineer. He and I discussed how we would manage the asbestos program. We began to put into place procedures and policies, and locked certain areas and restrict certain areas. And I felt that at that, from that date on, we had a plan in effect that would insure that people would not accidently or -- or knowingly be exposed to asbestos in -- in performing their regular duties. And we quit removing -- well, even before then we had quit, but definitely from that date forward, we did not use our employees to remove any asbestos in the facility. It was all done by contractor.

(Tr. 120-21).

Ms. Watkins testified that a team from the VA Designated Agency Safety and Health Office (VA DASHO) had conducted a survey of VAMC Allen Park and they had had two visits from the Occupational Safety and Health Administration. (Tr. 121). The VA DASHO visit in August 1990 determined "that asbestos exposures above the regulatory acceptable limits (OSHA and VA) are not being exceeded at this station." (Res. Ex. 2 at 1).

Mr. Anton Karporvich, Jr., an industrial hygienist at VAMC Allen Park since approximately November 1989, testified that the facility has abated hazardous exposure to asbestos by following the procedures recommended by various federal laws, being in compliance with VA Circulars, and by prohibiting any employees to touch, manipulate, or handle asbestos in any way. He testified that no area has been cleared for occupation by employees that exceeded the clearance level established by VA of .005 f/cc. (Tr. 126-33; Res. Ex. 1).

General Counsel and the Union presented Respondent's air sample reports revealing asbestos in the ambient air after November 13, 1989. (G.C. Ex. 42 and 60(a), (b), and (c)). The Union contended before the Arbitrator on March 11, 1992 that "[w]here, as here, the VA's air sampling results continue to yield samples of .005 f/cc and above, the VA's own final clean-up levels have not been met. In these circumstances, the VA cannot be deemed to have abated asbestos within the meaning of Appendix J." (G.C. Ex. 42 at 21).

Positions of the Parties

The General Counsel claims that Respondent has violated section 7122 and thereby section 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitrator's awards of August 17, 1990 and June 23, 1992.

The General Counsel asserts that Respondent was obligated by the August 17, 1990 award to pay EDP from July 26, 1978 until, at a minimum, August 17, 1990. The General Counsel maintains that Respondent's claim of abatement retroactive to November 13, 1989 is a weak, post-hoc ploy to evade further EDP liability as Respondent never presented that abatement date to either the Arbitrator or the Authority. Moreover, the General Counsel asserts that there is no evidence that exposure to asbestos ceased in accordance with the standard set by the Arbitrator and upheld by the Authority, and Respondent cannot use this proceeding to

refute that standard.

The General Counsel also claims that Respondent violated the Statute by failing to supply the Union with certain information within 45 days as ordered by the Arbitrator. The General Counsel contends that Respondent's argument about the difficulty of complying should have been raised in exceptions to the awards. Counsel claims that there is no evidence of a good faith effort to comply as Respondent did not agree to provide the documentation until November 18, 1992.

With respect to the June 23, 1992 award, the General Counsel argues that as Respondent took no exceptions, the award became final and binding and Respondent cannot now defend its failure to comply by asserting that the Arbitrator had no jurisdiction, was biased, or made erroneous findings.

In also urging that violations be found, the Charging Party contends that the Respondent conceded to the Arbitrator asbestos exposure as of June 29, 1990 and, therefore, could not subsequently pick November 13, 1989 as an abatement date. The Charging Party asserts that, even more significantly, the Arbitrator found continuing EDP entitlement until asbestos is abated in his August 17, 1990 award, and Respondent's failure to take exceptions from those findings and the subsequent Authority decision of April 11, 1991, affirming the supple-mental award, binds Respondent as a matter of law. The Charging Party argues that Respondent is bound to pay EDP at least through April 11, 1991, the date on which the August 17, 1990 award became final, and may not collaterally attack that date in this proceeding.

The Charging Party contends that Respondent's failure to comply with the June 23, 1992 supplemental award, which became final in the absence of exceptions, also constitutes an unfair labor practice. The Charging Party asserts that the Arbitrator appropriately retained jurisdiction, the Authority affirmed his retention of continuing jurisdiction, and Respondent may not relitigate that issue. In any event, the Charging Party argues that the Arbitrator's decision to convene implementation hearings in 1992 concerning the issue of abatement, particularly where that hearing was sought by one of the parties, was well within his retained jurisdiction since he had ordered EDP payment until asbestos was abated.

Respondent defends on the basis that hazards due to exposure to airborne asbestos were abated effective November 13, 1989 and, therefore, it complied with the award upheld by the Authority on April 11, 1991. Respondent contends the only substantive hearings on asbestos exposure in the arbitration case occurred in 1987, and the Arbitrator's award reflected findings prior to November 13, 1989 not subsequent thereto. Therefore, it could determine that asbestos was abated in 1989 and was not required to pay EDP until April 11, 1991, the date the Authority ruled on the Agency's exceptions. Respondent asserts that if the Union believed exposure occurred at some point after that date, a new grievance was necessary.

Respondent maintains that it made good faith efforts to calculate, process, and pay EDP to all persons so entitled and, therefore, it did not fail to comply with the Arbitrator's award because such efforts required more than the 45 days specified in the award.

Respondent claims that the Arbitrator had no jurisdiction to issue his June 23, 1992 award concerning implementation because the Union had made a statutory election under section 7116(d) by filing unfair labor practice charges on October 10, 1991 and January 14, 1992 concerning lack of implementation of the earlier

award. Respondent also claims that the Arbitrator was functus officio with regard to all hearings scheduled or threatened during 1991 and 1992.

Discussion and Conclusions

As the Court stated in Department of Health and Human Services v. FLRA, 976 F.2d 1409, 1413, 141 LRRM 2502, 2505 (D.C. Cir., 1992) (HHS):

> With respect to an arbitration reviewable directly by the FLRA under § 7122(a), § 7122(b) prevents any party from challenging the award in a later unfair labor practice proceeding. *See Department of Health & Human Services, Health Care Financing Administration v. American Federation of Government Employees, Local 1923*, 35 F.L.R.A. 491, 494-95 (1990); *see also United States Department of Justice v. FLRA*, 792 F.2d 25, 28-29 [122 LRRM 2499] (2d Cir. 1986) (federal courts do not have jurisdiction to review an underlying arbitration award in an appeal of an unfair labor practice decision). In such cases, opportunity knocks but once. Failure to comply with an award after it is affirmed on appeal to the FLRA or after time for appeal has run out violates § 7122(b), which mandates compliance with an award, and thus constitutes an unfair labor practice. *See United States Army, Adjutant General Publications Center v. American Federation of Government Employees, Local 2761*, 22 F.L.R.A. 200, 201-03 (1986). . . .

Once an arbitration award becomes final and binding, the Authority only reviews matters of compliance with the award in an unfair labor practice proceeding. Department of Veterans Affairs, Dwight D. Eisenhower Medical Center, Leavenworth, Kansas, 44 FLRA 1362, 1369 (1992). The adequacy of compliance is determined by whether the respondent's construction of the award is reasonable, which depends on whether the construction is consistent with the entire award and with applicable rules and regulations. Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, 46 FLRA 862, 868 (1992); Department of the Treasury, Internal Revenue Service and Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, 25 FLRA 71 (1987). If there is a delay in complying, the Authority looks to whether the respondent acted

promptly in light of all the facts and circumstances. U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida, 37 FLRA 603, 611 (1990) (Customs Service, Miami).

Compliance With The August 17, 1990 Award As Upheld By The Authority On April 11, 1991.

As noted, in June 1990 Respondent presented to the Arbitrator the issue of the duration of payment of EDP under the original arbitration award. It then represented that, as to 65 employees, "until . . . abatement . . . the VAMC will continue to pay EDP to grievants in accordance with the FPM Supplement." (G.C. Ex. 5(a) at 2, 9). Respondent did not assert that, as to the 65 employees or others, abatement had already taken place on November 13, 1989.

The Arbitrator's award of August 17, 1990 stated, "EDP is to be paid to all wage grade employees represented by Local 933 since July 26, 1978" (G.C. Ex. 6 at 12-13) and that "EDP continues to acccrue [sic] to all local 933 represented employees until asbestos is abated." (Id., at 11). Respondent's exceptions to the Authority did not contest the Arbitrator's finding concerning the duration of the award, or assert that abatement had already occurred.

Under these circumstances, Respondent's construction of the award as enabling it to choose November 13, 1989 as the date when exposure to potential illness from asbestos had been abated was not reasonable.

In order for Respondent to have complied with the Arbitrator's award that, in relevant respects, became final and binding on April 11, 1991, in VAMC Allen Park III, Respondent would have had to pay EDP to all wage grade employees represented by AFGE Local 933 from July 26, 1978 until at least August 17, 1990, the date of the Arbitrator's award. By paying EDP only to November 13, 1989 Respondent has failed to fully comply with the Arbitrator's final award of August 17, 1990 contrary to section 7122(b) of the Statute, and thereby did engage in unfair labor practices within the meaning of section 7116(a)(1) and (8) of the Statute.

I conclude that Respondent did not violate the Statute by not complying with paragraph 5 of the Arbitrator's award. This provision, among other things, required Respondent to identify, within 45 days, all unit employees who have worked for Respondent since July 26, 1978. The record reflects that the identification of such employees could not be completed within 45 days. It was a lengthy process involving, among other things, the placing of newspaper notices and the review of personnel

files. Respondent acted promptly in this respect in light of all the facts and circumstances. Cf. Customs Service, Miami, supra, 37 FLRA 603, 611 (1990).

As noted, Arbitrator Ellmann's August 17, 1990 award specifically found "that EDP continues to accrue to all Local 933-represented employees until asbestos is abated." He also continued to retain jurisdiction. As the Authority stated in VAMC Allen Park III, "The retention of jurisdiction by arbitrators for the purpose of clarification and interpretation of an award and the overseeing of the implementation of remedies is not unusual and has been approved by the Authority." 40 FLRA at 170.

When the parties could not agree on when or whether exposure to potential illness from asbestos had been abated for purposes of determining how long EDP payments should continue under FPM Supplement 532-1, Appendix J, the dispute was properly one to be decided by the Arbitrator in accordance with his retention of jurisdiction. The Union was not required to channel that dispute through a new re-exhaustion of the entire grievance/arbitration process. Cf. Local 2222, 2320-2327 v. New England, Etc., 628 F.2d 644 (1st Cir., 1980). Nor, in view of the retention of jurisdiction by the Arbitrator, is this the appropriate forum for resolving that dispute. Cf. Department of the Navy, Navy Public Works Center, Norfolk, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, 92 FSIP 72 (December 15, 1992).

Compliance With The June 23, 1992 Arbitration Award, As To Which No Exceptions Were Filed.

The June 23, 1992 arbitration award found "no abatement of asbestos at the VA facility to this date, and specifically during the period from April 12, 1991 to the present" and that "payment of EDP shall continue unabated." Respondent did not file exceptions to that award and has made no payments of EDP pursuant to the award.

Section 7122(b) of the Statute states:

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the

actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

As discussed above, the Authority has consistently held that a party cannot collaterally attack an arbitration award during the processing of an unfair labor practice brought to enforce the award. United States Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio, 15 FLRA 151, 153-54 (1984) (Wright-Patterson), affirmed sub nom., Depart-ment of the Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985); HHS, supra.

Respondent's contention that the Arbitrator had no jurisdiction under section 7116(d) of the Statute because of the earlier unfair labor practice charges should have been raised as exceptions to the award.[(4)] See International Association of Machinists and Aerospace Workers, Local 39 and U.S. Department of the Navy, Naval Aviation Depot, Norfolk, Virginia, 44 FLRA 1291 (1992) (Authority held on review of exceptions to award that arbitrator properly refused juris-diction over a grievance in accordance with section 7116(d) of the Statute because grievance was precluded by an earlier-filed unfair labor practice charge). Its argument that the Arbitrator was functus officio and had no authority to continue his jurisdiction based on his retention of juris-diction likewise could have been heard on exceptions to the award. See VAMC Allen Park III, supra, and U.S. Department of Veterans Administration Medical Center, Leavenworth, Kansas and American Federation of Government Employees, Local 85, 38 FLRA 232, 238-39 (1990). The Authority, in reviewing such exceptions, has applied the principle to find arbitration awards deficient in some circumstances. For example, General Services Administration and American Federation of Government Employees, Local 2600, 34 FLRA 1123 (1990) (arbitrator had no authority to reopen his award to determine the dispute over allocation of costs of the arbitration proceeding when he did not retain jurisdiction and both parties stipulated and agreed that they intended to place the issue before another arbi-trator); Overseas Federation of Teachers, AFT, AFL-CIO and Department of Defense Dependents Schools, Mediterranean Region, 32 FLRA 410 (1988) (arbitrator exceeded his authority by reopening and reconsidering his original award, which had become final and binding when he did not retain jurisdiction over the matter and when there was no joint request by the parties). The power of an arbitrator to proceed ex parte can be raised in exceptions to the award. U.S. Department of the Air Force, Griffiss Air Force Base and American Federation of Government Employees, Local 2612, 38 FLRA 276 (1990).

Claims that an award is deficient because an arbitrator is biased and failed to conduct a fair hearing can also be raised in exceptions to the award. U.S. Department of the Navy, Philadelphia Naval Shipyard and

Philadelphia Metal Trades Council, 41 FLRA 535, 540 (1991); U.S. Department of the Air Force, Oklahoma City Air Logistics Center, Tinker AFB and American Federation of Government Employees, Local 916, 35 FLRA 700, 704 (1990).

These issues are not litigable in this unfair labor practice proceeding, but are matters that go to the substance of the award that could have been raised within the appeals procedure established by Congress. U.S. Customs Service, Washington, D.C., 39 FLRA 749, 758-59 (1991).

By failing to comply with Arbitrator Ellmann's award of June 23, 1992, Respondent has acted contrary to section 7122(b) of the Statute and has thereby violated section 7116(a)(1) and (8) of the Statute, as alleged.

The August 17, 1990 award required the payment of EDP from July 26, 1978 to, at least, August 17, 1990. The June 23, 1992 award required the payment of EDP from April 12, 1991 until such time as exposure to potential illness from asbestos has been abated in accordance with the awards. Whether EDP is payable during the period from August 17, 1990 to April 12, 1991 is a matter for the parties to resolve or, in case of dispute, the arbitrator pursuant to his retained jurisdiction.

The Charging Party's request for an opportunity to address the matter of attorney fees for this proceeding should be initially addressed to the Authority pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(1), and 5 C.F.R. § 550.807 in the event the Authority corrects or directs the correction of an unjustified or unwarranted personnel action. See U.S. Customs Service, 46 FLRA 1080 (1992).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Veterans Affairs, Medical Center, Allen Park, Michigan, shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with the August 17, 1990 and June 23, 1992 final and binding arbitration awards of Arbitrator William M. Ellmann.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Fully comply with the August 17, 1990 and June 23, 1992 arbitration awards, including (1) paying environmental differential pay with interest to affected employees in accordance with the awards and with law and regulation from November 14, 1989 until August 17, 1990 and from April 12, 1991 until such time as exposure to potential illness from asbestos has been abated in accordance with the awards, and (2) paying attorney fees of $9,450. in accordance with the June 23, 1992 award.

(b) Post at its facilities 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, and shall be posted and maintained for 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Chicago Region, 55 West Monroe, Suite 1150, Chicago, IL 60603, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 22, 1993

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to fully comply with the August 17, 1990 and June 23, 1992 final and binding arbi-ration awards of Arbitrator William M. Ellmann.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fully comply with the August 17, 1990 and June 23, 1992 arbitration awards, including (1) paying environmental differential pay with interest to affected employees in accordance with the awards and with law and regulation from November 14, 1989 until August 17, 1990 and from April 12, 1991 until such time as exposure to potential illness from asbestos has been abated in accordance with the awards, and (2) paying attorney fees of $9,450. in accordance with the June 23, 1992 award.

_____

(Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 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 of the Federal Labor Relations Authority, Chicago Region, 55 West Monroe, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312) 353-6306.

1. Allegations that Respondent failed to provide certain information in violation of section 7116(a)(1), (5) and (8) were deleted in view of the parties' resolution of that matter prior to the hearing. (Tr. 11-12).

2. The General Counsel's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein. The General Counsel's and the Charging Party's motions to strike Attachments A through N attached to the Respondent's brief are granted in part. Attachment E is received as it is referred to in General Counsel's Exhibit 36. The other attachments are not received. They were not offered at the hearing (see Tr. 5, 66-68), and their possible probative value is substantially outweighed by the undue delay which would be caused by reopening the record for this purpose and to allow the Charging Party an opportunity to respond as requested. See Department of Housing and Urban Development, Region X, Seattle, Washington, 41 FLRA 363 (1991). The requests to strike other portions of Respondent's brief are denied; however, the decision is based only upon facts supported by evidence in the record. See Tr. 5.

3. Respondent's counsel argued that the Agency has paid EDP approximating $12 million and has spent $225,961 in order to process the payments. He claimed that from November 13, 1989 to the date of the hearing another $2.4 million is at stake with an ongoing award of $800,000 yearly. (Tr. 18).

4. If it were deemed necessary to resolve this Statutory issue, I would conclude that section 7116(d) of the Statute did not deprive the Arbitrator of jurisdiction. The unfair labor practice charges filed on October 10, 1991 and January 14, 1992 concerned the issue of Respondent's failure to comply with the August 27, 1990 award, principally by refusing to pay EDP subsequent to November 13, 1989. The June 23, 1992 award involved a matter before the Arbitrator pursuant to his continuing retention of jurisdiction over the grievance filed in 1986. The issues were whether the airborne asbestos hazard has been abated and, if not, the matter of determining damages, that is, the continuing obligation to pay EDP. The issues raised in the ULP are not the same as alleged in the grievance/arbitration procedure and the initial grievance was filed earlier.