MEMORANDUM DATE: November 3, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, WASHINGTON, DC

Respondent

and Case No. DA-CA-50198

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3637

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3637 Charging Party	Case No. DA-CA-50198

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the the undersigned Administrative Law Judge pursuant to the Statute and the Final Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date, and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision, is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 4, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: November 3, 1995
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3637 Charging Party	Case No. DA-CA-50198

James M. Sober, Esquire
For the Respondent

Charlotte A. Dye, Esquire
For the General Counsel

Sidney M. Bach, Esquire
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Acting Regional Director, Dallas Region, issued a complaint alleging that the Respondent (EEOC) violated sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to comply with an arbitrator's award. EEOC's answer admits the jurisdictional and other preliminary allegations of the complaint and admits that EEOC has refused to comply with the award. However, EEOC denies that it had any legal obligation to comply, asserting that the individual who rendered the award was not an arbitrator with legitimate authority to arbitrate any matter between EEOC and the Charging Party (the Union).

EEOC requested a subpoena, and a series of motions followed, including a motion by EEOC for a pre-hearing telephone conference with the administrative law judge assigned to hear the case. Such a conference was held. It resulted in the parties' agreement to an order postponing the scheduled hearing indefinitely and, instead, setting a schedule for the filing of motions for summary judgment by Counsel for the General Counsel and by the Union and for EEOC's filing of its opposition to the motions. The parties have filed their respective documents pursuant to that schedule.

Timeliness of the Unfair Labor Practice Charge

Under section 7118(a)(4) of the Statute, an unfair labor practice charge must normally be filed within six months of the occurrence of the alleged unfair labor practice. The disputed arbitration award in this case was issued by Arbitrator Joseph Lazar on January 24, 1994. Prior to the award, EEOC had informed the Union that it would not recognize any decision by Arbitrator Lazar regarding Schreiner King, the grievant. Further, on or about February 23, 1994, EEOC reaffirmed in a telephone conversation that it would not honor the award. On March 4, 1994, EEOC submitted to Arbitrator Lazar a motion for clarification and a motion to reopen the hearing. The Arbitrator denied both motions on April 13, 1994. On April 19, 1994, the Union sent EEOC a request to comply with the underlying award.

On May 3, 1994, the National Council for EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO, and grievant King filed a complaint in the United States District Court for the Eastern District of Louisiana to enforce the arbitration award.[1] On December 7, 1994, the court entered a judgment in EEOC's favor, dismissing the complaint for lack of subject matter jurisdiction. On December 30, 1994, the Union filed the unfair labor practice charge in this case.

In *Department of the Navy and Department of the Navy, Portsmouth Naval Shipyard (Portsmouth, New Hampshire)*, 21 FLRA 195 (1986), vacated on other grounds, 28 FLRA 209 (1987), the Authority adopted the findings and conclusions

[1] The National Council for EEOC Locals No. 216 is the exclusive representative of a unit of employees appropriate for collective bargaining. The Union is an agent of the National Council for purposes of representing unit employees at EEOC's New Orleans, Louisiana facility, where grievant King was employed.

of Administra-tive Law Judge Eli Nash, Jr. Judge Nash had rejected the agency's contention that the section 7118(a)(4) limitation barred an allegation adding a new responsible party for an alleged failure to comply with an arbitration award. Judge Nash reasoned in part that a failure to comply with an award is a "continuing violation." *Id.* at 204 n.1.

Not long after its *Portsmouth* decision, the Authority had before it another case involving an alleged failure to comply with an arbitrator's award. The charge had been filed more than six months after the Authority dismissed the agency's exceptions to the award (such dismissal making the award final and binding[2]). During the period before the union filed the charge on which a complaint was ultimately issued, it had filed a series of charges alleging that the agency had failed to fully comply with the award. The union had filed its second charge upon withdrawing its first. The Authority's Regional Director, affirmed by its General Counsel, dismissed the union's second charge as premature because the agency's exceptions to the award were still pending. The union filed a third charge, but withdrew it shortly before filing its fourth and final charge. During this extended period the union also continued to communicate with the agency in connection with their dispute. The Authority held that the union's diligence in attempting to secure compliance with the award warranted suspension, on equitable grounds, of the 6-month filing period prescribed by section 7118(a)(4). *Department of the Air Force, Headquarters 832D Combat Support Group, DPCE, Luke Air Force Base, Arizona*, 24 FLRA 1021 (1986) (*Luke AFB*).

The "continuing violation" theory was available to the Authority in *Luke AFB*, and the administrative law judge in that case had relied in part on that theory. However, the Authority decided to base its "timeliness determination . . . on somewhat different reasons[.]" (*Id.* at 1024), those relating to the principle of equitable *suspension* of the filing period. One might argue that the Authority's failure to find a "continuing violation" in *Luke AFB* signifies an intention to abandon that theory in arbitration award cases. *See also Dept. of the Air Force v. FLRA*, 775 F.2d 727, 732-33 (6th Cir. 1985). However, absent an express or more clearly implied abandonment, I consider myself bound by the continuing precedential force of the Authority's action in *Portsmouth*. I therefore find that the allegation here that EEOC failed to comply with the award, alleges a continuing violation that is not time-barred.

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[2] *See Department of the Treasury, United States Customs Service, New York Region, New York, New York*, 21 FLRA 999, 1002 (1986).

Irrespective of the viability of the "continuing violation" theory, I also find that the principle of equitable suspension of the filing period is applicable here. Thus, like the union in *Luke AFB*, the Union (through its parent affiliate) sought persistently but unsuccessfully to obtain the desired relief before filing the charge on which the complaint is based. While here the Union chose the wrong forum, its efforts were as well calculated to keep the agency aware of its pursuit of compliance with the award as were the efforts of the union in *Luke AFB*. Therefore, the filing period was tolled by the May 3, 1994, filing of the Federal court action and remained suspended until that action was dismissed on December 7, 1994. The Union's December 30, 1994, charge was timely, then, whether the 6-month period is deemed to have begun on February 23 (30 days after the award was issued in the absence of a petition for judicial review) or on May 13, 1995 (30 days after Arbitrator Lazar denied EEOC's motions for clarification and for reopening.)[3]

Existence of Genuine Issues of Material Fact

In opposition to the motions for summary judgment, EEOC asserts that Mr. Lazar, whom EEOC refers to as the "putative arbitrator," did not have jurisdiction to function as the Arbitrator of the grievance in which he rendered the disputed award. The bases of this assertion are that Lazar had been disqualified as Arbitrator and that he was selected unilaterally by the Union and thus was not appointed under any provision of the parties' collective bargaining agreement. EEOC also argues that, in the circumstances of this case, the Authority may consider the merits of the award and that, on such examination, the Authority should deny enforcement of the award because of the Arbitrator's bias in conducting the hearing and because the award has no factual basis.

For the purpose of deciding whether the procedural technique of summary judgment is appropriate here, I accept

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[3] It is also at least arguable that the 6-month period began to run on February 23, was tolled during the pendency of EEOC's motions to the Arbitrator, began to run again when the Arbitrator ruled on April 13, and was tolled again on May 3.

all of EEOC's factual assertions.[4] I must decide whether, in asserting these facts in opposition to the motions for summary judgment, EEOC has demonstrated the existence of any genuine issues of material fact. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995).

The fundamental issue that EEOC seeks to raise in opposition, that it seeks to litigate in this proceeding, and that underlies all of its other arguments, is the asserted lack of jurisdiction of the Arbitrator. Recognizing that the Authority, with court approval, has concluded that claims of *contractual* impediments to an arbitrator's jurisdiction cannot be raised collaterally in an unfair labor practice proceeding, *Dept. of Health and Human Services v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992)(*DHHS v. FLRA*), EEOC seeks to present its jurisdictional argument as one that asserts a *statutory* rather than a *contractual* impediment to Lazar's jurisdiction.

EEOC contends that such a distinction is applicable here because it challenges "the arbitrator's very jurisdiction," a phrase used by the District of Columbia Circuit to character-ize the Authority decision it affirmed in *AFGE v. FLRA*, 850 F.2d 782 at 785 (1986). In that case, an arbitrator had ordered the Veterans Administration to reinstate a "title 38 employee." Section 4110 of U.S.C. Title 38 provides exclusive procedures available to "title 38 employees" for handling disputes regarding discipline for their alleged professional misconduct. Those procedures do not include arbitration. Section 4119 of Title 38 U.S. makes the provisions of 38 U.S.C. § 4110 applicable to matters concerning "title 38 employees" in the event that § 4110 conflicts with any provision of title 5 (of which the Statute is part). The Authority therefore held that 38 U.S.C. § 4110 took precedence over section 7121 of the Statute, and that the arbitration award could not be enforced. *Veterans Administration Central Office, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota*, 27 FLRA 835, 840 (1987) (*VA Central Office*).

Notwithstanding the District of Columbia Circuit's broad characterization, in *AFGE v. FLRA*, of the Authority's decision in *VA Central Office*, the Authority itself has

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[4] Not all of these assertions, some of which are mixed assertions of fact and inference, are documented by affidavit or otherwise. However, I find it unnecessary to decide here whether any of the assertions of fact should be excluded from my consideration.

construed its holding in that case much more narrowly. Thus, in *Department of Health and Human Services, Social Security Administration*, 41 FLRA 755 (1991) (*DHHS*), the Authority stated that *VA Central Office* "is limited to cases involving the lack of jurisdiction by an arbitrator because of exclusions by law from the permissible coverage of a grievance procedure negotiated under the Statute." *Id.* at 768. Further, the Authority did "not view the court's decision [in *AFGE v. FLRA*, affirming *VA Central Office*] as authorizing collateral attack and indirect review of an award in an unfair labor practice proceeding more extensively than that expressly permitted by the Authority." *Id.* at 770. Consequently, the Authority refused to permit the agency to attack an award collaterally on the ground that the arbitrator lacked jurisdiction because of an asserted failure to receive authority from the parties. The Authority also rejected the suggestion that its use of the phrase, "validly obtained arbitration awards," in *VA Central Office*, indicated an intention to permit collateral attacks based on lack of arbitral jurisdiction in any but *VA Central Office* situations. *DHHS* at 769-770.

The District of Columbia Circuit affirmed the Authority's *DHHS* decision, concluding in relevant part that the Authority properly distinguished a challenge to an arbitrator's jurisdiction predicated on "arbitrability"--the claim that the arbitrator has exceeded his authority under an agreement--from a *VA Central Office*-type challenge "based on another federal statute." *DHHS v. FLRA* at 1414.

With this court-approved distinction in mind, EEOC's attempt to characterize its jurisdictional attack as one falling within *VA Central Office* rather than *DHHS* cannot prevail. EEOC contends that Lazar was not an "arbitrator" as contemplated by the Statute, and seeks to place the burden on the General Counsel to prove that he was. However, the Statute does not define "arbitrator." In the absence of a statutory definition, an arbitrator, as commonly understood in Federal sector labor relations terms, is anyone selected pursuant to a negotiated grievance procedure.

Mr. Lazar was selected to serve as one of three permanent "National Arbitrators" the parties' negotiated grievance procedure provide for. EEOC has consistently argued that Lazar's selection and his subsequent assertion of jurisdiction were improper because EEOC did not participate in the striking of names from the list the Federal Mediation and Conciliation Service provided (pursuant to the negotiated grievance procedure) to

determine the three "National Arbitrators.[5] Although EEOC appears to take the position that Lazar's selection was not "pursuant to" the negotiated grievance procedure, it does not deny that the negotiated grievance procedure governs the process of selecting the arbitrator for the Schreiner King grievance. EEOC's challenge really goes to the question of whether the selection process used here conformed to the provisions of the negotiated procedure. Thus, EEOC argued in another case, *Equal Employment Opportunity Commission and American Federation of Government Employees, National Council of EEOC Locals No. 216*, 48 FLRA 822 (1993) that Lazar's assertion of jurisdiction as a permanent national arbitrator failed to draw its essence from the parties' collective bargaining agreement.

Despite the form in which EEOC now presents its jurisdictional challenge, the challenge still goes to the *contractual* validity of the selection, for the focus of the attack remains the validity of Lazar's selection in relation to the contract's selection procedure. The new clothes in which this challenge is attired are either transparent or nonexistent.

EEOC also contends that Lazar's *statutory* authority to hear and decide the grievance ceased when EEOC sent him a notice of disqualification under the negotiated grievance procedure, which notice, EEOC contends, Lazar improperly failed to adjudicate. Like the underlying jurisdictional challenge, however, the challenge based on EEOC's notice of disqualification rests on *contractual*, not *statutory* grounds, and may not form the basis for collateral attack in an unfair labor practice proceeding. *Cf. U.S. Department of Veterans Affairs, Medical Center, Allen Park, Michigan*, 49 FLRA 405, 427 (1994) (*DVA Med. Ctr.*) (no collateral attack permitted on the basis that the arbitrator had improperly retained jurisdiction).

Having failed to make a persuasive case that it has raised a justiciable *statutory* issue with respect to the Arbitrator's jurisdiction, EEOC's further arguments concerning the Arbitrator's alleged bias and the award's lack of factual basis also fail to raise issues of material fact. The fact that EEOC challenges the Arbitrator's jurisdiction does not warrant the Authority's review of the merits of the award. Were EEOC to have successfully

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[5] The background of the dispute over this selection procedure is set forth more fully in *American Federation of Government Employees, National Council of EEOC Locals No. 216 and Equal Employment Opportunity Commission*, 47 FLRA 525, 526-28 (1993).

challenged the Arbitrator's jurisdiction, the appropriate result presumably would have been to vacate the award, not to review its merits. It makes no more sense to review the merits of the award, including a claim of bias, where, as here, the attempted challenge has failed. *See DVA Med. Ctr.* at 427.

It appears, therefore, that there are no genuine issues of material fact and that the General Counsel and the Charging Party are entitled to summary judgment. Accordingly, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

The Union, a labor organization, is an agent of the exclusive representative of employees of EEOC, an agency, in a unit of employees appropriate for collective bargaining. The Union and EEOC are parties to a collective bargaining agree-ment covering employees in the bargaining unit.

On January 24, 1994, Joseph Lazar, the individual selected as the Arbitrator of a grievance filed under the negotiated grievance procedure of the parties' collective bargaining agreement, issued a decision and award in that grievance, finding that EEOC violated the collective bargaining agreement by its "removal" (termination) of bargaining unit employee Schreiner King. In his award, Arbitrator Lazar directed that King be returned to his position with back pay for the entire period since his wrongful termination, after deducting outside earnings, without loss of seniority or accrued benefits. The award directs EEOC to implement the award within 30 days.

No action was taken under section 7121(f) of the Statute to obtain judicial review of the award. On April 13, 1994, Arbitrator Lazar denied EEOC's motions for clarification and to reopen the record. On April 19, 1994, the Union requested EEOC to comply with the award. EEOC has failed to perform the acts ordered by the award.

Discussion and Conclusions

An agency's failure to comply with a final and binding arbitrator's award prevents an employee from exercising the protected activity of filing and processing grievances under a collective bargaining agreement. Such failure therefore constitutes an unlawful interference with the employee's right to exercise that protected activity, in violation of section 7116(a)(1) of the Statute. *United States Army, Adjutant General Publications Center, St. Louis, Missouri,*

22 FLRA 200, 207-08 (1986). Failure to comply with such an award also violates section 7116(a)(8) of the Statute. *DHHS* at 765, 774.

The award in question here became final and binding on February 23, 1994, 30 days after the unreviewed award was issued. *See* 5 U.S.C. §§ 7121(f) and 7703. EEOC admits its failure to comply with the award, disputing only the legitimacy of the award and its legal obligation to comply with it. EEOC's defenses have no merit. *See DHHS* and discussion of "Existence of Genuine Issues of Material Fact," above. I therefore conclude that EEOC violated sections 7116(a)(1) and (8) of the Statute and recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Equal Employment Opportunity Commission, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to implement the January 24, 1994, award of Arbitrator Joseph Lazar.

(b) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

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

(a) Comply fully with the January 24, 1994, award of Arbitrator Lazar ordering that Schreiner King be reinstated with back pay

(b) Post at its facilities where bargaining unit employees represented by National Council of EEO Locals No. 216, American Federation of Government Employees, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of its Employee and Labor Relations Division, Human Resources Management Services, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and 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) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 3, 1995

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JESSE ETELSON
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 STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to implement the January 24, 1994, award of Arbitrator Joseph Lazar.

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

WE WILL comply fully with the January 24, 1994, award of Arbitrator Lazar ordering that Schreiner King be reinstated with back pay.

(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, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is (214) 767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. DA-CA-50198, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

James M. Sober, Esquire
Equal Employment Opportunity Commission
1801 L Street, NW
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Charlotte A. Dye, Esquire
Federal Labor Relations Authority
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REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
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Dated: November 3, 1995
Washington, DC