

**64 FLRA No. 153**

UNITED STATES  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
NORTHWEST MOUNTAIN REGION  
RENTON, WASHINGTON  
(Agency)

and

NATIONAL AIR TRAFFIC CONTROLLERS  
ASSOCIATION  
(Union)

0-AR-4247

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DECISION

May 28, 2010

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Before the Authority: Carol Waller Pope, Chairman,  
and Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This matter is before the Authority on exceptions to an Award of Arbitrator James Evenson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the exceptions.

The grievance alleged that the Agency violated the parties' collective bargaining agreement (CBA) by restricting a Union representative from serving on an Agency evaluation team. In the Initial Award, the Arbitrator sustained the grievance and retained jurisdiction solely limited to remedy. However, in the Subsequent Award at issue here, the Arbitrator reexamined the evidence previously weighed in the Initial Award and denied the grievance.

For the reasons discussed below, we set aside the Subsequent Award and remand this case to the parties for resubmission to the Arbitrator, absent settlement, for a determination of the appropriate remedy.

**II. Background and Arbitrator's Awards**

The Union filed a grievance alleging that the Agency violated Article 51, § 1<sup>1</sup> of the CBA by conducting a full-facility or follow-up evaluation of the Agency's facility without allowing a Union representative to serve on the evaluation team. The Agency conducts three types of evaluations: full-facility evaluations, which assess the facility's overall performance based on a fixed checklist of items; follow-up evaluations, which assess remedial action taken to correct problems detected at a previous full-facility evaluation; and special evaluations, which assess specific areas of the facility at the request of Agency Headquarters. Initial Award at 3-4.

Here, Agency Headquarters notified the facility at issue that a special evaluation would be conducted in about a week. *Id.* at 5. The facility's Union representative assigned a Union designee to serve on the evaluation team. *Id.* Management then notified the Union that no Union representative could serve on the evaluation team because Article 51, § 1 of the CBA does not allow for Union participation during a special evaluation. *Id.* According to testimony by the Union, management stated that this evaluation was an "operational assessment of the tower and that it was covered under different rules." *Id.* at 6-7. However, Union testimony also indicated that the post-evaluation report appeared to describe a follow-up evaluation because it focused on problem areas addressed in a previous full-facility evaluation report. *Id.* at 6.

The grievance was not resolved and was submitted to arbitration. At the hearing, the following issue was before the Arbitrator:

Whether the Agency violated Article 51 of the [CBA] when it conducted an evaluation of the Salt Lake City Air Traffic Control Tower...? If not, what is the proper remedy?

*Id.* at 2.

**A. Initial Award**

The Arbitrator sustained the Union's grievance in his Initial Award. *Id.* at 20. He concluded that the

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1. The relevant portion of Article 51, § 1 states that "when a full facility or follow-up check evaluation is conducted at an air traffic facility, the Union at the local level may designate one (1) member to serve on the evaluation team." Initial Award at 2.

Agency violated Article 51, § 1 of the CBA by refusing to allow a Union representative to serve on the evaluation team during a full-facility or follow-up evaluation. *Id.* In so reasoning, the Arbitrator determined that, under the CBA, the Union has the right to designate a representative to serve on the evaluation team of a full-facility or follow-up evaluation, but not of a special evaluation. *Id.* at 8.

Based on the record evidence, the Arbitrator concluded that the evaluation at issue was a full-facility or follow-up evaluation, and not a special evaluation. *Id.* at 18. As a basis for his determination, the Arbitrator found that the checklist used for the evaluation was the same used for a full-facility or follow-up evaluation, except that the evaluators did not assess all of the items on the list. *Id.* The Arbitrator also noted that the Agency allows Union representatives to serve on the evaluation team in about half of the evaluations performed, but cannot articulate a reasonable rationale for when a Union representative may do so. *Id.* at 17-18. The Arbitrator further determined that the Agency characterizes any interaction between the employees and the evaluators as “questioning” because, unlike “interviewing,” it does not require Union representation on the evaluation team. *Id.* Therefore, the Arbitrator found that the Agency:

[G]utted Article 51 by calling everything a [s]pecial [e]valuation and then deciding they may or may not allow a [U]nion [representative] to participate on the evaluation team. The Agency has the right to eliminate the [f]ull and [f]ollow-up [e]valuations but they can't do it by just calling it something else. If the Agency doesn't want to give notice or minimal notice of these evaluations that is their business but you can't trample on the rights of the Union like they are in this case.

*Id.* at 19.

Based on his conclusion that the Agency violated the CBA by refusing to allow a Union representative to serve on the evaluation team, the Arbitrator sustained the Union's grievance and issued a Cease and Desist Order. *Id.* at 19-20. With regard to remedy, the Arbitrator stated that he would:

[R]etain jurisdiction regarding the remedy for this case for 90 days to give the Agency and Union representatives a chance to work out an appropriate remedy for this case or others like it involving what the Agency is

now calling a [s]pecial [e]valuation. If a remedy can't be agreed on, then either party may contact this Arbitrator to arrange for a telephonic or personal hearing regarding a remedy for this case.

*Id.* at 20.

The Authority dismissed the Agency's exceptions to the Initial Award as interlocutory because the Award did not appear to contain a complete resolution of the remedy issue.

#### B. Subsequent Award

In the Subsequent Award, the Arbitrator reversed his initial determination and denied the Union's grievance. Subsequent Award at 4.

After failing to reach agreement with the Union regarding the appropriate remedy, the Agency contacted the Arbitrator within the 90-day period set out in the Initial Award, and requested a final decision regarding the remedy. Exceptions, Attaches. 2 & 4. The Arbitrator reexamined the evidence he had relied on in rendering his Initial Award and found that the Union had not met its burden of proving that the evaluation at issue was a full-facility or follow-up evaluation, rather than a special evaluation. This led the Arbitrator to reverse the Initial Award's findings and conclude that the Union failed to prove that the Agency had violated the CBA. *Id.* at 4.

### III. Positions of the Parties

#### A. Union's Exceptions

The Union contends that the Arbitrator's Subsequent Award is deficient on the grounds that he (1) violated the doctrine of *functus officio*; (2) exceeded his authority; and (3) relied on a nonfact. Exceptions at 5.

The Union alleges that the Arbitrator violated the doctrine of *functus officio* in the Subsequent Award when he reexamined and reversed his findings on the merits from the Initial Award. *Id.* at 5. Citing *United States Department of Defense Dependents Schools*, 49 FLRA 120, 122-124 (1994) (*Dependents Schools*), the Union argues that the doctrine of *functus officio* bars an arbitrator from reexamining and reversing a final decision on the merits. Specifically, the Union contends that, in the Initial Award, the Arbitrator made a complete decision on the merits when he

affirmed the Union's grievance after concluding that the disputed evaluation "has the appearance of a Full or Follow-up evaluation" and that "the Agency gutted Article 51 by calling everything a Special Evaluation[.]" Exceptions at 8-9. The Union points out that, after making a decision on the merits in the Initial Award, the Arbitrator then limited his jurisdiction to remedy only. However, when the parties subsequently contacted him solely to decide the issue of remedy, the Union argues that the Arbitrator erroneously reconsidered the merits of the case in the Subsequent Award. *Id.* at 10-11. Therefore, the Union contends that the Arbitrator's subsequent finding that the Union did not meet its burden of proving that the evaluation at issue was a full-facility or follow-up evaluation is a violation of the doctrine of *functus officio*. *Id.*

The Union further argues that the Arbitrator exceeded his authority in the Subsequent Award when he violated his self-imposed authority to decide only the issue of remedy. *Id.* at 5. In support, the Union cites the Arbitrator's alleged improper reexamination of the merits of the case in his Subsequent Award, discussed above, that the Union relies on as part of its "*functus officio*" claim. *Id.* at 5, 8-11.

The Union also contends that the Arbitrator relied on a nonfact when he stated that the parties had agreed he would render a final decision on the merits in the Subsequent Award. *Id.* at 12. Contrary to this assertion, the Union claims that the parties agreed that the Arbitrator would render a final decision in the Subsequent Award as to remedy only. *Id.* at 13. The Union argues that the Arbitrator, therefore, had no jurisdiction to readdress the merits on his own. *Id.* Thus, the Union posits that, had the Arbitrator not erroneously determined that he had full jurisdiction over the case, he would not have made another ruling on the merits of the case in the Subsequent Award. *Id.*

#### B. Agency's Opposition

The Agency rejects the Union's assertion that the Subsequent Award is deficient based on the doctrine of *functus officio*. According to the Agency, the doctrine of *functus officio* does not apply because the Initial Award failed to definitively resolve the issue of whether the Agency violated Article 51, § 1 of the CBA. Opp'n at 3. In support, the Agency contends that because the Initial Award is ambiguous, the Subsequent Award merely clarifies it. *Id.* Consequently, the Agency claims that, because the Arbitrator did not fulfill his function or accomplish

the designated purpose of his office in the Initial Award, his authority and jurisdiction continued until he completely resolved the issues before him in the Subsequent Award. *Id.* In support of its contention that the Initial Award is not the final decision, the Agency argues that the Authority dismissed the exceptions the Agency filed after receiving the Initial Award as interlocutory, indicating in its Order Dismissing Exceptions that the Agency could file exceptions "after the Arbitrator renders a final award completely determining all of the issues before the arbitrator." *Id.* (quoting Opp'n, Attach. 2, Order Dismissing Exceptions at 1). Therefore, the Agency contends that the Subsequent Award serves as the final decision because, unlike the Initial Award, it completely resolves the issue before the Arbitrator. Opp'n at 3.

#### IV. Analysis and Conclusion

The Subsequent Award violates the doctrine of *functus officio*.

As the Union alleges, the Arbitrator violated the doctrine of *functus officio* when he reversed his final determination on the merits to find, in the Subsequent Award, that the Union did not prove that the Agency violated the CBA. Pursuant to the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. *E.g.*, SSA, 63 FLRA 274, 278 (2009).

Here, the Union has satisfactorily proven that the Arbitrator resolved the issue submitted to arbitration in his Initial Award. The Arbitrator found that the Agency violated Article 51, § 1 of the CBA by refusing to allow a Union representative to serve on the evaluation team during a full-facility or follow-up evaluation. As a basis for this determination, the Arbitrator found that the Agency has "gutted Article 51 by calling everything a [s]pecial [e]valuation and then deciding they may or may not allow a union rep[resentative] to participate on the evaluation team." Initial Award at 18-19. He then expressly affirmed the grievance and issued a Cease and Desist Order. Initial Award at 20. The Agency argues that the doctrine of *functus officio* does not apply because the Arbitrator did not fulfill his function or accomplish the designated purpose of his office in his Initial Award. Opp'n at 3. However, contrary to the Agency's argument, the Arbitrator's express affirmation of the grievance and issuance of a Cease and Desist Order indicates that the Arbitrator unambiguously and definitively resolved the issue submitted to arbitration.

Moreover, the Agency's contention that the Authority dismissed its exceptions to the Arbitrator's Initial Award because a final decision had not been reached fails to demonstrate that the Arbitrator was not *functus officio* when he rendered the Subsequent Award. As indicated previously, the *portion* of the Initial Award resolving the merits was *final*. Under the doctrine of *functus officio*, once the Arbitrator made a complete determination on the merits in the Initial Award, he had no further authority to resolve issues concerning the merits of this case. *See Dependents Schools*, 49 FLRA at 122-23 (arbitrator violated doctrine of *functus officio* when he reversed merits of his award even though he retained jurisdiction as to implementation of award).

Furthermore, as the Union notes, it was the Arbitrator who specifically limited his jurisdiction to remedy only, after deciding the merits in the Initial Award. Initial Award at 20. Unless an arbitrator retains jurisdiction of an issue after rendering an award, the arbitrator has no authority to take any further action with respect to that issue absent the joint request of the parties. *See Dependents Schools*, 49 FLRA at 122. Here, it is clear that the Arbitrator explicitly retained jurisdiction in his Initial Award solely for the purpose of resolving questions concerning the remedy. Initial Award at 20. In addition, although the Arbitrator stated that the parties stipulated that the case was properly before him, he did not expressly find that the parties specifically agreed to resubmit the case for a determination on the merits. Moreover, the Agency does not contend that the parties ever requested that the Arbitrator revisit the merits of the case. Furthermore, even if the Initial Award was ambiguous, as the Agency argues, Authority precedent holds that any subsequent clarification the Arbitrator makes must conform to the original award. *SSA*, 63 FLRA at 278. Consequently, the Arbitrator had no authority to reach a finding on the merits in the Subsequent Award that did not conform to his original findings in the Initial Award.

The principle that an arbitrator's decision on the merits becomes final and subject to the doctrine of *functus officio*, even when the arbitrator retains jurisdiction over some other aspect of the grievance, was first adopted by the Authority in *Dependents Schools*, 49 FLRA 120. *See supra* Part III. A. & IV. There, in his initial award, the arbitrator sustained a grievance after making dispositive findings on the issue of transportation expenses. *Dependents Schools*, 49 FLRA at 120-21. He also retained jurisdiction to resolve any issues that the parties could not resolve themselves solely limited to

implementation of the award. *Id.* at 121. However, when the Union requested that he issue a final decision, the arbitrator dismissed the grievance. *Id.* In considering the Union's exceptions to this decision, the Authority concluded that the arbitrator's initial ruling on the merits rendered the arbitrator "*functus officio* as to that issue" because the arbitrator had limited his jurisdiction to the issue of implementation only. *Id.* at 122. Similarly, after he decided the merits, the Arbitrator in the case before us limited his continuing jurisdiction to the issue of remedy only. Therefore, just as the arbitrator in *Dependents Schools* could not redetermine the merits after relinquishing his authority to do so, the Arbitrator in this case is similarly limited by the doctrine of *functus officio* from redetermining the merits of the case.

For these reasons, we find that the Arbitrator was barred under the doctrine of *functus officio* from reversing his decision in the Subsequent Award because he had already resolved the issue.<sup>2</sup> Accordingly, we remand the case to the Arbitrator to resolve the issue of remedy over which the Arbitrator specifically retained jurisdiction when he rendered his Initial Award.

## V. Decision

The Subsequent Award is set aside and the matter is remanded to the parties for resubmission to the Arbitrator, absent settlement, for a determination of the appropriate remedy.

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2. We find it unnecessary to address the Union's additional exceptions that the Arbitrator exceeded his authority and that the subsequent award is based on a nonfact.