

**65 FLRA No. 144**

UNITED STATES  
DEPARTMENT OF THE NAVY  
TRIDENT REFIT FACILITY  
KINGS BAY, GEORGIA  
(Agency)

and

INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND  
AEROSPACE WORKERS  
LOCAL LODGE 2783  
(Union)

0-AR-4698

—  
DECISION

March 31, 2011

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

**I. Statement of the Case**

The matter is before the Authority on exceptions to an award of Arbitrator Samuel J. Nichols, Jr. filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.<sup>1</sup>

---

1. The Union filed a supplemental submission pursuant to § 2429.26 of the Authority's Regulations consisting of documents that it contends are "relevant and material" to the Agency's exceptions. Union Supplemental Submission at 2. The Union claims that these documents concern safety violations the Agency allegedly committed and that the documents did not come into existence until after the Agency filed its exceptions. *See id.* The Agency filed a response disputing the Union's claims that the documents are relevant. *See* Agency Supplemental Submission. The Union's proffered documents relate to the Agency's exceptions that challenge the Arbitrator's initial award; as discussed below, these exceptions are untimely. Because we do not consider the exceptions, it is unnecessary to address the Union's or the Agency's supplemental submissions addressing them. *See, e.g., U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C., 63 FLRA 406, 407 (2009) (citation omitted) (denying party's request to*

In his initial award (Merits Award), the Arbitrator concluded that the Agency violated a settlement agreement and past practice by failing to pay the grievants environmental differential pay (EDP). He ordered the parties to determine the amount of EDP the grievants should receive. After the parties were unable to reach agreement, the Arbitrator awarded the grievants \$782,266.98 in EDP (Remedy Award). For the reasons set forth below, we dismiss the Agency's exceptions in part and deny the remaining exception.

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

The Agency and the Union entered into a settlement agreement, which, among other things, required the Agency to pay EDP to several groups of employees. Merits Award at 6-7. In October 2007, the Agency terminated this practice with respect to the grievants. *Id.* at 7. The Union presented a grievance challenging the Agency's action. The grievance was unresolved and proceeded to arbitration. The parties stipulated to the following issues: "(1) Whether [the Agency] terminated [EDP] in violation of the [parties' agreement], or other law, rule and regulation, by terminating compensation to the [g]rievants in shops 71A, 57A, 57B, and 38A"; and (2) "If so, what is the appropriate remedy?"<sup>2</sup> Opp'n at 7; Exceptions at 5-6; Exceptions, Attach. 4, Union's Closing Brief at 1.

On May 5, 2010, the Arbitrator issued his Merits Award. The Arbitrator concluded that the Agency violated the parties' agreement and past practice, and awarded the grievants EDP. Merits Award at 15. The Arbitrator did not award a specific amount of EDP; rather, he ordered the parties to consult "regarding the amount of EDP due." *Id.* The Arbitrator gave the parties sixty days to do so. *Id.* The Arbitrator stated that, before determining the final amount owed, he would "allow the parties to submit their respective computations" for his consideration. *Id.* The Arbitrator further stated that the Merits Award would "be made final upon the Arbitrator's certification of the EDP due on the grievance." *Id.* The Agency did not file exceptions to the Merits Award.

---

file supplemental submission because submission was deemed unnecessary), *reconsid. denied* 63 FLRA 600 (2009).

2. The Arbitrator did not set forth these issues in either of his awards. However, both parties agree that these were the stipulated issues. *See* Exceptions at 5-6; Opp'n at 7.

The parties were unable to agree on the amount of EDP that the grievants were owed; accordingly, they asked the Arbitrator to resolve their dispute. Remedy Award at 2. The Union requested \$782,266.98 for the period covering 2007 to October 1, 2010; the Agency asserted that the grievants were not entitled to any EDP. *See id.* at 2-3. On September 9, 2010, the Arbitrator issued his Remedy Award and concluded that the Agency owed the grievants \$782,266.98. *Id.* at 3. The Arbitrator stated that, if the Agency failed to implement this award by October 1, 2010, he would allow the Union to “submit additional calculations covering any and all hours recorded subsequent thereto.” *Id.*

### III. Positions of the Parties

#### A. Preliminary Issue

##### 1. Agency’s Threshold Issue

The Agency argues that the Authority should consider its exceptions because they are timely. *See* Exceptions at 3. The Agency avers that the Merits Award was not final because the Arbitrator ordered the parties to determine the amount of EDP the grievants should receive; thus, the award left an issue unresolved. *See id.* The Agency further notes that the Arbitrator stated that “[the Merits Award] will be made final upon the Arbitrator’s certification of the EDP due on the grievance.” *Id.* (quoting Merits Award at 14). Based on the foregoing, the Agency contends that it could not have filed exceptions to the Merits Award because they would have been interlocutory; thus, the Agency had to wait to file exceptions until the Arbitrator issued his Remedy Award. *See id.* at 3-4.

##### 2. Union’s Response

The Union does not dispute the Agency’s assertion that its exceptions are timely. *See* Opp’n at 8.

#### B. Merits

##### 1. Agency’s Exceptions

The Agency claims that the Merits Award is deficient for three reasons. First, the Agency argues that the Arbitrator exceeded his authority because he was not asked to decide whether the Agency violated a past practice. *See* Exceptions at 5-8. Second, the Agency contends that the award of EDP is contrary to law because it conflicts with portions of the United States Code and the Code of Federal Regulations.

*See id.* at 8-9. Third, the Agency argues that the Merits Award is incomplete and ambiguous because “it fails to provide any legal or factual basis for [the] conclusion that the grievants are entitled to EDP.” *Id.* at 10-11.

The Agency argues that the Remedy Award is deficient because the Arbitrator exceeded his authority in two ways. First, the Agency avers that the Arbitrator exceeded his authority by failing to timely issue the Remedy Award. *Id.* at 7. The Agency contends that the parties’ agreement requires an arbitrator to issue his or her award no more than thirty days after the conclusion of the hearing unless the parties agree otherwise. *Id.* (citing Article 33, Section 13 of the parties’ agreement). The Agency claims that the Arbitrator took seven months to issue the Remedy Award without seeking an extension from either party. *Id.*

Second, the Agency contends the Arbitrator exceeded his authority by retaining jurisdiction after he issued the Remedy Award. *Id.* The Agency claims “[t]here is no authority” to support the Arbitrator’s decision to retain jurisdiction to award additional EDP if the Agency failed to timely implement the award. *Id.* The Agency avers that the Arbitrator was asked “to review a finite issue, not to exercise continuing jurisdiction over all future EDP claims the grievants may choose to file.” *Id.*

##### 2. Union’s Opposition

The Union argues that the Authority should deny the three Agency exceptions challenging the Merits Award. *See* Opp’n at 12-16, 21-33.

As to the exceptions contesting the Remedy Award, the Union disputes the Agency’s assertion that the Arbitrator exceeded his authority by issuing an untimely award. *See id.* at 16. The Union contends that the Remedy Award was timely. *See id.* at 16-17.

The Union also rejects the Agency’s argument that the Arbitrator exceeded his authority by retaining jurisdiction to assist with the implementation of the Remedy Award. The Union contends that it asked the Arbitrator to retain jurisdiction to award attorney fees and to assist with implementation in the event the Agency failed to pay EDP. *See id.* at 17-18. The Union argues that arbitrators are permitted to retain jurisdiction to “oversee[] the implementation of remedies[.]” *Id.* at 18 (quoting *U.S. Dep’t of Veterans Admin., Med. Ctr., Leavenworth, Kan.*, 38 FLRA 232, 238-39 (1990)). The Union further

contends that the Arbitrator did not retain jurisdiction to consider all future claims of EDP. *Id.* at 19.

#### IV. Preliminary Issues

##### A. The Agency's exceptions challenging the Merits Award are untimely.

The Agency argues that its exceptions to the Merits Award are timely. According to the Agency, the Merits Award was not final; as such, any exceptions filed as to the Merits Award would have been interlocutory.

Section 7122(b) of the Statute states that “[i]f no exception to an arbitrator’s award is filed under [§ 7122(a) of the Statute] during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding.” 5 U.S.C.

§ 7122(b); *see also* 5 C.F.R. 2425.2(b).<sup>3</sup> The thirty day limit is jurisdictional; the Authority is unable to waive or extend it and must dismiss untimely filed exceptions. 5 U.S.C. § 7122(b); 5 C.F.R. § 2429.23(d);<sup>4</sup> *e.g.*, *U.S. Dep’t of Commerce, PTO, Arlington, Va.*, 60 FLRA 869, 877 (2005) (*PTO*). Parties must, therefore, file exceptions no later than thirty days after an award becomes final and is served on a party. *See* 5 U.S.C. § 7122(b).

An award is considered final for purposes of filing exceptions when it fully resolves all issues submitted to arbitration. *See, e.g.*, *U.S. Dep’t of Transp., FAA, Wash., D.C.*, 60 FLRA 333, 334 (2004). When an arbitrator orders a remedy but retains jurisdiction to assist the parties in the implementation of that remedy, all submitted issues are considered resolved. *See, e.g.*, *U.S. Dep’t of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (award was final where arbitrator

ordered backpay in initial award but retained jurisdiction to assist parties in determining the amount of backpay), *reconsid. denied* 65 FLRA 76; *U.S. Dep’t of the Treasury, IRS*, 63 FLRA 157, 158-59 (2009) (same). However, where an arbitrator orders the parties to determine the remedy that should be awarded, the award is not considered final. *See, e.g.*, *U.S. Dep’t of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003) (award was not final because arbitrator declined to issue remedy, and instead directed parties to determine the appropriate remedy); *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231-32 (2000) (same).

The foregoing precedent establishes that the Arbitrator’s Merits Award was final for purposes of filing exceptions. The Arbitrator awarded a remedy of EDP and ordered the parties to determine the specific amount of EDP owed. Thus, the only issue left unresolved by the Merits Award was the amount that the grievants should recover. Because this was the only unresolved issue, the Merits Award constituted a final award for purposes of filing exceptions to it. *See, e.g.*, *DOJ*, 64 FLRA at 1170 (award was final where it awarded a remedy of backpay, but left unresolved the amount of backpay that should be paid to the grievants).

The Arbitrator’s statement that the Merits Award would not become final until he certified the amount of EDP owed does not alter our conclusion. An arbitrator’s characterization of an award does not, by itself, demonstrate whether the award is final. *See, e.g.*, *AFGE, Local 12*, 61 FLRA 355, 357 (2005) (finding that arbitrator’s statements in award did not establish whether award was final).

The Merits Award was final for purposes of filing exceptions. The Agency, therefore, was required to file any exceptions to that award no later than thirty days after it received the award. *See* 5 U.S.C. § 7122(b). The Merits Award was issued and served upon the parties in May 2010. The Agency filed its exceptions with the Authority on October 8, 2010, well beyond the thirty days set forth in § 7122(b) of the Statute. Three of the five Agency’s exceptions challenge the Arbitrator’s conclusion, in his Merits Award, that the grievants were entitled to EDP.<sup>5</sup> *See* Exceptions at 5-9, 11.

3. 5 C.F.R. § 2425.2(b) states, in relevant part: “The time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award. This thirty (30)-day time limit may not be extended or waived.” We note that § 2425.2(b) was amended effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Previously, § 2425.2(b) was located at 5 C.F.R. § 2425.1(b); however, the foregoing quoted language did not change. Accordingly, although we apply 5 C.F.R. § 2425.2(b), we rely on Authority precedent interpreting 5 C.F.R. § 2425.1(b).

4. 5 C.F.R. § 2429.23(d) states “[t]ime limits established in 5 U.S.C. [ §§ ] 7105(f), 7117(c)(2) and 7122(b) may not be extended or waived under this section.”

5. We note that, under Authority precedent, where an arbitrator issues a subsequent award that modifies the original award, the time limit for filing exceptions begins upon service of that subsequent award on the excepting party. *See, e.g.*, *U.S. Dep’t of Labor, Wash., D.C.*,

Because these three exceptions were filed more than thirty days after the Agency received the Merits Award, we find that they should be dismissed as untimely. *See, e.g., PTO*, 60 FLRA at 877.

The Agency's remaining two exceptions challenge the Remedy Award that was issued on September 9, 2010, and were filed by mail on October 8, 2010. *See Exceptions, Certificate of Serv.* These exceptions, therefore, were filed within the thirty day statutory timeline. Accordingly, we find that these two exceptions are timely.

- B. The Agency's exception arguing that the Arbitrator failed to issue the Remedy Award within thirty days is barred by § 2429.5 of the Authority's Regulations.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that "could have been, but were not, presented" to the arbitrator.<sup>6</sup> 5 C.F.R. 2429.5; *see, e.g., AFGE, Council 236*, 65 FLRA 421, 421 n.\* (2010) (*AFGE*); *see also U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389 (2010). Exceptions raising such issues will be dismissed. *See AFGE*, 65 FLRA at 421 n.\*. Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*) (dismissing agency's argument that parties' agreement did not incorporate certain Office of Personnel Management regulations because agency conceded before arbitrator that agreement *did* incorporate those regulations).

In one of its exceptions to the Remedy Award, the Agency argues that the Arbitrator exceeded his authority because he did not issue the Remedy Award within thirty days of the Merits Award as required by the parties' agreement. The Arbitrator gave the parties sixty days to negotiate over the amount of EDP owed to the grievants; the Agency raised no objection. *See Merits Award at 15; see also Remedy*

---

59 FLRA 131, 132 (2003) (Chairman Cabaniss concurring). The Agency does not assert that the Remedy Award modified the merits award. Our review of the Remedy Award likewise does not establish that the Arbitrator modified his Merits Award.

6. We note that § 2429.5 was amended effective October 1, 2010. *See 75 Fed. Reg. 42,283* (2010). Because these exceptions were filed after that date, we apply the revised Regulation. *See, e.g., AFGE, Council 236*, 65 FLRA 421, 421 n.\* (2010).

Award at 2. The Agency further expanded this timeframe by requesting an additional forty-five days to negotiate over the amount of EDP owed. *See Opp'n at 16*. This establishes that, while before the Arbitrator, the Agency tacitly agreed to extend the timeframe for the issuance of the Remedy Award well beyond thirty days. The Agency's position before the Arbitrator is inconsistent with the position the Agency has adopted before the Authority. Consequently, the Agency's exception is not properly before the Authority. *See, e.g., FAA*, 64 FLRA at 328.

Alternatively, even if the Agency did not agree to extend the timeframe for the issuance of the Remedy Award, the Agency failed to raise any objection to an extended timeframe. As established above, the Agency had clear and unambiguous notice that the Arbitrator, at a minimum, could take at least sixty days to issue his Remedy Award. *See Merits Award at 15; see also Remedy Award at 2*. Despite this notice, the Agency gave no indication such an action would be improper. Because the Agency failed to object below, even though it had a clear opportunity to do so, it may not object now. *See, e.g., AFGE*, 65 FLRA at 421 n.\*.

Accordingly, we dismiss the Agency's exception.

#### **V. The Arbitrator did not exceed his authority by retaining jurisdiction after he issued the Remedy Award.**

The Agency contends that the Arbitrator had no authority to retain jurisdiction after he issued the Remedy Award; according to the Agency, the Arbitrator was not asked to decide all future claims for EDP that the grievants might file. *See Exceptions at 7*. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). The Authority, like the federal courts, accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *E.g., Veterans Admin.*, 24 FLRA 447, 450 (1986). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.*

The Agency has not established that the Arbitrator exceeded his authority. The parties stipulated that the Arbitrator would decide: (1) whether the Agency violated law and the parties' agreement by failing to pay the grievants EDP; and (2), if so, what was the appropriate remedy. Opp'n at 7; Exceptions at 6. In response to these issues, the Arbitrator concluded that: (1) the Agency violated past practice by failing to pay the grievants EDP; and (2) as a result of this violation, the Agency owed the grievants a remedy of \$782,266.98 in EDP by October 1, 2010. Merits Award at 15; Remedy Award at 3. The Arbitrator also determined that, if the Agency failed to pay the grievants this amount by October 1, he would allow the Union the opportunity to submit additional calculations "covering any and all hours recorded subsequent thereto." Remedy Award at 3. Thus, the Arbitrator did not state that he would consider additional EDP claims; rather, he merely held that he would consider additional calculations of EDP owed as result of the Agency's violation. The Agency has pointed to no language that suggests the Arbitrator retained jurisdiction to consider *all* possible future claims of EDP. The Remedy Award, therefore, is directly responsive to the stipulated issues. Accordingly, we find that the Arbitrator did not exceed his authority.

## **VI. Decision**

The Agency's exceptions are dismissed in part and denied in part.