70 FLRA No. 19

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
U.S. DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5172

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DECISION

December 13, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

After issuing a merits award and two supplemental awards dealing with a number of pay-related and leave issues affecting employees (grievants) working in the Agency's Dependents Schools overseas, Arbitrator Andrée Y. McKissick issued a fourth award (the implementation award). In her implementation award, the Arbitrator found that the Agency had not complied with her previously ordered remedies, including her remedies regarding the Agency's Voluntary Leave Transfer Program (VLTP). The Agency filed exceptions to the implementation award.

The substantive question before us is whether the Arbitrator exceeded her authority because she was functus officio when she issued the implementation award. Because the Arbitrator retained jurisdiction in the merits award and in the supplemental awards for various purposes, including to "address[] and correct[] any systemic or individual problems discovered in the VLTP,"[1] and the Agency did not file exceptions to the Arbitrator's jurisdictional rulings in any of these awards, the answer is no.

[1] Exceptions Br., Attach. 6 (Second Supplemental Award) at 1.

II. Background and Arbitrator's Awards

The procedural history of this case spans over five years, four awards, and one Authority decision. We summarize that history briefly here to provide necessary context for our decision resolving the Agency's exception to the implementation award.

In her 2010 merits award, the Arbitrator resolved a number of pay-related and leave issues affecting grievants working in the Agency's Dependents Schools overseas. In addition to determinations on certain pay issues, the Arbitrator found that the Agency did not properly credit donated leave to one of the grievants, as required by the VLTP.[2] The Arbitrator retained jurisdiction for various purposes, including to ensure that the Agency complied with Debt-Collection-Act[3] procedural safeguards, to entertain a motion for attorney fees, and "to remedy the systemic problems [relative] to the . . . [VLTP], as it pertains to" one of the grievants.[4] The Agency filed exceptions to the merits award, but did not challenge the Arbitrator's retention of jurisdiction. The Authority denied the Agency's exceptions.[5]

In a supplemental award (first supplemental award), issued in 2012, the Arbitrator determined that "additional relief is now required for the viability of [the VLTP],"[6] and ordered the Agency to maintain VLTP-related documents and share them with the Union. Neither party filed exceptions to the first supplemental award. Three years later, in 2015, the Arbitrator issued another supplemental award (second supplemental award), which: (1) required the Agency to provide the Union with monthly VLTP reports; and (2) further retained jurisdiction "to ensure [implementation of] all the relief in the [merits a]ward" and to "address[] and correct[] any systemic or individual problems discovered in the VLTP."[7] Again, neither party filed exceptions to the second supplemental award.

Five months after the Arbitrator issued the second supplemental award, the Agency sent a letter to the Arbitrator and the Union stating that: (1) the Arbitrator was without jurisdiction to discuss VLTP issues; (2) it considered all VLTP-related issues closed; and (3) it "will not attend any hearing scheduled by [the Arbitrator], provide any documents [the Arbitrator] demand[s,] and/or compensate

[2] Opp'n, Attach. 3 (Merits Award) at 36-37.
[3] 5 U.S.C. § 5514.
[4] Merits Award at 38.
[5] *U.S. DOD Dependents Sch. – Eur.*, 66 FLRA 181, 183-85 (2011) (*DOD*).
[6] Exceptions Br., Attach. 5 (First Supplemental Award) at 2.
[7] Second Supplemental Award at 1.

[the Arbitrator] for further work."[8] In response, the Union sent the Arbitrator a draft implementation award – which she subsequently adopted – and requested the Arbitrator to: "[p]lease submit a bill to each of [the parties] for [her] services. If [the Agency] refuses to pay, [the Union] will add that to the [unfair-labor-practice (ULP) charge]. If [the Arbitrator] like[s], [the Union] will pay [the Agency's] half until [the Union] prevail[s] in the ULP for reimbursement."[9]

In an email response, the Agency objected to the Union's proposed payment arrangement, and restated its position that the Arbitrator was without jurisdiction to issue the implementation award. The Union replied. Regarding payment matters, the Union asked the Arbitrator to "bill [the Agency] for half of [her] services" to "avoid any inference of impropriety."[10] The Union also requested the Arbitrator to "offer [the Agency] a [h]earing"[11] and an opportunity to brief the jurisdictional issue. But after the Agency did not provide "a response . . . in regards to a hearing or a brief on the jurisdictional issue,"[12] the Arbitrator issued the implementation award before us, which states, in its entirety:

> [The Agency] is in noncompliance with the [merits and supplemental a]wards in these cases[, including the merits award] dated May 26, 2010, upheld by the [Federal Labor Relations Authority (FLRA)] on September 26, 2011, the [first s]upplemental [a]ward dated June 20, 2012, which was not appealed, and the [second s]upplemental [a]ward dated May 12, 2015, which was not appealed. [The Agency] is hereby immediately ordered to comply. This [implementation a]ward is issued so that [the Union] can file a[ULP c]harge with the FLRA for enforcement proceedings.[13]

The Agency filed exceptions to the implementation award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters: Some of the Agency's exceptions are untimely.

In its exceptions, the Agency argues that the Arbitrator exceeded her authority by: (1) improperly assigning herself open-ended jurisdiction over VLTP issues; and (2) issuing the implementation award because "there was no further VLTP relief due under the [m]erits [a]ward."[14]

Under § 2425.2(b) of the Authority's Regulations, the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award.[15] If no exceptions are filed within that thirty-day period, then the award becomes final and binding.[16] As discussed above, neither party filed exceptions within thirty days of either supplemental award. Therefore, the supplemental awards are final and binding.[17]

After the Agency filed its exceptions to the implementation award, the Authority's Office of Case Intake and Publication (CIP) issued an order to show cause why the Agency's exceptions should not be dismissed as untimely.[18] Specifically, CIP issued the order because the Agency's exceptions appeared to focus on issues addressed by the supplemental awards, and "not the *implementation* award [that is] before the Authority."[19] The order gave the Agency an opportunity to file a response, and the Union an opportunity to respond to the Agency's response. Both the Agency and the Union filed responses.

[8] Exceptions Br., Attach. 4 at 1.
[9] Exceptions Br., Attach. 7 at 4.
[10] *Id.* at 2.
[11] *Id.*
[12] *Id.* at 1.
[13] Implementation Award at 1.
[14] Exceptions Br. at 10.
[15] 5 C.F.R. § 2425.2(b); *see also* 5 U.S.C. § 7122(b).
[16] 5 U.S.C. § 7122(b); *e.g., U.S. Dep't of VA, Northport VA Hosp., Northport, N.Y.*, 67 FLRA 325, 326 (2014) (*Northport*).
[17] 5 U.S.C. § 7122(b); *e.g., Northport*, 67 FLRA at 326.
[18] Order to Show Cause (Aug. 9, 2016) at 4.
[19] *Id.* at 3.

A. We will not consider the Union's response.

As discussed above, the order to the Agency gave the Union an opportunity to file a response to the Agency's response. The Union filed its response on September 28, 2016, electronically, using the FLRA's eFiling system. But eFiling is not an authorized method for filing a response to an Authority order.[20] Subsequently, CIP issued the Union an order to show cause why the Union's response should be considered. The order provided that "failure to respond to or comply with this order . . . will result in the Authority not considering the Union's response."[21] The Union did not file a reply to the order. Accordingly, we will not consider the Union's response.

B. The two Agency exceptions identified above are untimely.

We dismiss the two Agency exceptions identified above because they are untimely. These exceptions do not challenge the implementation award's sole finding that the Agency has failed to comply with the Arbitrator's earlier awards.[22] Rather, these exceptions challenge the *supplemental* awards, in which the Arbitrator specifically retained jurisdiction to further address the "viability of [the VLTP],"[23] "including addressing and correcting any systemic or individual problems discovered in the VLTP."[24]

The time for the Agency to raise these exceptions was before the supplemental awards became final and binding. But the Agency did not. Indeed, even when the Agency filed its exceptions to the merits award, it did not challenge the Arbitrator's retention of jurisdiction in that award, including with regard to VLTP-related issues.[25] These exceptions are therefore untimely.

The Agency contends that its failure to file timely exceptions does not bar its claim that the Arbitrator lacked jurisdiction to issue the implementation award because "jurisdictional challenges may be raised at any time."[26] The decisions on which the Agency relies[27] do not support this contention. The Authority has stated that a challenge to the Authority's subject-matter jurisdiction may be raised at any time.[28] But the Authority has distinguished this principle from the principles applicable to cases where a party is "not questioning the jurisdiction of the Authority" but instead is "questioning for the first time in its exception the jurisdiction of the [a]rbitrator to resolve the grievance."[29] And the Authority has expressly declined to follow the decisions that the Agency cites to the extent that those decisions suggest that a challenge to an arbitrator's jurisdiction to resolve a grievance cannot be time-barred.[30] Here the Agency's first objection to the Arbitrator's jurisdiction was a letter "notifying the Arbitrator that the Agency considered . . . her jurisdiction to have ended,"[31] sent after the Arbitrator's first and second supplemental awards became final and binding.

Accordingly, we dismiss these Agency exceptions as untimely.

IV. Analysis and Conclusions: The Arbitrator did not exceed her authority because she was not functus officio when she issued the implementation award.

In its remaining exception, the Agency argues that the Arbitrator exceeded her authority because she was functus officio when she issued the implementation award.[32] 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.[33]

Under the doctrine of functus officio, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.[34] Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding.[35] However, where an arbitrator retains jurisdiction to resolve disputes over interpretation or

[20] 5 C.F.R. § 2429.24(e).
[21] Order to Show Cause (Oct. 6, 2016) at 2.
[22] *See* Implementation Award at 1.
[23] First Supplemental Award at 2.
[24] Second Supplemental Award at 1.
[25] *DOD*, 66 FLRA at 182-83.
[26] Resp. to Order to Show Cause (Resp.) at 3.
[27] *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.,* 55 FLRA 193, 195 (1999) (*NPS*); *AFGE, Local 916*, 47 FLRA 150, 153 (1993) (*AFGE*); *U.S. DOJ, INS, El Paso, Tex.,* 40 FLRA 43 (1991) (*INS*).
[28] *INS*, 40 FLRA at 51-52.
[29] *NPS*, 55 FLRA at 195.
[30] *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936-937 (2000) (declining to follow *AFGE* & *INS*).
[31] Resp. at 3.
[32] Exceptions Br. at 8-10.
[33] *NAGE, SEIU, Local 551*, 68 FLRA 285, 286 (2015) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).
[34] *E.g.*, *SSA*, 63 FLRA 274, 278 (2009).
[35] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (citing *Overseas Fed'n of Teachers, AFT, AFL-CIO*, 32 FLRA 410, 415 (1988)).

implementation of an award, the arbitrator may issue a supplemental award resolving such disputes without a joint request from the parties.[36]

The Agency argues that because the merits award's single VLTP "issue was resolved when the grievant was made whole,"[37] the Arbitrator could not issue further awards. However, the Agency's functus officio exception does not challenge the implementation award's finding that the Agency failed to comply with the merits award and the two supplemental awards.

Moreover, in the merits award, the Arbitrator retained jurisdiction to resolve certain Debt-Collection-Act issues and "systemic" and individual problems relating to the VLTP.[38] The Arbitrator exercised this jurisdiction when she awarded "additional relief . . . for the viability of th[e VLTP]"[39] in her first supplemental award, and reaffirmed in her second supplemental award her retention of jurisdiction to "address[] and correct[] any systemic or individual problems discovered in the VLTP."[40] And absent a timely challenge by the Agency, these awards became final and binding. The Arbitrator's actions in the implementation award, addressing implementation issues relating to all of her previous, final and binding awards, exercised the jurisdiction she retained in those previous awards.[41]

Accordingly, we deny the Agency's exceeds-authority exception claiming that the Arbitrator was functus officio when she issued the implementation award.[42]

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

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[36] *See AFGE, Local 1156 & Laborers' Int'l Union, Local 1170*, 57 FLRA 602, 603 (2001) (*Local 1156*).
[37] Exceptions Br. at 10.
[38] Merits Award at 38.
[39] First Supplemental Award at 2.
[40] Second Supplemental Award at 1.
[41] *See Local 1156*, 57 FLRA at 603.
[42] The Agency's statement in its exceptions that the implementation award "raises issues of arbitrator impartiality," Exceptions Br. at 12, suggests that the Agency may have intended to argue that the Arbitrator was biased. However, the Agency does not state that the Arbitrator was biased, and on the exceptions form the Agency filed, where the form asks, "Are you arguing that the Arbitrator was biased?", the Agency responded, "No." Exceptions Form at 6. Moreover, the Agency makes its "impartiality" statement in its exceptions brief as part of its argument that the Arbitrator exceeded her authority. In these circumstances, the Agency's statement does not raise a bias exception.

Member Pizzella, dissenting:

Let's start here. No arbitrator has the power to restart or override the statutory clock that Congress created to determine when an unfair-labor-practice (ULP) charge is timely or untimely.[1] Arbitrator Andrée McKissick, however, did just that and proceeded as though a statutory limitation is merely a suggestion and that she may dictate to the General Counsel of the Federal Labor Relations Authority (FLRA) when that clock will start ticking.

The Arbitrator calls the December 2015 document, issued under her signature, a "[s]upplemental [a]ward"[2] (even though she did not draft it or have the authority to issue it). The Federal Education Association (FEA) calls it a "game."[3] My colleagues call it an "implementation award."[4] The Department of Defense Dependents Schools (DODDS) calls it a "bribe."[5] What I am certain of is that this is not what Congress had in mind when it created the framework for collective bargaining in the federal government. The Federal Service Labor-Management Relations Statute[6] (the Statute), according to Congress, was to "facilitate[] and encourage[] the amicable settlement[] of disputes."[7]

Under the Statute, the question of whether or not a ULP is timely is left to the sole discretion of the Authority's General Counsel and cannot be resurrected by arbitral fiat.[8] Congress also never intended for arbitrators to have the ability to fundamentally redefine parties' disputes and then define their own jurisdiction for as long as they can and then bill the parties for their services which result from the arbitrator extending his or her own jurisdiction. (As I have said many times before, let's not forget, it is the American taxpayer that gets stuck paying these costs).[9]

Oddly enough, it seems that neither the FEA nor the Arbitrator want this dispute to ever end. The dispute began in February 2007[10] and continues to drag on with no end or final resolution in sight. Several weeks before that, the Apple iPhone was unveiled but during the same time the parties here have engaged in battle, Apple productively developed and released six updates to one of the most revolutionary products of all time.[11] In stark contrast, the parties have not been able to resolve this never-ending dispute.

FEA initiated the grievance on behalf of *eighteen* employees of DODDS, who were specifically *named* in the grievance.[12] Those named grievants complained about a variety of pay issues. Another employee (John Davatelis) was added to the grievance but his complaint was that he believed that DODDS wrongfully denied him leave transfers under the Voluntary Leave Transfer Program (VLTP).[13] But by the time the grievance made its way to arbitration in 2009, *five* of the *eighteen* pay-dispute grievants had been made whole and withdrew from the grievance, leaving *fourteen* grievants, *including* Davatelis.[14] FEA proceeded to arbitration on behalf of these *fourteen* grievants.

Arbitrator McKissick was selected as the arbitrator, conducted a hearing in June 2009, and issued an award in May 2010. In that award, Arbitrator McKissick determined that the *thirteen pay-dispute grievants* were entitled to reimbursements in various amounts[15] and that *Davatelis* was entitled to reimbursement in the amount of $5000 for transferred leave that had not been credited to his account.[16]

DODDS appealed the award, but the Authority denied its exceptions.[17] On appeal, the FEA unsuccessfully tried to convince the Authority to extend the scope of its grievance to include additional employees and other issues (such as "systemic problems" with DODDS's VLTP program) because Arbitrator McKissick in the award had tried to assert continuing jurisdiction over those matters.[18] The Authority, however, made it abundantly clear that Arbitrator McKissick's continuing authority was limited to the remaining *thirteen* pay-dispute grievants and to Davatelis' *claim* for reimbursement and to ensure that those reimbursements were made.[19]

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[1] *See* 5 U.S.C. § 7118 (a)(4).
[2] Award at 1.
[3] Exceptions, Attach. 7 at 1.
[4] Majority at 3.
[5] Exceptions, Attach. 7 at 2.
[6] 5 U.S.C. §§ 7101-7135.
[7] *Id.* at § 7101(a)(1)(B).
[8] *Id.* § 7118 (a)(4).
[9] *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella).
[10] It is worth noting that the parties have been in dispute over various pay and reimbursement problems since at least September 2003. 2010 Award at 30.
[11] https://en.wikipedia.org/wiki/IPhone.
[12] 2010 Award at 1, 3.
[13] *Id.* at 14, 20, 28, 36.
[14] *U.S. DOD Dependents School – Eur.*, 66 FLRA 181, 182 (2011) (*DOD*).
[15] 2010 Award at 40.
[16] *Id.* at 38.
[17] *DOD*, 66 FLRA at 183-85.
[18] *Id*. at 184.
[19] *Id*.

After the decision in *U.S. DOD Dependents School – Europe* (*DOD*),[20] Davatelis was made whole (a fact which FEA does not dispute), but FEA nonetheless continued to go back to Arbitrator McKissick (over the objection of DODDS) time and again to argue that DODDS had not complied with the 2010 award.[21] Contrary to the limited jurisdiction which the Authority delineated for her in *DOD*, Arbitrator McKissick unilaterally extended her own jurisdiction in two "supplemental" awards in June 2012 and May 2015, following a habit she had developed while serving as arbitrator in other agency-union disputes.[22]

In 2012 and 2015, as relevant here, Arbitrator McKissick issued new awards which approved the addition of a new grievant (who was not one of the fourteen grievants approved by the Authority in *DOD*) to Davatelis' grievance and ordered DODDS to reform its VLTP program until she confirmed its "viability."[23]

DODDS raises a number of exceptions, but my colleagues summarily dismiss most and refuse to consider the merits of those. According to the majority, DODDS should have filed exceptions after the unauthorized awards in 2012 and 2015 and is now precluded from doing so.[24]

But the majority misses a key point. Under precedent which the majority has consistently applied, and which it reaffirmed just one month ago in *AFGE, Local 2145*,[25] DODDS was in a proverbial catch-22 – had DODDS filed exceptions to those awards, the majority would most certainly have dismissed them as interlocutory.

In *AFGE, Local 2145*, the majority held that exceptions are "interlocutory[] when the arbitrator . . . decline[s] to make a final disposition as to a remedy."[26] In the same decision, however, the majority said that exceptions are not interlocutory "whe[n] an arbitrator has retained jurisdiction *solely to assist* the parties in the implementation of awarded remedies."[27] But then, as relevant to this case, the majority went on to hold that when a compensation remedy depends on *the completion of additional steps*, such as "*audit results*," the award is *interlocutory, not final*.[28]

By the time Arbitrator McKissick issued the 2012 and 2015 awards, DODDS had already made Davatelis whole, but those awards had nothing to do with the "amount of [his] monetary relief."[29] Instead, Arbitrator McKissick (similar to what she did at least six times in *HUD I – HUD VI*)[30] unilaterally ordered DODDS to take additional steps[31] − to create an entirely new auditing "process"[32] and to prepare specific, ongoing reports which were to be submitted to her for her approval until she alone determined that DODDS's VLTP program had achieved "viability"[33] – which are no different to any meaningful extent than the additional steps which the arbitrator in *AFGE, Local 2145* ordered. Accordingly, even had DODDS filed exceptions to those awards, there is no reason to believe that my colleagues would not have dismissed them as interlocutory.

Therefore, DODDS' exceptions are not untimely.

Arbitrator McKissick also exceeded her authority when she mandated that DODDS add a new grievant beyond the "fourteen . . . who had not withdrawn" from the grievance in *DOD*.[34] In this respect, it is quite clear that she exceeded the "limited" jurisdiction which the Authority delineated for her in *DOD*.[35]

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[20] 66 FLRA 181.

[21] 2012 Award at 2.

[22] In *U.S. Dep't of HUD*, 68 FLRA 631, 636 (2015) (*HUD V*) (Dissenting Opinion of Member Pizzella), I noted that Arbitrator McKissick *for fourteen years* managed to extend her authority to include additional grievants, new issues, and new and creative remedies that had nothing to do with the original grievance or the original violation which she found. *See also U.S. Dep't of HUD*, 69 FLRA 213, 224 (2016) (*HUD VI*) (Dissenting Opinion of Member Pizzella). By her *thirteenth* award, Arbitrator McKissick had managed to turn a simple classification dispute (which was not grievable from the outset) into a remedy for the National Council of HUD Locals 222 requiring the reclassification and upgrade of 73% of HUD's General Schedule (GS) workforce in forty-two (42) job series. Arbitrator McKissick determined that her services were required for an indefinite period to enforce compliance with her never-ending supplemental awards. As one might guess, that award is still not final (as of the date of this decision). *Id*. at 224-25. On November 3, 2016, the Authority ruled on, incorrectly in my view, another dispute concerning Arbitrator McKissick's self-perpetuating jurisdiction. *See U.S. Dep't of HUD*, 70 FLRA 38, 40 (2016) (*HUD VII*) (Dissenting Opinion of Member Pizzella).

[23] 2012 Award at 2.

[24] Majority at 3-4.

[25] 69 FLRA 563, 564 (2016) (*AFGE, Local 2145*) (Member Pizzella dissenting).

[26] *Id.* at 564.

[27] *Id*. (emphasis added).

[28] *Id*. at 565 (emphasis added).

[29] *Id*. at 564.

[30] *See* n.22 supra.

[31] *AFGE, Local 2145*, 69 FLRA at 564.

[32] 2012 Award at 2.

[33] *Id*.

[34] *DOD*, 66 FLRA at 184.

[35] *Id*.

Therefore, I do not agree that DODDS's exceptions − concerning Arbitrator McKissick's self-perpetuating open-ended jurisdiction, ordering relief to a new grievant, and assuming jurisdiction over "continuing issues" with the VLTP program[36] all of which go beyond the limited continuing jurisdiction approved by the Authority in *DOD* − may be summarily dismissed.

I would conclude that the December 2015 award, which purports to enforce the 2012 and June 2015 awards, is contrary to law because, as discussed above, Arbitrator McKissick had no authority (i.e., was "functus officio") to issue either of those awards.

DODDS also directly challenges the "impartiality" of Arbitrator McKissick.

After the June 2015 award, FEA's General Counsel Bill Freeman missed the deadline to file what would have been a timely ULP charge with the Authority's General Counsel (to complain that the Agency had not complied with the unauthorized awards). Freeman pleaded with Arbitrator McKissick to help him win the "*game* created by . . . the FLRA."[37]

According to Freeman's interpretation of the rules for this "game," Arbitrator McKissick could sign the document *(conveniently drafted for her signature so she would have to do nothing at all*), which became the December 2015 "supplemental award," and thereby help him circumvent the 180-day filing deadline imposed by 5 U.S.C. § 7118(a)(4)(A) and (B), the statutory rules which made his ULP untimely. To sweeten the pot just a bit more (for the specific benefit of Arbitrator McKissick), Freeman promised that FEA would immediately "pay [for all of] our and [DODDS's] share" of the fees which Arbitrator McKissick had billed to both parties in return for Arbitrator McKissick's signature.[38] Under this scheme, Freeman would use the ULP process to collect DODDS's share of the fees after Arbitrator McKissick went along with his scheme.[39]

DODDS "object[ed]" vigorously to Freeman's "unseemly proposal"[40] and described it as an "attempt[] to *buy* (*bribe*) an award"[41] from Arbitrator McKissick and "evad[e] the dilemma that the FLRA has . . . told [them] they are in."[42] DODDS also directly challenges the "impartiality" of Arbitrator McKissick. According to DODDS, when Arbitrator McKissick signed the award (to which her sole contribution was "add[ing an] accent mark" above her first name[43]) without giving DODDS any "opportunity . . . to defend its position" in an impartial hearing,[44] she created an impermissible "conflict of interest" and became "an active participant [rather than a neutral] in a collective[-]bargaining dispute."[45]

The majority refuses to even consider these serious allegations. My colleagues are technically correct that when DODDS completed the Authority's thirteen-page exceptions form it answered "no" to the question that asks if a "bias" claim is being raised.[46] In all meaningful respects, however, DODDS's arguments meet *all* of the *requirements* that are set forth in the Authority's regulations.[47] On this point, the majority fails to explain why it makes sense to give *more* weight to a one-word answer on an "*optional*" form[48] (which contains over eighty questions and is intended to serve, not as a procedural requirement, but as a *guide* to a party filing exceptions) than it would give to arguments that are detailed throughout DODDS's exhaustive brief and documentary evidence acknowledged by both parties.

As I have noted before, "I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments."[49] Therefore, I would consider the exceptions that challenge Arbitrator McKissick's impartiality and impermissible self-interest.

Last year in *Independent Union of Pension Employees for Democracy & Justice* (*UPE*), my colleagues and I unanimously reaffirmed that when an arbitrator's award "concerns the arbitrator's *own employment* for what may be an extended period of time, *impermissible self-interest* requires the arbitrator's disqualification and 'allowing an arbitrator to rule on his or her own contested extended appointment creates *a risk of unfairness so inconsistent with the basic principles of justice*.'"[50] We held that, under such circumstances, "the arbitrator's award must be *automatically vacated*."[51] The Authority has also held that an arbitrator demonstrates "bias" when: an award is "procured by improper means," the arbitrator shows "partiality," or the arbitrator engages

[36] 2012 Award at 2.
[37] Exceptions, Attach. 7 at 1 (emphasis added).
[38] *Id.* at 5
[39] *Id.* at 4.
[40] Exceptions Br. at 12.
[41] Exceptions, Attach. 7 at 2 (emphasis added).
[42] *Id*.
[43] *Id*. at 4.
[44] *Id*. at 2.
[45] *Id*.
[46] Majority at 6 n.42.
[47] *See* 5 C.F.R. § 2425.4(a).
[48] *Id.* § 2425.4(d).
[49] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1037 (2015) (Dissenting Opinion of Member Pizzella) (citations omitted).
[50] 68 FLRA 999, 1005 (2015) (emphasis added).
[51] *Id.* (emphasis added).

in "misconduct that prejudiced the rights of the appealing party."[52]

Here, FEA made no pretense of its surreptitious goal. It was aware that it missed the deadline for filing a timely ULP charge. Freeman admitted to Arbitrator McKissick that the sole purpose of the new award, he had prepared for her signature, was to "trigger" a new filing deadline.[53] Unconcerned with the constraints placed on her authority in *DOD*, Arbitrator McKissick signed the December 2015 award "so that FEA can file a[ULP c]harge with the FLRA."[54] What a deal!! Arbitrator McKissick did not hold a hearing[55] or prepare an award but was still able to bill the parties for her "services" (plus "standard interest") with the assurance that she would be paid immediately (as promised by Freeman).

These fortuitous events must have put Arbitrator McKissick in a festive spirit because she returned FEA's self-drafted award on December 18, 2015 sending glad tidings to Freeman and his counterparts at FEA − "[h]appy [h]olidays to [a]ll."[56]

Notwithstanding the seasonal sentiments, I would conclude that Arbitrator McKissick was without an iota of authority to issue the December 2015 award and did so in direct contravention of the restrictions placed on her by the Authority in *DOD*. In this respect, Arbitrator McKissick exceeded her authority and the award is contrary to law.

Unlike the majority, I am not willing to just look the other way when any party makes an "unseemly" proposal,[57] which (as in this case) borders on bribery, whether or not the proposal is accepted by the arbitrator. These proposals are at best unprofessional but Arbitrator McKissick's acquiescence suggests an "impermissible self-interest"[58] and "bias" which casts a cloud over the Arbitrator's entire role.

The December 2015 award is invalid and should be vacated.

My colleagues turn a blind eye to the characterization of the Authority's enforcement of statutory filing deadlines, by FEA's General Counsel Freeman, as a "game created . . . by the FLRA"[59] and to use that characterization to justify his questionable conduct. But I will not. On this point, I suggest that the parties and the majority review 5 U.S.C. § 7118(a)(4)(A) and (B).

Thank you.

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[52] *AFGE, Local 3979, Council of Prison Locals*, 61 FLRA 810, 813 (2006) (citations omitted).
[53] Exceptions, Attach. 7 at 2.
[54] Award at 1.
[55] Exceptions, Attach. 2 at 1.
[56] *Id*.
[57] Exceptions Br. at 12
[58] *UPE*, 68 FLRA at 1004.
[59] Exceptions, Attach. 7 at 1.