65 FLRA No. 216

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
SWANTON, VERMONT
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 2774
NATIONAL BORDER PATROL COUNCIL
(Charging Party/Union)

BN-CA-09-0171

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DECISION AND ORDER

July 27, 2011

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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 unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to fully comply with a final and binding arbitration award. The Judge found that the Respondent did not violate the Statute as alleged, and he recommended dismissing the complaint.

For the reasons that follow, we: deny the GC's exceptions that challenge the Judge's factual findings and allege that the Judge committed prejudicial procedural errors; find that the Respondent violated the Statute as alleged; deny the GC's request for a reinstatement remedy; and grant the GC's remaining requested remedies.

II. Background

The facts are set forth in detail in the Judge's decision and are only briefly summarized here. A Border Patrol agent (the affected employee) was removed from federal service for making false statements in the course of his duties. Judge's Decision at 3. The Charging Party (Union) filed a grievance on the affected employee's behalf, challenging the removal. *Id.* The grievance was unresolved and submitted to arbitration. *Id.* On December 5, 2008, an arbitrator (the arbitrator) issued an award (the award) in which he found that the Respondent had violated the parties' collective bargaining agreement and, as relevant here, directed the Respondent to vacate the removal and reinstate the affected employee. *Id.* In addition, the arbitrator retained jurisdiction "as to any requests for clarification, interpretation[,] and/or implementation" of the award. Jt. Ex. 1 (Arbitration Award) at 30.

The Office of Personnel Management (OPM) did not appeal the award on the Respondent's behalf,[1] and the Respondent proceeded with reinstating the affected employee. Judge's Decision at 3. Shortly before the affected employee's return date of January 5, 2009,[2] officials at the Respondent's national headquarters (HQ) contacted the Respondent's Office of Internal Affairs (Internal Affairs), which informed the HQ officials that the affected employee was due for a periodic background reinvestigation (PRI). *Id.* at 4. The HQ officials determined that a PRI was necessary in order for the affected employee to have access to the Respondent's computer systems, which they asserted was necessary for the affected employee to perform duties as a Border Patrol agent (agent). *Id.* Accordingly, the HQ officials directed the Respondent not to assign the affected employee agent duties. *Id.* Instead, the Respondent assigned him to perform duties as a mission support specialist, but after a day or two in that position, the Respondent determined that those duties required computer access. *Id.* Accordingly,

1. As discussed further below, only the Director of the OPM could appeal the award on the Respondent's behalf, and only after seeking reconsideration from the arbitrator. At the ULP hearing, the Respondent conceded that OPM did not request reconsideration from the arbitrator. *See* Tr. at 9. However, the Judge did not address, and the record does not indicate, whether the Respondent requested OPM to do so.

2. In this regard, a Respondent witness testified, without dispute, that he contacted Internal Affairs "a few days" before the affected employee's return and was informed of the need to conduct a PRI. Tr. at 128.

the Respondent placed the affected employee on paid administrative leave. *Id.* Subsequently, Internal Affairs conducted the PRI and, in approximately September 2009, informed the Respondent that the PRI was completed and that the affected employee did not pass it. *Id.*

The Union filed a charge, and the GC issued a complaint, alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to fully comply with the award. *Id.* at 1-2.

III. Judge's Decision

The Judge found that the award had clearly directed the Respondent to return the affected employee to his duties as an agent. Judge's Decision at 7-8. In addition, the Judge determined that the Respondent failed to fully comply with the award because it reinstated the affected employee for only two days before placing him in a non-duty status. *Id.* at 7. The Judge found that, while the affected employee was in a non-duty status, he did not have "the opportunity to earn administratively uncontrollable overtime and other types of premium pay or to be considered for training, details or promotion." *Id.* at 4.

In addressing whether the Respondent had a valid justification for failing to fully comply, the Judge stated that there is "little or no Authority precedent on this point, particularly in employee removal cases," but that there is a "substantial body" of Merit Systems Protection Board (MSPB) precedent. *Id.* at 8. In this regard, the Judge found that the MSPB has held that agencies may decline to return reinstated employees to their former positions when the agencies have a "strong, overriding interest" for doing so. *Id.* (citations omitted). The Judge also found that the MSPB has held that agencies are entitled to "special deference" when compliance issues are "entwined with security concerns[,]" and that the MSPB has upheld employee removals when the employees' security clearances have been revoked. *Id.* at 9.

In addition, the Judge found that 5 C.F.R. § 732.201(a) requires agencies to designate as sensitive any position that could have a "material adverse effect on the national security[,]" and that "Critical-Sensitive[]" is one designation for a sensitive position. *Id.* at 10. He also found that the agent position is a "Critical-Sensitive" position and that, under the Respondent's Personnel Security Handbook (the Handbook), "[a]ll employees are subject to a [PRI] to ensure continued suitability for employment." *Id.* The Judge noted that the Handbook addresses PRIs separately from security clearances, and stated that the record does not indicate whether agents are required to have security clearances. *Id.* He also noted that MSPB precedent on which he relied involved security clearances, and he stated that it was "not entirely clear . . . whether the same principles of 'special deference' to executive decisions on security clearances are applicable to cases involving [PRIs]." *Id.* at 11. While acknowledging that PRIs "are not, in and of themselves, security clearance determinations," the Judge determined that, because both security clearances and PRIs raise national security concerns, there was no "meaningful distinction" between them in the context of this case. *Id.*

Further, the Judge determined that agents who have been "off rolls" and return to active duty must pass a PRI before they may access the Respondent's computer systems, "unless they have a current PRI in their files." *Id.* at 12. In this connection, the Judge stated that until the affected employee passed a PRI, "he would not have access to the [Respondent's] computer systems or email, precluding him from performing his duties as a[n] [agent]." *Id.* at 4. In addition, the Judge determined that the affected employee had been in a non-duty status from 2005 until January 2009, and that his previous PRI had been performed in 1997. *Id.* at 12. Thus, the Judge found that the Respondent's "normal security procedures" required a new PRI for the affected employee. *Id.* In addition, the Judge found that the Respondent had not raised the issue of the affected employee's PRI during the arbitration proceedings that resulted in the award "because the need to perform a PRI did not arise" until after the arbitrator directed the Respondent to reinstate the affected employee. *Id.*

Moreover, the Judge found that, in order for the Respondent to fully comply with the award and fully reinstate the affected employee as an agent, the Respondent would have been required to "override or violate the procedures requiring PRIs[]" because "[i]t would have had to give access to the [Respondent's] automated systems (and all the sensitive information that might be contained therein) to a person whose 'continued employment' has been determined not to be 'consistent with the interests of the national security.'" *Id.* (quoting 5 C.F.R. § 732.203). In addition, the Judge determined that directing the Respondent to do so would "not merely review the substance of the PRI determination, but override the PRI entirely." *Id.* Accordingly, the Judge concluded that the Respondent had "compelling and overriding

reasons" for placing the affected employee on administrative leave until he passed his PRI, and in keeping him off active duty when he later failed his PRI. *Id.* at 13. In this connection, the Judge found that after the affected employee failed his PRI, he could not have computer access and, thus, was "unable to perform a significant component of his duties as a[n] . . . [a]gent." *Id.* at 12.

The Judge also found that the Respondent's actions did not constitute a "collateral attack" on the award because the Respondent was not disputing the arbitrator's factual or legal conclusions but, instead, "based its actions on additional facts that did not exist at the time of the arbitration hearing: [the affected employee's] failure to pass his PRI and his consequent inability to perform the duties of a[n] [agent]." *Id.* at 13.

Based on the foregoing, the Judge found that the Respondent did not violate the Statute as alleged, and he recommended dismissing the complaint. *Id.* at 14.

IV. Positions of the Parties

A. GC's Exceptions

The GC asserts that the Judge's factual findings omit relevant evidence in two respects. First, the GC contends that the record supports a "reasonable inference" that, during the arbitration proceedings, the Respondent could have anticipated, and notified the arbitrator of the possibility, that the affected employee would need a PRI in the event that he was ultimately reinstated. GC's Exceptions at 6. Second, the GC argues that the Judge's finding that lack of computer access precluded the affected employee from performing agent duties is "not entirely accurate," because the Respondent could have assigned him administrative duties as an agent, and hearing testimony indicated only that the affected employee could not perform agent duties "efficiently" without computer access -- not that he could not have performed them at all. *Id.*

The GC also asserts that the Judge's findings are "internally inconsistent and arbitrary" because the Judge "effectively equat[ed]" PRIs and security clearances after finding no evidence that agents are required to have security clearances and stating that it was unclear whether agency determinations regarding PRIs are entitled to the same deference as determinations regarding security clearances. *Id.* at 12-13. In addition, the GC argues that the Judge erred by finding that, in order for the Respondent to comply with the award, it would have had to grant computer access to an individual whose continued employment "'*has been determined*'" not to be consistent with the interests of national security. *Id.* at 15 (quoting Judge's Decision at 12 (emphasis added by GC)). In this connection, the GC asserts that, when the Respondent failed to reinstate the affected employee to agent duties in January 2009, no such determination had been made because the affected employee had not yet failed his PRI. *Id.*

The GC also argues that the Judge erred by admitting the Handbook into evidence. *Id.* at 9. In this regard, the GC asserts that the Respondent did not list the Handbook in its prehearing disclosure, as required by § 2423.23 of the Authority's Regulations,[3] but that the Handbook was admitted at the Judge's prompting and over the GC's objection. *Id.* at 9-10. According to the GC, without the Handbook, there is no record evidence to support the Judge's findings regarding the purported "national security" implications of a PRI. *Id.* at 11. Thus, the GC claims that the Judge denied the GC due process because he then "used the Handbook to invent" a national security defense that the Respondent had not presented. *Id.*

Moreover, the GC argues that the Judge erred by relying on MSPB precedent to conclude that the Respondent had a valid justification for failing to comply with the award. *Id.* at 6-7. In this regard, the GC contends that, in the ULP forum, a respondent may not collaterally attack an arbitration award, *see id.* at 14-16, and a party cannot defend its noncompliance with a final and binding arbitrator's award on grounds that could have been raised on review under 5 U.S.C. § 7122, *see id.* at 7. The GC asserts that because "OPM did not appeal . . . [the a]ward, the Respondent has no options left but to comply" with it. *Id.* at 9. Further, the GC contends that the Authority's decision in *United States Department of Transportation, Federal Aviation Administration*, 54 FLRA 480 (1998) (*FAA*), is "directly on point" and precludes the Respondent's defense here. GC's Exceptions at 8. Moreover, the GC argues that, contrary to the Judge's finding, an order directing the Respondent to comply with the award would not require the Authority to review the PRI determination, because the unlawful conduct was placing the affected employee on administrative leave in January 2009, before the PRI was conducted. *Id.* at 13. Nevertheless, the GC requests that the Authority issue an order that includes a direction to reinstate the affected employee. *See id.* at 19. The

3. The pertinent wording of § 2423.23 of the Authority's Regulations is set forth below.

GC also requests a make-whole remedy for the affected employee, as well as a nationwide posting of a notice signed by the highest official of the Respondent. *See id.* at 17-19.

B. Respondent's Opposition

The Respondent asserts that the record supports the Judge's factual findings. Respondent's Opp'n at 2. With regard to whether the Respondent could have informed the arbitrator about the potential need for a PRI, the Respondent contends that the record evidence indicates that, although there was speculation that the affected employee was due for a PRI, the PRI was initiated by Internal Affairs' Personnel Security Division, and the Respondent neither had control over the PRI process nor knew what the outcome of that process would be. *Id.* at 4.

The Respondent also asserts that the Judge properly exercised his discretion in admitting the Handbook into evidence. *Id.* at 8. In addition, the Respondent argues that the Judge did not "invent" a defense for the Respondent, but found persuasive a defense that the Respondent had "repeatedly raised[.]" *Id.* at 9.

Further, the Respondent argues that the Judge correctly determined that there was a compelling reason for the Respondent not to fully implement the award. *Id.* at 4. The Respondent also argues that the Judge correctly determined that the Respondent did not collaterally attack the award because the factors that limited the affected employee's ability to return to duty did not exist at the time of the arbitration hearing. *Id.* at 12. Finally, the Respondent claims that the Judge correctly determined that, in order for the Respondent to comply with the award and fully reinstate the affected employee, the Respondent would be required to "override or violate the procedures requiring PRIs." *Id.* at 11.[4]

V. Analysis and Conclusions

A. The Judge's factual findings are not deficient.

Several of the GC's arguments effectively challenge the Judge's factual findings and his failure to make other factual findings. In determining whether a judge's factual findings are supported, the Authority looks to the preponderance of the record evidence.[5] *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009) (Member Beck concurring).

The GC claims that the evidence supports a "reasonable inference" that, during the arbitration proceedings, the Respondent could have anticipated that the affected employee would need to undergo a PRI if he were ultimately reinstated. However, the Judge found that the Respondent's HQ officials did not become aware of the need for the affected employee to undergo a PRI until *after* the award issued, when they contacted Internal Affairs and were informed that the affected employee was due for a PRI. *See* Judge's Decision at 12. A preponderance of the record evidence supports this factual finding. *See, e.g.*, Tr. at 129 (Respondent witness testified that he did not ask Internal Affairs whether the affected employee was due for next PRI "until after the arbitration award came out"); *id.* at 161 (testimony that, in January 2009, human resources contacted Internal Affairs and asked whether a PRI was needed); *id.* at 162 (testimony that the affected employee "was officially off rolls, so he would not have come up" in the system that notifies the Respondent when an employee's PRI is due); *id.* at 114 & 125 (Respondent witness testified that, although he believed the affected employee "probably" needed a PRI, he "didn't know"); *id.* at 128 (testimony that management contacted Internal Affairs "a day or two" before the affected employee's reinstatement); *id.* at 131 (Respondent witness testified that he was not "privy" to "most of the

4. In addition, the Respondent claims that it acted in accordance with its "reasonable" construction of the award. Respondent's Opp'n at 6-7. However, the Judge rejected the Respondent's claim that it "acted reasonably[,]" Judge's Decision at 7, and the Respondent did not except or cross-except to that finding. Accordingly, we do not address the Respondent's claim further.

5. Member Beck notes that, for the reasons stated in his separate opinions in *Social Security Administration*, 64 FLRA 199, 207 (2009) (Dissenting Opinion of Member Beck), *United States Department of the Air Force, Air Force Materiel Command, Space and Missile Systems Center, Detachment 12, Kirtland Air Force Base, New Mexico*, 64 FLRA 166, 179-80 (2009) (Concurring Opinion of Member Beck), and *United States Department of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Texas*, 63 FLRA 256, 262-63 (2009) (Concurring Opinion of Member Beck), he reviews the Judge's factual findings using a "substantial evidence in the record" standard rather than a "preponderance" standard.

particulars" of the case). In addition, the Judge found that agents who have been "off rolls" and are returning to active duty must pass a PRI in order to gain access to the Respondent's computer systems, "*unless* they have a current PRI in their files." Judge's Decision at 12 (emphasis added). In other words, if an agent has a current PRI in his or her files, then the agent is not required to have a PRI conducted. Thus, it was reasonable for the Respondent to have been unaware, at the time of the arbitration proceedings, that the affected employee needed a PRI before he could be fully reinstated. For these reasons, there is no basis for concluding that the Judge erred in failing to find that, at the time of the arbitration proceedings, the Respondent should have anticipated and raised the possibility that the affected employee might need to undergo a PRI in the ultimate event of his reinstatement.

The GC also challenges the Judge's finding that lack of computer access precluded the affected employee from performing agent duties. *See* GC's Exceptions at 6. In this connection, the Judge stated that until the affected employee passed his PRI, "he would not have access to the [Respondent's] computer systems or email, precluding him from performing his duties as a[n] [agent]." Judge's Decision at 4. However, the Judge also stated that a lack of access to the Respondent's "computer and security systems" after the affected employee failed to pass his PRI resulted in him being "unable to perform a *significant component* of his duties as a[n] . . . [agent]." *Id.* at 12 (emphasis added). Reading the two statements together, it is apparent that the Judge found only that the lack of computer access precluded the affected employee from performing a "significant component" of agent duties, *id.* -- not that it precluded him from performing *any agent duties at all*. Thus, the premise of the GC's argument is misplaced and does not provide a basis for finding that the Judge erred in this regard.

In addition, the GC alleges that the Judge's findings are "internally inconsistent and arbitrary" because the Judge "effectively equat[ed]" PRIs and security clearances after finding no evidence that agents are required to have security clearances and stating that it was unclear whether agency determinations regarding PRIs are entitled to the same deference as determinations regarding security clearances. GC's Exceptions at 12-13. In this connection, the Judge acknowledged that security clearances and PRIs are not the same thing, but found that, in the context of this case, there is no "meaningful" distinction between them. Judge's Decision at 11. The GC does not explain, or provide any basis for finding, that these findings are "internally inconsistent" or "arbitrary." GC's Exceptions at 12. Thus, the GC does not demonstrate that the Judge erred in this regard.

Finally, the GC asserts that the Judge erred in stating that, in order to comply with the award, the Respondent would have had to give computer access to a person whose continued employment "*has been determined*" not to be consistent with the interests of national security. GC's Exceptions at 15 (quoting Judge's Decision at 12 (emphasis added by GC)). According to the GC, at the time when the affected employee was reinstated, such a national security determination had not yet been made. Even assuming that the Judge's use of the phrase "has been determined" is a misstatement, there is no basis for finding that this alleged misstatement is material. In this regard, the Judge also found that the Respondent could not fully comply because the affected employee could not be reinstated to all of his former duties until he passed his PRI, and the GC does not demonstrate that this finding is deficient. Thus, the GC's assertion does not provide a basis for reversing the Judge.

For the foregoing reasons, we find that the Judge's factual findings are not deficient.

B. The Judge did not commit prejudicial procedural errors.

The GC claims that the Judge deprived the GC of due process, and acted contrary to § 2423.23 of the Authority's Regulations, by allowing the Handbook into evidence and then relying on it to "invent" a national security defense that the Respondent had not presented. GC's Exceptions at 11. With regard to the GC's due-process argument, the Respondent -- not the Judge -- raised a national security defense in the first instance. In this connection, the Respondent's prehearing disclosure stated, in pertinent part: "Pursuant to 5 C.F.R. § 732.203, [the affected employee] was required to undergo his [PRI] after being reinstated[,]" and "[b]ecause of [this and other] concerns, the Respondent had a compelling reason to place [the affected employee] on administrative leave after reinstating him as a[n] [agent]." Disclosure at 2. As the Judge stated, 5 C.F.R. § 732.203 addresses "national security." Judge's Decision at 10. Further, in its post-hearing brief, the Respondent again raised concerns regarding the PRI process, and made arguments and cited MSPB precedent regarding the loss of security clearances. *See* Respondent's Post-Hearing Brief at 8, 14-15. Thus, the Respondent raised a national

security defense, separate and apart from the Handbook, and the Judge did not "invent" such a defense for the Respondent. GC's Exceptions at 11.

With regard to whether admission of the Handbook denied the GC due process, during the hearing, after extensive witness testimony regarding the PRI process, the Judge asked the Respondent's attorney whether he intended to admit into evidence "whatever regulation . . . governs these [PRIs]." Tr. at 145. In this connection, the Judge stated that "to the degree that [the Respondent was] essentially raising a defense that the decision to keep [the affected employee] off of active duty was based on the concern that he was not going to pass the [PRI], I think it is relevant to have the regulation itself for me to consider. And so rather than asking a lot of questions of either this or the next witness about all that, having the regulation itself might be more straightforward." *Id.* at 146. During the questioning of the next witness, the Respondent then moved to introduce the Handbook. *Id.* at 151. Although the GC objected to its admission, the Judge did not deprive the GC of the opportunity to ask questions or present evidence or arguments regarding it, and the GC could have made arguments regarding it in its post-hearing brief. Further, as discussed above, the Respondent's pre-hearing disclosure and witness testimony expressly raised and discussed the PRI process. Thus, there is no basis for finding that the GC was prejudiced by the Judge's admission of the Handbook.

With regard to the GC's reliance on § 2423.23 of the Authority's Regulations, that Regulation, entitled "Prehearing disclosure[,]" provides, in pertinent part: "*Unless otherwise directed or approved by the Judge,* the parties shall exchange[] . . . the following items at least [fourteen] days prior to the hearing: . . . (b) *Documents*. Copies of documents, with an index, proposed to be offered into evidence[.] . . ." (emphasis added). Under the plain terms of the Regulation, the Judge had discretion to allow the Respondent to introduce the Handbook, even though it had not been included in the Respondent's prehearing disclosure. Further, it is well established that, under § 2423.31(b) of the Authority's Regulations, the determination of matters to be admitted into evidence is within the discretion of the administrative law judge. *E.g., U.S. Dep't of Veterans Affairs, Golden Gate Nat'l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 959 n.7 (2004) (Chairman Cabaniss dissenting in part). Thus, the Judge did not act contrary to § 2423.23 by admitting the Handbook into evidence.

For the foregoing reasons, we find that the Judge did not commit prejudicial procedural errors.

C. The Judge erred by finding that the Respondent did not violate § 7116(a)(1) and (8) of the Statute as alleged.

Under § 7121(e) of the Statute, a party may challenge an adverse action within the meaning of 5 U.S.C. § 7512 (§ 7512), such as a removal, under either the appellate procedures of the MSPB or the parties' negotiated grievance procedure (NGP) if such matters have not been excluded from the NGP. *U.S. Army, Adjutant Gen. Publ'ns Ctr., St. Louis, Mo.*, 22 FLRA 200, 203-04 (1986) (*Army*). If the action is challenged under the NGP and the matter is submitted to arbitration, then the arbitrator is governed by 5 U.S.C. § 7701(c)(1), pertaining to the appellate procedures of the MSPB. *See id.* at 204.

In addition, § 7121(f) of the Statute (§ 7121(f)) states that 5 U.S.C. § 7703 (§ 7703), which deals with judicial review of final MSPB decisions, also applies to arbitration awards pertaining to matters covered under §§ 7303 and 7512. *See id.* at 204-05. Thus, a party that wishes to appeal such an award may not file exceptions with the Authority. *See id.* at 203. Further, pursuant to the framework for judicial review set forth in §§ 7121(f) and 7703, agencies may not directly obtain judicial review of such awards. *See id.* at 205. Rather, § 7703(d) provides, in pertinent part:

> The Director of . . . [OPM (the Director)] may obtain review of any final order or decision of the [arbitrator] by filing, within [sixty] days after the date the Director received notice of the final order or decision of the [arbitrator], a petition for judicial review in the United States Court of Appeals for the Federal Circuit [(the Federal Circuit)] if the Director determines, in his discretion, that the [arbitrator] erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the [arbitrator's] decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the [arbitrator], the Director may not petition for review of [an arbitrator's] decision under this section unless the Director first petitions the [arbitrator] for a reconsideration of [his or her] decision, and such a petition is denied. . . . The granting of the petition for

> judicial review shall be at the discretion of the Court of Appeals.

5 U.S.C. § 7703(d).

If the Director does not file a timely petition for review of the arbitration award, then the award is considered final and binding. *See Army*, 22 FLRA at 207-08. At that point, a party that fails to comply with the award's unambiguous terms constitutes a ULP. *Id.* at 208. Thus, although the Authority lacks jurisdiction to resolve exceptions to an award regarding a § 7121(f) matter, the Authority may review in a ULP proceeding the alleged noncompliance with such awards. *Id.* at 207. In doing so, as with other awards, the Authority will not allow the respondent to collaterally attack the award. *See id.* at 206. *Cf. FAA*, 54 FLRA 480, 484 (review of arbitration award finding ULP for failure to comply with previous arbitration award); *U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 38 FLRA 99, 107 (1990) (in non-§ 7121(f) cases, claim that award is inconsistent with law, rule or regulation should be raised as an exception to award, and if party fails to do so, then it "must comply" with final award). In this connection, the Authority has held that to allow for such a collateral attack would circumvent congressional intent with respect to statutory review procedures and the finality of arbitration awards. *See Army*, 22 FLRA at 206.

In assessing whether an agency has failed to comply with a final and binding arbitration award regarding a removal, the Authority previously has relied on the fact that the agency failed to request OPM to seek Federal Circuit review of the award. Specifically, in *FAA*, the Authority stated that, following the issuance of an award directing an agency to reinstate a grievant, "[i]f the [a]gency had any concerns about reinstating [the grievant] to [the] duties [of her position] . . . , the [a]gency could have either raised them before [the] [a]rbitrator . . . or asked the Director of OPM to seek review of the award in the Federal Circuit in accordance with [§] 7703(d)." 54 FLRA at 485. As "[t]he [a]gency did neither[,]" the Authority found that the "award became final and binding, and [§] 7122(b) of the Statute mandated that the [a]gency comply with the . . . award." *Id.*

Here, as stated previously, the Respondent became aware of the need to conduct a PRI for the affected employee shortly before his return date of January 5, 2009. In his December 5, 2008 award, the arbitrator had retained jurisdiction "as to any requests for clarification, interpretation[,] and/or implementation of th[e] [a]ward[,]" and did not limit the period of time of his retention of jurisdiction. Arbitration Award at 30. Thus, there is no basis for finding that the Respondent could not have raised its concerns about the PRI to the arbitrator when it became aware of the need to conduct a PRI. There also is no dispute that the Respondent could have requested OPM to petition the arbitrator for reconsideration and, if that was unsuccessful, to petition the Federal Circuit for review. However, there is no claim or record evidence that the Respondent took any of these actions. As such, *FAA* supports a conclusion that the "award became final and binding, and [§] 7122(b) of the Statute mandated that the [Respondent] comply" with it by reinstating the affected employee to agent duties. 54 FLRA at 485. As the Respondent did not comply with the award by reinstating the affected employee to agent duties, we find that the Respondent failed to fully comply with the arbitration award and thereby violated § 7116(a)(1) and (8) of the Statute.

D. We grant the GC's requested remedies in part and deny them in part.

The GC requests an order to reinstate the affected employee. The Authority has found it appropriate to consider "intervening events" in assessing the propriety of requested remedies. *U.S. DoL, Wash., D.C.*, 61 FLRA 603, 605 (2006) (then-Member Pope dissenting in part on other grounds). *See also U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 361 (2009) (Member Beck concurring in part and dissenting in part) (*Davis-Monthan*) ("in considering the remedy for [a] ULP, it is appropriate to take into account the remedies awarded in other appeals processes" such as MSPB proceedings); *U.S. Dep't of Transp. & FAA*, 48 FLRA 1211, 1214 n.2 (1993), *pet. for review denied sub nom., PASS v. FLRA*, 52 F.3d 1123 (D.C. Cir. 1995) (unpublished) (assessment of whether status quo ante relief is appropriate "necessarily may result in consideration of events that have transpired subsequent to, and as a consequence of, a unilateral implementation of a change in conditions of employment").

Here, after the affected employee returned to work and was placed on administrative leave, Internal Affairs conducted, and the affected employee failed, a PRI. There is no claim or record evidence that the failure to pass the PRI resulted from any unlawful conduct by the Respondent. Thus, an intervening event -- the affected employee's failure to pass a PRI -- resulted in the employee being unable

to perform the duties of his position. In these circumstances, we find that a reinstatement remedy is not warranted, and deny the GC's request for such a remedy. Although the GC claims that directing the Respondent to fully comply with the award would not require the Authority to review the PRI determination, directing the Respondent to fully comply with the award and reinstate the affected employee to agent duties would "override the PRI entirely[,]" as the Judge found. Judge's Decision at 12. Accordingly, we reject the GC's argument.

With regard to the GC's request for make-whole relief, the Authority regularly grants such a remedy in ULP cases. *See, e.g., Davis-Monthan*, 64 FLRA at 361; *SSA*, 64 FLRA 199, 205 (2009) (Member Beck dissenting in part on other grounds). The Judge found that while the affected employee was on administrative leave, he did not have "the opportunity to earn administratively uncontrollable overtime and other types of premium pay or to be considered for training, details or promotion." Judge's Decision at 4. The Respondent does not address, and thus does not oppose, the GC's request for these forms of make-whole relief. Accordingly, we grant an appropriate make-whole remedy for the period of time between the affected employee's placement on administrative leave and the time that he failed his PRI in September 2009.[6]

Finally, the GC requests a nationwide posting signed by the highest official of the Respondent. In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *E.g., SSA, Balt., Md. & SSA, Office of Hearings & Appeals, Kan. City, Mo. & SSA, Office of Hearings & Appeals, St. Louis, Mo.*, 60 FLRA 674, 681 (2005) (*SSA*). First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. *Id.* Second, in many cases the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Id.* In applying this test, a relevant factor is whether the national office of a respondent was involved in the statutory violations. *Id.* at 682. *See also U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000) (*IRS*). Where that has been the case, and the Authority has directed a nationwide posting, the Authority also has directed the highest official of the national office to sign the posting. *See, e.g., SSA*, 60 FLRA at 682; *IRS*, 56 FLRA at 914.

The Judge found, and there is no dispute, that the Respondent's national HQ directed the Respondent not to assign agent duties to the affected employee upon his reinstatement. *See* Judge's Decision at 4. In addition, the Respondent does not address, and thus does not oppose, the GC's request for a nationwide posting signed by the highest official of the Respondent's national office. In these circumstances, we grant the GC's request for a nationwide posting signed by the Chief of the Border Patrol.

VI. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with the award issued by Arbitrator Parker Denaco on December 5, 2008 (the Denaco award).

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured them by the Statute.

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

(a) Make whole the employee whose removal was at issue in the Denaco award by paying him backpay, with interest, for all pay that he lost as a result of the Respondent's failure to comply with the Denaco award, through the time of his failure to pass his periodic reinvestigation in September of 2009.

(b) Post at its facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Chief of the Border Patrol, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted.

6. We note that undisputed record evidence indicates that "if an agent is performing his or her responsibilities in the course of th[e] five years [between PRIs], ordinarily that agent just continues his responsibilities while the [PRI] is being done[.]" Tr. at 127. By contrast, if an agent has been "inactive" in the Respondent's computer systems for more than forty-five days, then the agent is "locked out" of the system and must have access restored. *Id.* at 136. Thus, if the affected employee had been continuously performing agent duties, then he would have continued to have access to the computer systems while his PRI was conducted.

Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Boston 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.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Homeland Security, U.S. Customs and Border Protection, Swanton, Vermont, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE RECOGNIZE that the Federal Service Labor-Management Relations Statute (the Statute) requires an agency to take the actions required by an arbitrator's final award.

WE WILL NOT fail and refuse to fully comply with the award issued by Arbitrator Parker Denaco on December 5, 2008 (the Denaco award).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured them by the Statute.

WE WILL make whole the employee whose removal was at issue in the Denaco award by paying him backpay, with interest, for all pay that he lost as a result of the Respondent's failure to comply with the Denaco award, through the time of his failure to pass his periodic reinvestigation in September of 2009.

_____
(Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of the posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.

Office of Administrative Law Judges

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
SWANTON, VERMONT
Respondent

and

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2774
Charging Party

Gerard M. Greene
For the General Counsel

David A. Markowitz
For the Respondent

Patricia T. Nighswander
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On March 3, 2009, the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, Local 2774 (the Union or the Charging Party) filed an unfair labor practice charge against the Department of Homeland Security, U.S. Customs and Border Protection, Swanton, Vermont (the Agency or the Respondent). After investigating the charges, the Acting Regional Director of the Boston Region of the Authority issued a Complaint and Notice of Hearing on December 18, 2009, alleging that the Agency had refused to fully comply with a final arbitration award as required by Sections 7121 and 7122 of the Statute, and that such refusal constituted an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute. The Respondent filed its Answer to the Complaint on January 12, 2010, denying that it refused to comply with the award or committed any unfair labor practice.

A hearing was held in this matter on February 3, 2010, in Burlington, Vermont. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Ross D. Schofield was hired by the Immigration and Naturalization Service (which later merged into the Respondent) in 1997 as a Border Patrol Agent. In February of 2005, he was working as a GS-1896-11 Border Patrol Agent assigned to the Newport, Vermont, Border Patrol Station, which is one of eight stations in the Swanton Sector that covers the U.S.-Canada border in New York and Vermont. At that time, Agent Schofield and two other agents were involved in the apprehension and release of a drug smuggling suspect and the seizure of 60 pounds of marijuana. Jt. Ex. 1 at 8-9. In the weeks after the incident, officials of the Agency, as well as officials of Immigration and Customs Enforcement, the Drug Enforcement Administration and the Newport police, came to believe that the three agents had falsified information on the documents relating to the drug seizure: although the documents prepared by the agents indicated that they had found the marijuana "abandoned" on a roadside and concealed the fact that a suspect in possession of the drugs had initially been arrested, contradictory details began to surface. *Id.* at 10-11. Upon further questioning, Schofield and the other two agents admitted that they had falsified details of their reports in order to utilize the drug suspect as an informant and to provide the suspect with a plausible alibi for losing his drugs. *Id.* at 9-10, 12, 18-20. They believed that such falsification was justifiable based on a prior case at the Newport Station. *Id.* at 10, 13.

[1] The General Counsel noted some corrections to the transcript in its post-hearing brief. While these corrections were untimely under 5 C.F.R. § 2423.21(b)(4), I have independently determined that they, as well as other corrections are appropriate, as follows: 1) Wherever the name "Aguila" occurs, it should be replaced with "Aguilar"; 2) On page 9, line 6, "McCole" should be replaced with "make whole"; 3) On page 75, line 25, "his" should be replaced with "your"; and 4) On page 125, line 17, "OPF" should be replaced with "OPM."

After an investigation, the agents were indicted in November 2005 by a Federal grand jury on a series of charges including conspiracy and the making of materially false statements to Federal officials. Shortly thereafter, Schofield was placed on indefinite suspension by the Agency, based on his indictment. *Id.* at 13. However, the criminal charges against Schofield were dropped by the U.S. Attorney in July 2006, causing the Agency to rescind his suspension, place him on paid duty status and on administrative leave pending further disciplinary investigation. *Id.* The case was presented to the Agency's National Disciplinary Review Board, and in November 2007 the Agency issued a notice of intent to remove Agent Schofield from the Federal service. The Agency characterized his series of false statements as "wrong and deceptive," alleging that he had "jeopardized the mission and significantly damaged the credibility of the CBP/Border Patrol as a law enforcement agency," and that he had "demonstrated complete disregard for the drug interdiction process and the interagency coordination that exists." *Id.* at 14.

The Union filed a grievance on Agent Schofield's behalf, challenging the removal; after conducting a hearing on the grievance, Arbitrator Parker Denaco issued a decision and award on December 5, 2008. Jt. Ex. 1 (the Award). The Union challenged the Agency's removal of Agent Schofield both on the merits of the case and on the ground that the Agency had violated Article 32(G) of the collective bargaining agreement, which requires the Agency to furnish employees with notices of proposed adverse actions "at the earliest practicable date[.]" The arbitrator analyzed prior arbitration precedent between these parties concerning Article 32(G), concluding that the provision is not merely procedural but substantive, thus obviating the need for the grievant to show harmful error from a delay. *Id.* at 23-24. Noting that the Agency proposed Schofield's removal 33 months after the alleged misconduct, or 16 months after the Federal indictment against Schofield was dismissed, the arbitrator determined that the latter period was unjustifiable; thus he concluded that the Agency had violated Article 32(G). *Id.* at 24-25.

Arbitrator Denaco stated that his finding of an Article 32(G) violation was "dispositive of this case", but he went on nonetheless to express reservations concerning the substantive charges against Schofield. *Id.* at 27-28. He found that the Agency did not prove that Schofield knew the actions of his fellow agents were improper or that they had received training on the use of informants. *Id.* at 27. He also cited mitigating factors that might have weighed in favor of a lesser penalty than removal. *Id.* at 28. Based on his conclusion that the Agency had violated Schofield's Article 32(G) rights under the CBA, the arbitrator ordered the Agency to vacate the adverse action against the grievant, to expunge all records referring to the adverse action, and to reinstate the grievant with back pay and benefits from the date of his removal; he further gave Schofield the right to request reassignment out of his current chain of command. *Id.* at 29-30.

Upon receiving the arbitrator's decision and award, the Agency did not appeal, but rather began to implement it. Schofield was put back on active duty on January 5, 2009 and told to report to the Newport Station headquarters. Tr. 17. The parties stipulated that he was paid back pay and benefits from the date of his removal to his reinstatement. Jt. Ex. 3. However, Schofield's service on active duty was short-lived. Officials at the Agency's national headquarters initially directed Swanton Sector's Chief Patrol Agent not to put Schofield in uniform and instead to assign him to administrative duties. Tr. 75, 79, 118. Schofield had been either suspended, removed or on administrative leave since early 2005, and until he passed a periodic background reinvestigation (PRI) he would not have access to the Agency's computer systems or email, precluding him from performing his duties as a Border Patrol Agent.[2] Tr. 115, 162. They were also concerned that Federal prosecutors would refuse to pursue future criminal cases involving Schofield, because Schofield's prior actions in the drug seizure had compromised his credibility and might trigger a "*Giglio*" obligation.[3] Headquarters officials checked with the Agency's Office of Internal Affairs and ascertained that Schofield was due to have a PRI performed. Tr. 118. They considered a variety of positions for Schofield and decided to assign him to the Swanton Sector headquarters as a mission support specialist, but after a day or two in that position, Agency officials determined that there was little or no work that Schofield could do, in light of his inability to access the computer systems; instead, Schofield was placed on (paid) administrative leave, and he has remained in that status since approximately January 7, 2009.

[2] An official of the division within the Office of Internal Affairs that performs employee security clearance investigations and periodic reinvestigations testified that the position of Border Patrol Agent is classified as "critical sensitive" and that all such employees must have a "single scope background investigation" performed every five years. Tr. 150, 154-55; *see also* Resp. Ex. 1.

[3] *Giglio v. United States*, 405 U.S. 150 (1972)(*Giglio*), requires Federal prosecutors to disclose to defense counsel information that bears on the credibility of a government witness.

Schofield was notified by the Agency's Office of Internal Affairs on January 22, 2009, that it was beginning Schofield's PRI. Tr. 161. The result of this process was that Schofield did not "clear" his reinvestigation; that is, he did not pass. Tr. 163. These results were turned over to Agency management in approximately September 2009 to determine what further action would be taken. Tr. 145, 147, 168. At the time of the hearing, Schofield remained on administrative leave, receiving pay and benefits but not working or having the opportunity to earn administratively uncontrollable overtime and other types of premium pay or to be considered for training, details or promotion. Tr. 19-20, 39-40, 45, 46, 51.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel (GC) argues that the Respondent has intentionally refused to comply with the Award, by allowing Agent Schofield to work only for two days before placing him back on administrative leave, a status in which he is unable to earn a variety of premiums or to be considered for promotion, training or details. Although the GC agrees that the Agency paid Schofield full back pay, expunged any references to the adverse action from Schofield's personnel file, and briefly reinstated him to duty status, it argues that this does not constitute full compliance with the Award, citing *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). Because Schofield is not being allowed to perform the duties he performed before his adverse action, and because he is not enjoying many of the benefits of active employment, the clear intent and purpose of the Award is being thwarted.

The General Counsel further submits that the Authority has long held that an agency's failure to comply with a final arbitration award, even in termination cases on which the agency cannot file exceptions under section 7122(a) of the Statute, constitutes an unfair labor practice under section 7116(a)(1) and (8). *U.S. Army Adjutant General Publications Center, St. Louis, Mo.*, 22 FLRA 200 (1986)(*Army Adjutant General*). Once an award has become final and binding, either through the denial of exceptions, the failure to file exceptions, or the Federal Circuit's denial of a petition for judicial review, the Authority will not review the merits of the award in an unfair labor practice proceeding. *Id.* at 206. Accordingly, the GC argues that the Respondent's justifications for putting Schofield on administrative leave are nothing more than collateral attacks on the Award and must be rejected.

The GC recognizes that the Merit Systems Protection Board (MSPB), which directly reviews appeals of agency adverse actions and enforces compliance with its own decisions, will excuse an agency's refusal to reinstate an employee to his former position, notwithstanding a Board decision in favor of the employee and a *status quo ante* remedial order, when the agency shows "that an outside event or determination rendered the appellant incapable of performing the duties of his prior position." *Marcotrigiano v. Dep't of Justice*, 95 MSPR 198, 204 (2003). In *Marcotrigiano*, the Board held that the agency did not have to reinstate an INS investigator to his former position after he was acquitted on charges of pornography and his removal was overturned, because two U.S. Attorneys had advised the employee's supervisors that they would not use him as a witness, based on *Giglio*-type concerns related to his criminal trial. While the Board recognized that the credibility concerns about the employee were related to matters that had been raised in his removal appeal, the Board noted that these concerns had been raised not by the agency itself but by Federal prosecutors. *Id.* at 203-05. The General Counsel argues, however, that *Marcotrigiano* is distinguishable from the instant case, because here the *Giglio* concern was raised by Agency officials, not outside prosecutors, and that it was mere speculation at the time Schofield was removed from duty. Similarly, the GC argues that in January 2009, Agency management could only speculate as to whether Schofield would pass his PRI. Even if Schofield did not pass the reinvestigation, the decision of what action to take against Schofield rests with the Respondent, not the division investigating him. Finally, the GC notes that the Agency's concerns – both those relating to possible *Giglio* problems and those relating to Schofield's inability to pass a reinvestigation – were based on the same conduct as that which was litigated in his arbitration hearing. Thus, the GC argues that the Respondent is improperly attempting to collaterally attack the Award itself, which considered all of the same facts and found that Schofield should be reinstated.

Respondent

The Respondent defends its actions on several grounds. First, it asserts that it fully complied with the Award, arguing that its reinstatement of Schofield on January 5, 2009, fulfilled the requirements of the Award, and that its decision to place him on administrative leave two days later was a distinct and separate action that was justified by the facts of the

case. Citing the case of *Noble v. Dep't of Justice*, 68 MSPR 524 (1995), Respondent asserts that an agency is not prohibited from instituting a subsequent personnel action against an employee after rescinding his prior removal. Citing *U.S. Dep't of the Treasury, IRS, Austin Serv. Ctr., Austin, Tex.*, 25 FLRA 71 (1987), Respondent further argues that its compliance with the Award must be evaluated in terms of whether its construction of the Award was reasonable, and that in the circumstances of this case, it acted reasonably in placing Schofield on administrative leave until his PRI was completed. It noted testimony that Border Patrol Agents cannot perform most of their work without access to the Agency's computer systems, and that employees who have been in a non-duty status for as long as Agent Schofield must pass a PRI before being allowed access to those systems. In this context, the Respondent's removal of Schofield from duty status on January 7, 2009, was a reasonable precaution, based not on the conduct for which Schofield had been removed, but on Schofield's inability to perform the duties of his job until he passed a PRI.

Additionally, the Respondent submits that it had a "strong overriding interest" justifying its refusal to keep Schofield on duty status. *LaBatte v. Dep't of the Air Force*, 58 MSPR 586, 594 (1993). In *LaBatte*, the MSPB upheld an agency's refusal to return an employee to his former position because his security clearance had been revoked; in *Marren v. Dep't of Justice*, 32 MSPR 285, 287 (1987), the Board upheld the agency's revocation of a Border Patrol Agent's government driver's license, despite the fact that the agent's removal for causing a serious car accident in his government vehicle and for related conduct had been overturned. The Respondent also cites the *Marcotrigiano* decision for this same principle. In all of these cases, the Board held that despite prior decisions ordering an employee's reinstatement, the lack of some required job qualification (a government driver's license, a security clearance) justified the agencies' refusal to return the employees to their former jobs. Similarly, Respondent argues here that all its Border Patrol Agents must have passed a PRI in order to access the Agency's computer systems and to perform their duties, and they must also be able to testify in criminal cases against people they investigate. The Respondent submits that Schofield lacked the former qualification when he was reinstated in January 2009, and that they reasonably feared he would not be able to meet the latter qualification.

The Respondent agrees that once an arbitration award is final and binding, as the Award was in this case, it cannot be collaterally attacked. *U.S. Dep't of Transportation, Fed. Aviation Admin., Northwest Mountain Region, Renton, Wash.*, 55 FLRA 293, 296-97 (1999). It insists that it is not attacking the Award here, but rather that an "outside event or determination" rendered Schofield incapable of performing his duties. Resp. Brief at 19, paraphrasing the *Marcotrigiano* decision, 95 MSPR at 204.

Analysis

If this case simply involved the question whether Respondent complied with the Award, it would be fairly straightforward, and it would be resolved in favor of the General Counsel. It is not that simple, however, and requires a consideration of precedent from the MSPB as well as the Authority, ultimately tipping the scales in favor of the Respondent.

As noted by the General Counsel, the Authority has long held that once an arbitration award is final, the parties must comply with it and may not collaterally attack it. *Army Adjutant General, supra*, 22 FLRA at 202. The Respondent recognizes that the Award in this case was final and binding. Resp. Brief at 19. A party's refusal to comply with a final award is an unfair labor practice enforceable by the Authority, even when the Authority lacks jurisdiction (pursuant to section 7121(f) of the Statute) to hear exceptions to the award. *Dep't of HHS, SSA*, 41 FLRA 755 (1991). Where the award is unambiguous, a strict compliance test is employed. *See United States Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1315 (1992). Where the award is ambiguous, the test for compliance is whether the agency's action is consistent with a reasonable construction of the award; *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3, 4 (2003).

In accordance with these precedents, the Respondent argues that it acted reasonably in reinstating Schofield and then putting him on administrative leave, in light of the logistics involved in putting an agent back on the rolls within a short time frame. This argument is premised, however, on the notion that the Award was ambiguous, and I cannot accept that premise. There was nothing ambiguous about the arbitrator's order to reinstate Agent Schofield. Reinstating Schofield for two days and then placing him in a non-duty status was considerably less than full compliance with the Award, and it cannot be rationalized in terms of administrative difficulties in fulfilling the arbitrator's demands. The Agency was not simply looking for a few additional weeks to put Schofield back into a full

duty status;[4] rather, it was citing a new basis for keeping him off duty. Respondent's argument conflates the issue of whether it complied with the Award and the separate issue of whether it had legitimate reasons for refusing to do so. Although, as I explain later, I agree that it was justified in putting Schofield on extended administrative leave, I will not indulge in the illusion that this constituted compliance with the Award.

The Award directs the Respondent, *inter alia*, to reinstate Agent Schofield, to make him whole in regard to pay and benefits, to expunge all records of the adverse action, and not to use those records in the future to detract from Schofield's promotional opportunities or other administrative actions. Jt. Ex. 1 at 29. The Respondent was further directed to grant any request Schofield might make in the subsequent year for reassignment out of his current chain of command. *Id.* The Award is clear in its intent to return Schofield to his original duty status and to enable him to resume his career as a Border Patrol Agent. While he is currently being paid his base salary while on administrative leave, he is not earning administratively uncontrollable overtime (which can routinely amount to a quarter of an agent's base pay) or premiums such as night differential and Sunday pay, and he is not being considered for promotions or career-enhancing details or training. Tr. 19-20, 39-40, 45, 46, 51. The Award clearly intended that Schofield be allowed to work as a Border Patrol Agent and to have the advancement opportunities of other agents, and both these purposes are being frustrated by the Respondent's actions.[5]

The true issue in this case is not whether the Respondent complied with the Award, but whether it had a valid justification for refusing to comply. There is little or no Authority precedent on this point, particularly in employee removal cases, but there is a substantial body of precedent at the MSPB, whose jurisdiction covers most Federal employee removals, and whose case law also applies to arbitration proceedings challenging such removals. Section 7121(e)(2) of the Statute; *see also Cornelius v. Nutt*, 472 U.S. 648, 652 (1985). The Board has long held that while an agency is generally required to return a reinstated employee to his former position, it may refuse to do so when there is "a strong, overriding interest" against doing so. *Payne v. U.S. Postal Service*, 55 MSPR 317, 319-20 (1992). In *Payne*, an employee's removal for mishandling of the mails was overturned, but subsequently he was convicted on criminal charges arising out of the same actions for which he had been removed. The Board noted that the criminal conviction was directly related to the employee's official duties and held that it was "a compelling reason for not returning appellant to active duty status[.]" *Id.* at 320, 321. The Board cited *Burrell v. Dep't of the Navy*, 43 MSPR 174 (1990), where the agency successfully argued that despite an order to reinstate a motor vehicle operator, the employee's convictions for reckless driving and driving under the influence rendered him unfit to transport explosives.[6] Moreover, in *Yokley v. U.S. Postal Service*, 57 MSPR 482, 285-86 (1993) and *Connor v. U.S. Postal Service*, 50 MSPR 389, 392-93 (1991), the Board held that the agency was justified in requiring the employees to undergo fitness for duty examinations as a prerequisite for reinstatement, based on the nature of their prior actions and the length of time the employees had been off duty. The case law in this area was summarized by the Board in *Sink v. U.S. Postal Service*, 65 MSPR 628, 632-34 (1994).[7]

In the *Sink* decision, the Board also noted that agencies are entitled to "special deference" when "the issue of compliance [is] entwined with security concerns." *Id.* at 634, citing *LaBatte*, 58 MSPR at 594. In *LaBatte*, a firefighter holding a sensitive position requiring a security clearance was removed for using cocaine, and while his removal action was pending, the agency suspended his security clearance. The MSPB overturned the removal and ordered him

[4] *See, e.g., Dep't of HHS, SSA*, 22 FLRA 270, 282-84 (1986).

[5] In analogous situations, the MSPB has held that placing an employee on administrative leave following his reinstatement is not full compliance with a reinstatement order. *Special Counsel v. Dep't of Transportation*, 72 MSPR 104, 107 (1996); *Rauccio v. U.S. Postal Service*, 44 MSPR 243, 245 (1990).

[6] In *Burrell*, the agency agreed to place the appellant in a lower position, but in *Payne*, the agency's insistence that it had no other position for the appellant was upheld by the Board.

[7] The Board has also held that an agency's concern (pursuant to the Supreme Court's 1972 *Giglio* decision) that prosecutors would not allow an employee to testify in court may justify its refusal to place an employee into a job that requires him to appear in court. *Marcotrigiano, supra.* In our case, Respondent cites this as an additional justification for its refusal to put Schofield back onto active duty. But in *Marcotrigiano*, the agency's concern was based on letters from two U.S. Attorneys' offices that they would not call the appellant as a witness. 95 MSPR at 202. In the instant case, no prosecutors have raised *Giglio* concerns about Schofield to the Agency, and the Agency's fears are thus speculative to this point. Accordingly, I do not consider this to be a sufficient reason to keep Schofield off active duty, and I do not discuss it further.

reinstated, but in a subsequent compliance proceeding it held that the agency was justified in placing him in another job until his security clearance was reinstated. "The lack of a security clearance constitutes a compelling reason not to return the appellant to his Firefighter position." 58 MSPR at 595. *See also King v. Dep't of the Navy*, 98 MSPR 547, 555 (2005).

In *LaBatte*, the appellant's return to his old job was merely delayed, but the Board has also upheld the outright removal of employees due to the revocation of their security clearance. *See, e.g., Payne, supra*, and *Egan v. Dep't of the Navy*, 28 MSPR 509, 522 (1985), which was ultimately affirmed by the Supreme Court in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)(*Egan*). Similarly, in *Blagaich v. Dep't of Transportation*, 90 MSPR 619 (2001), the agency removed an air traffic control specialist (a position requiring a security clearance) after he was criminally convicted on several unspecified charges. An arbitrator reduced his removal to a suspension and ordered him reinstated, but after receiving the arbitration decision the agency revoked his security clearance based on the same underlying misconduct and removed him once again. Despite the prior arbitration decision, the Board refused to apply the doctrine of *res judicata* or to overturn the employee's removal. *Id.* at 623-24. It held that the initial removal had been based on the misconduct leading to his criminal conviction, while the subsequent removal was based on separate and distinguishable grounds: his loss of the security clearance that was required for his job. *Id.* Pursuant to the Supreme Court's decision in *Egan, supra*, 484 U.S. at 530, the Board stated that it could not review the merits of a decision to revoke a security clearance. In light of the employee's loss of his security clearance, the Board held that his removal was valid. *Blagaich*, 90 MSPR at 626. Finally, the Board held in *Blagaich* that the agency was not required to place the employee in a nonsensitive position. Citing *LaChance v. Jowanowitch*,144 F.3d 792, 793 (Fed. Cir. 1998), the Board found no statute, agency regulation or other evidence that the employee had a right to reassignment to a nonsensitive position. As in *LaChance*, Blagaich had been hired for a position requiring a security clearance, and once he lost that clearance he could not perform his job. 90 MSPR at 626. *See also Lyles v. Dep't of the Army*, 864 F.2d 1581, 1583 (Fed. Cir. 1989).

In the case at bar, Schofield was employed as a Border Patrol Agent, which is designated by the Agency as a "Critical-Sensitive" position, which requires employees to undergo periodic reinvestigation every five years. Tr. 155. *See also* Resp. Ex. 1 at 9, 16 (Personnel Security Handbook, HB 1400-07, December 2006) and 5 C.F.R. §§ 732.201(a) and 732.203. 5 C.F.R. § 732.201(a) provides:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.203 requires periodic reinvestigations of all Critical-Sensitive employees every five years and further states: "The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security."

Pursuant to the above regulation, Chapter 1, Section 4 of the Agency's Personnel Security Handbook provides, in regard to Position Sensitivity Designation, "CBP [Customs and Border Protection] positions are designated High Risk Public Trust or Critical-Sensitive National Security." Resp. Ex. 1 at 9. It defines Critical-Sensitive positions as "hav[ing] the potential for causing exceptionally grave damage to national security." *Id.* Later, it states: "All employees are subject to a periodic reinvestigation (PRI) to ensure continued suitability for employment." *Id.* at 16.

It should also be noted that the definition section of the Personnel Security Handbook contains a separate definition for "Security Clearance" than for "Position Sensitivity Designation," (*Id.* at 10) and it devotes separate chapters for periodic reinvestigations and for security clearances. It appears that while all CBP employees are designated as either High Risk Public Trust or Critical-Sensitive National Security positions, and that Border Patrol Agents are designated as Critical-Sensitive National Security, not all CBP employees are required to have security clearances. *See* Resp. Ex. 1 at 19. The record does not indicate whether Border Patrol Agents are required to have a security clearance.

The *Egan, LaBatte, Blagaich* and *LaChance* decisions cited above all, involve the removal of employees from, or reinstatement to, positions requiring a security clearance. Pursuant to *Egan*,

reviewing agencies and courts are prohibited from examining the substance of an agency decision to revoke a security clearance. 484 U.S. at 530. It is not entirely clear, based on the evidence of record and the case law, whether the same principles of "special deference" to executive decisions on security clearances are applicable to cases involving periodic reinvestigation. *Sink*, *supra*, 65 MSPR at 634.

The Authority has applied the holding and underlying principles of *Egan* in a variety of contexts, although not in circumstances analogous to the instant case. Pursuant to *Egan*, it stated in *United States Information Agency*, 32 FLRA 739, 745 (1988), that an arbitrator may not review the merits of an agency's security clearance determination. In *IFPTE, Local 3*, 57 FLRA 699, 700 (2002), the Authority stated that it "has consistently indicated that proposals which would permit arbitrators to review the merits of security clearance determinations would not be negotiable under *Egan*." Yet it has also held that *Egan* "does not foreclose examination of other issues not related to the merits of an agency's clearance determination[.]" *AFGE, Local 1923*, 39 FLRA 1197, 1205 (1991). Accordingly, in *Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174 (2000), the Authority held that an agency committed an unfair labor practice when it suspended several employees' security clearances in retaliation for lawful picketing. The Authority reasoned that it was not barred under *Egan* from making such a determination, as the agency had stated unequivocally that it suspended the employees' security clearances because of their picketing. Thus, the Authority said it did not need to examine the substance of the agency's security clearance decision in order to find an unfair labor practice.

Although the PRIs performed by the Respondent's Office of Internal Affairs are not, in and of themselves, security clearance determinations, it is clear from the quoted language of the regulation and the Agency's handbook that a PRI directly involves questions of national security. 5 C.F.R. part 732, on which the classification of the position of Border Patrol Agent as Critical-Sensitive is based, is entitled "National Security Positions," and by definition an employee holding a Critical-Sensitive position may have "a material adverse effect on the national security[.]" 5 C.F.R. § 732.201(a). The record in our case does not contain any substantive information about the PRI performed on Agent Schofield in the months prior to the hearing, but a determination that he failed the PRI inherently indicates that his "continued employment . . . in a sensitive position is [not] clearly consistent with the interests of the national security." 5 C.F.R. § 732.203. In these respects, and in the limited context of this case, it is difficult to discern any meaningful distinction between the failure to pass a PRI and the revocation of a security clearance. Both Deputy Division Chief Viens and Respondent's Internal Affairs official testified that agents returning to a duty status cannot have access to the Agency's computer and security systems until they have passed a PRI, and as a result they would not be able to perform the duties of their job. Tr. 115, 162. This is not a mere technicality or personnel rule, but an issue that directly involves national security. The classification system that has been established within the Executive Branch to protect national security, as described by the Supreme Court in *Egan*, 484 U.S. at 527-30, is indistinguishable from the Respondent's system that has been outlined in the present case requiring Border Patrol Agents to pass Periodic Reinvestigations in order to demonstrate the continued ability to perform the duties of their jobs. Accordingly, if the Authority is asked to compel an agency to reinstate an employee to a Critical-Sensitive position, it should not do so if this would require the Authority to evaluate the substance of a PRI determination.

Arbitrator Denaco ordered the Respondent to reinstate Schofield as a Border Patrol Agent. The issue of Schofield's PRI was not raised in that proceeding, because the need to perform a PRI did not arise until Schofield was ordered to be reinstated. Schofield had been in a non-duty status from 2005 to January 2009. The record establishes that Border Patrol Agents who have been "off rolls" and are returning to active duty must pass a PRI before having access to the Agency's computer systems, unless they have a current PRI in their files. Tr. 115, 162. Schofield's last PRI had been performed in 1997, and a lesser form of investigation was performed in 2003. Tr. 162-3. Thus the Agency's normal security procedures required a new PRI to be performed for Schofield, and the Agency followed these procedures in initiating such a PRI in January 2009. Several months later, in approximately September 2009, the PRI was completed, and Schofield did not pass. Tr. 147, 168. As a result, Schofield has not had access to the Agency's computer and security systems, and is unable to perform a significant component of his duties as a Border Patrol Agent. Tr. 115, 168.

In order for the Respondent to reinstate Schofield fully as a Border Patrol Agent in January 2009, and to comply with the Award, it would have had to override or violate the procedures requiring PRIs. It would have had to give access to the Agency's

automated systems (and all the sensitive information that might be contained therein) to a person whose "continued employment" has been determined not to be "consistent with the interests of the national security." 5 C.F.R. § 732.203. As the *Egan* court stated with regard to security clearances, the process is "an attempt to predict his possible future behavior and to assess whether . . . he might compromise sensitive information. . . . Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." 484 U.S. at 528-29. Needless to say, neither I, nor the Authority, possess the expertise necessary to decide whether Schofield should be allowed access to the Agency's sensitive information. Placing Schofield in his former position as a Border Patrol Agent, and affording him all the career opportunities to which an agent is entitled, would require the Agency to assume a national security risk that its Office of Internal Affairs determined was unacceptable. Such an order would not merely review the substance of the PRI determination, but override the PRI entirely.

On the basis of *Egan* and related Authority and MSPB precedent, I conclude that the Respondent was justified in placing Schofield on administrative leave until he passed a PRI. Although Internal Affairs had not yet begun its PRI on Schofield when he was reinstated on January 5, 2009, Agency officials checked and learned that Schofield was due to have a PRI in order to return to full duty status, and the PRI was initiated later that month. Tr. 114, 118, 134, 147, 161. In these circumstances, I find that the Respondent had compelling and overriding reasons to keep Schofield off active duty until he passed his PRI. Since he subsequently failed the PRI, the Respondent was justified in keeping him off active duty.

Contrary to the assertion of the General Counsel, Respondent's actions in this case do not represent a collateral attack on the Award. Respondent has not disputed here either the factual or legal conclusions of the arbitrator, but rather it has based its actions on additional facts that did not exist at the time of the arbitration hearing: Schofield's failure to pass his PRI and his consequent inability to perform the duties of a Border Patrol Agent. The MSPB made a similar analysis in *Blagaich*, *supra*, 90 MSPR at 623-24, and in a somewhat different context in *Marcotrigiano*, *supra*, 95 MSPR at 203-05. I believe the reasoning is applicable here as well. The arbitration addressed the proposed removal of Schofield based on his conduct in 2005; Respondent's action placing him on administrative leave in 2009 was based on Schofield's inability to perform the duties of his job until he passed a PRI. This is a separate and independent basis for taking action against Schofield, and this distinguishes it from cases such as *U.S. Dep't of Transportation, Fed. Aviation Admin.*, 54 FLRA 480 (1998). Respondent is not claiming that Arbitrator Denaco's Award is contrary to law or regulation. Rather, it is arguing that once Schofield became eligible for reinstatement in January 2009, a basic requirement of his position was passing a PRI. Until he passed the PRI, he could not perform the duties of his job because he did not have access to basic information necessary for his work; after he failed the PRI, his inability to work as a Border Patrol Agent was further established. As in *Blagaich* and *Marcotrigiano*, Respondent's actions concerning Schofield in 2009 were based on facts and events separate from those decided by Arbitrator Denaco.

This does not mean that Agent Schofield is without recourse in seeking to regain his job. There may be internal Agency procedures for him to appeal the outcome of his PRI; moreover, the Agency will have to institute an adverse action against him if it wishes to change his status as an employee on administrative leave and to remove him permanently from his position, thereby entitling him to statutory appeal procedures. This case also does not address whether there are other jobs that Schofield can perform or whether the Agency is required to find such a position for him. The current decision simply means that the FLRA is not the appropriate forum for overturning the determination of an employee's national security-based periodic reinvestigation.

For all of these reasons, I conclude that the Respondent did not commit an unfair labor practice when it removed Schofield from active duty in January 2009. Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, September 29, 2010.

RICHARD A. PEARSON
Administrative Law Judge