**65 FLRA No. 200**

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
(Agency)

and

PROFESSIONAL AIRWAYS
SYSTEMS SPECIALISTS
(Union)

0-AR-4267

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DECISION

June 29, 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 matter is before the Authority on exceptions to the final award of Arbitrator Suzanne R. Butler filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.[1]

In her final award, the Arbitrator ordered that the Agency immediately provide the Union with all of the information it had requested or "affirmatively show cause why specific parts of said information cannot be provided." Final Award at 20. For the reasons that follow, we deny the Agency's exceptions in part and dismiss them in part.

1. The Union also filed a motion to dismiss the Agency's exceptions because the Agency failed to serve the Union with a copy of the attachments to the Agency's exceptions. In response, the Agency timely re-served a copy of the attachments to its exceptions. Therefore, as the procedural issue underlying the Union's motion has been resolved, we deny the Union's motion.

## II. Background and Arbitrator's Awards

### A. Interim Award

In preparation for contract negotiations with the Union, the Agency commissioned a market survey from a private company (the contractor) comparing salaries of Agency employees to those of private sector employees doing comparable work. Interim Award at 5. The Union filed an information request seeking a copy of the actual survey, identification of the methodology used in conducting the survey, identification of the specific Agency positions and the private sector positions that were analyzed in the survey, and a copy of the contract between the Agency and the contractor. *Id.* at 9. When the Agency did not provide the requested information, the Union filed a grievance. *Id.* at 10-11. The parties were unable to resolve the grievance and an arbitration hearing was conducted.

The Arbitrator issued the interim award upholding the grievance and finding that the Agency improperly failed to provide the Union with the requested information. *Id.* at 34; Final Award at 4. The Arbitrator found the requested information relevant because, among other things, the Union had a particularized need for information regarding pay bands, as the CBA required the Agency to conduct annual pay band reviews. Interim Award at 28. The Arbitrator noted that the Agency had an interest in not disclosing this information due to the confidentiality restrictions contained in its agreement with the contractor. *Id.* at 28-29. However, the Arbitrator found that the Union's particularized need for the information prevailed because the Agency did not sufficiently explore the possibility of providing the Union with sanitized or redacted information. *Id.* at 29.

The Arbitrator directed that the parties "cooperate immediately in an effort to find alternative means for providing the requested information to the Union." *Id.* at 34. She also retained jurisdiction for ninety days over any disputes regarding implementation of the remedy. *Id.*; Final Award at 5.

### B. Final Award

In response to the Arbitrator's interim award, the Agency sent the Union eighteen pages of information. Final Award at 5, 16. The Union e-mailed the Agency that it did not understand the information the Agency provided and requested a meeting. *Id.* at 5. When the Agency did not respond,

the Union e-mailed the Agency again. *Id.* When the Agency still failed to respond, the Union contacted the Arbitrator and asked her to assert her retained jurisdiction. *Id.* at 6. The Arbitrator suggested a conference call and/or a face-to-face meeting. *Id.* This was within the ninety-day period during which the Arbitrator had retained jurisdiction. *Id.*

The Agency responded to the Arbitrator by stating that, because the Arbitrator had already sent the Agency her bill, her contract with the Agency was fulfilled and the interim award was final. *Id.* The Agency claimed that it had no authorization to expend additional funds on this matter and that there was no contract in place to cover the Arbitrator's fee for any additional services. Moreover, the Agency argued that the Arbitrator did not need to perform any additional services because the Agency was in compliance with the Arbitrator's award. *Id.* The Agency also claimed that it did not normally maintain the market information the Union had requested. Finally, the Agency claimed that, because the parties had entered into a new collective bargaining agreement covering employee compensation, the grievance regarding its failure to provide information relating to the market survey was moot. *Id.* at 6-7.

At this point, the Arbitrator again suggested a conference call with the parties. The Union responded by sending a letter to the Arbitrator stating that it did not "believe that an agency can override an arbitrator's express retention of jurisdiction by simply writing a check." *Id.* at 7. Therefore, it informed the Arbitrator, it had filed an unfair labor practice (ULP) charge. The ULP charge alleged that the Agency failed to recognize the Arbitrator's jurisdiction and refused to meet with the Arbitrator and the Union to resolve its lack of compliance with the award. *Id.*

After receiving the Union's letter, the Arbitrator informed the parties that she was holding the case in abeyance. *Id.*

A Regional Director of the Authority subsequently declined to issue a ULP complaint, stating that the award was not final and binding because the Arbitrator had directed the parties to develop an appropriate remedy on their own. *Id.* at 7-8. The Regional Director stated his view that the Agency's alleged refusal to participate in the arbitration proceeding was not a ULP because, when one party refuses to participate, an arbitrator has the authority to proceed ex parte on all matters properly before him or her. *Id.* at 8.

At this point, the Union requested that the Arbitrator take the case out of abeyance and assert her retained jurisdiction. *Id.* at 8-9. The Agency responded by claiming that it had closed out its contract with the Arbitrator, that her interim award had become final ninety days after it was issued, and that this post-award activity was not within the terms of her contract. *Id.* at 9. The Agency also reiterated that it was in compliance with the interim award and claimed that the Arbitrator was functus officio. *Id.*

The Arbitrator responded by informing the parties that she continued to retain jurisdiction over all disputes relating to remedy. *Id.* She stated that the Agency's functus officio argument was inapposite because an award does not become final if an arbitrator directs the parties to create a remedy. *Id.* at 9-10. The Arbitrator also informed the parties that, since the Agency was refusing to participate, she would exercise her authority to proceed ex parte and issue a final award. *Id.* at 10. Lastly, the Arbitrator indicated that invoices for her services would continue to be split equally between the parties. *Id.*

Absent a joint submission due to the Agency's refusal to participate, the Arbitrator framed the issue in the final award as follows: "Did the Agency fully comply with the [Interim] Award . . . ? If not, what shall be the remedy?" *Id.* at 2.

First, the Arbitrator examined the Agency's argument that she did not retain jurisdiction and that the interim award became final either on the date of the Arbitrator's invoice or ninety days after the award was issued. *Id.* at 14-15. The Arbitrator found these arguments unpersuasive. She determined that the interim award had not become final because she had not determined a remedy but rather remanded the matter to the parties so they could create a mutually acceptable remedy. *Id.* at 15. In addition, the Arbitrator noted the Union's request that she reassert her jurisdiction within the ninety-day period during which she specifically retained such jurisdiction. *Id.*

Next, the Arbitrator considered the Agency's claim that she was functus officio. She noted that the Authority will deem an award final if an arbitrator specifies a remedy but retains jurisdiction regarding any disputes that may arise over its implementation. *Id.* at 16. However, she also noted that the Authority will not find an award final if the arbitrator retains jurisdiction over the nature of the remedy. *Id.* The Arbitrator stated that, in this case, she had clearly done the latter.

The Arbitrator then considered the grievance's merits. As to whether the Agency satisfied the interim award's direction that the Agency supply the Union with the requested information, she noted that it was not unreasonable for the Agency to take two weeks to provide information to the Union. However, she found that the documents the Agency produced were not responsive and therefore did not establish its "reasonable, good faith 'cooperation'" with the Union, within the meaning of the interim award. *Id.* at 17 (quoting Interim Award at 34).

The Arbitrator recognized that the Agency provided eighteen pages of actual data to the Union. However, she found that this did not constitute compliance on the part of the Agency because the data was devoid of meaning without an explanation, which the Agency failed to provide. *Id.* at 18. Moreover, the Arbitrator recognized that the Union made several requests for explanatory meetings but the Agency never responded.

The Arbitrator similarly rejected the Agency's claim that there is no longer a need for the requested information because the parties have signed a new collective bargaining agreement. The Arbitrator found that market survey information relates to the bargaining unit members' pay bands, which the CBA requires the parties to review every year. *Id.*

Therefore, the Arbitrator ordered the Agency to provide the Union with the requested information immediately or "affirmatively show cause why specific parts of said information cannot be provided." *Id.* at 20. The Arbitrator also directed the Agency to meet with the Union to explain the information already provided and to post a notice "acknowledging that the Agency violated the Statute and the CBA by failing to provide the requested information and assuring employees of the Agency's intention to comply with the Statute and the CBA henceforth." *Id.*

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency argues that the award fails to draw its essence from the CBA because the Union waited too long to file its grievance, thereby missing the deadline set forth in the CBA. The Agency claims that it informed the Union in 2000, 2002, and 2005 of its position regarding whether the information at issue could be provided. The Agency also cites Article 5, Section 9, Step 1 of the CBA, which states that a party has fifteen days from the date of the event giving rise to the incident to submit a grievance. Exceptions at 10.

In addition, the Agency claims that the Arbitrator did not have the authority to issue a second award because she was functus officio. *Id.* at 8. The Agency alleges that the Arbitrator only had jurisdiction for ninety days after the issuance of her interim award. *Id.* at 5. It also claims that it fully complied with the Arbitrator's interim award and subsequently paid her for its share of the cost of her services, as required by the CBA. *Id.* at 3, 7. Therefore, the Agency claims, the Arbitrator's final award exceeded the limits of her contractual authority. *Id.* at 2.

The Agency also argues that the Arbitrator exceeded her authority in the arbitration proceeding. In this connection, the Agency claims that the portion of the remedy directing it to post a nationwide notice was never previously raised before the Arbitrator or discussed by the parties. *Id.* at 13.

Repeating an argument it made before the Arbitrator, the Agency further excepts to the award's remedy that the Agency provide the Union with the information the Union requested because it claims the information is proprietary information held by the contractor. *Id.* at 14-15. The Agency argues that there are restrictions on the release of proprietary information that are similar to restrictions on the Federal Government's dissemination of copyrighted material. *Id.* at 17. The Agency also claims that requiring it to provide this information to the Union would cause the contractor and other companies that perform market-based surveys to exclude the Federal Government from participating. This, the Agency argues, would force the Federal Government to devise its own system for determining pay raises, which would cost a significant amount of money. Therefore, the Agency claims, requiring it to provide the Union with the requested information would interfere with management's right to contract out for services in the most cost-effective manner. *Id.* at 15. The Agency also contends that it does not have to provide the Union with the requested information because the Union has not proven that it has a particularized need for such information. *Id.* at 20. The Agency claims that there is no particularized need because the parties have already agreed to a new CBA that resolves the issues between the parties concerning pay. *Id.* at 20-21.

Finally, the Agency argues that it cannot provide the Union with the requested information because the information is held by the contractor. *Id.* at 20.

Therefore, the Agency alleges, the information is neither "readily" available to the Agency nor maintained by it. *Id.*

B. Union's Opposition

Regarding the Agency's arbitrability argument, the Union claims that its failure to file a grievance in 2000 or 2004 has no relevance to the grievance filed here because different information was involved. Opp'n at 16.

The Union also claims that the Arbitrator was not functus officio when she issued her final award. *Id.* at 11. In support, the Union points out that the interim award directed the parties to fashion a remedy and the Arbitrator retained jurisdiction for ninety days to resolve any remedy-related disputes. *Id.* at 11-14.

The Union interprets the Agency's argument that it cannot provide the requested information because it is proprietary information held by a private company as a contrary to law claim. However, the Union argues that the Agency never specifies which section of the Statute it claims the award violates. *Id.* at 14. Furthermore, the Union contends, if the Agency claims that certain information is restricted from disclosure, the Agency should at least specify which information cannot be divulged and provide its rationale. *Id.* at 15. This, the Union claims, would also satisfy the Agency's duty to consider alternative forms and means of disclosing the information.

The Union also argues that it has a particularized need for all of the information it requested. *Id.* at 24-25. In support of this argument, the Union notes that the parties are still following the 2000 CBA. Therefore, the Union claims, the information will help the Union with the present negotiations. *Id.* at 24. In addition, the Union argues, the information will assist it in preparing for future negotiations. *Id.* at 24-25. Also, the Union contends, this information may become the basis for future grievances concerning the propriety of the January 2005 pay adjustments, particularly in that some bargaining unit employees have been denied a pay increase. *Id.* at 25.

Finally, the Union asserts that the Agency's argument that the Agency does not maintain the information is meritless. *Id.* at 23-24. The Union claims that the Agency cannot argue that the information is not in its possession when the Agency relied on the information to create a summary of the market survey. *Id.* at 24.

## IV. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination is not deficient.

The Agency argues that the final award does not draw its essence from the CBA. Exceptions at 9. The basis for the Agency's argument is that the Union's grievance is untimely because the Union had ample notice of the Agency's position that the requested information is proprietary. *Id.* at 9, 14. Specifically, the Agency claims that it advised the Union of this during negotiations in 2000, 2002, and 2007. *Id.* at 9-10. The Agency references Article 5, Section 9, Step 1 of the CBA as allowing either party to submit a grievance within fifteen days from the time of the event giving rise to the grievance. *Id.* at 10. Therefore, the Agency argues, since it previously informed the Union of its position regarding the proprietary nature of the information and the Union did not file a grievance at that time, the Union is contractually precluded from doing so now. *Id.* at 10-11. For this reason, the Agency claims that the award fails to draw its essence from the CBA. *Id.* at 11.

An arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural-arbitrability of that grievance. *United Power Trades Org.*, 63 FLRA 208, 209 (2009). The Authority generally will not find an arbitrator's ruling on the procedural-arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). In addition, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See U.S. EEOC*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

Here, the Arbitrator found that the Union's grievance was timely filed under the CBA. This finding constitutes a procedural-arbitrability determination. *See id.* As the Agency's exception directly challenges this procedural-arbitrability determination, we deny this exception.

B. The Arbitrator was not functus officio.

The Agency argues that the Arbitrator was precluded from issuing a final award because the Arbitrator was functus officio. Exceptions at 8. Under the principle of functus officio, once an arbitrator has resolved the matter submitted to arbitration, the arbitrator is without further authority. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 574, 576 (2010) (*FAA*); *AFGE, Local 2172*, 57 FLRA 625, 627 (2001). Unless an arbitrator retains jurisdiction after issuance of the award, the arbitrator has no authority to take any further action without the joint request of the parties. *See FAA*, 64 FLRA at 576. However, where an arbitrator expressly retains jurisdiction to resolve disputes over interpretation or implementation of a remedy, the arbitrator may issue a supplemental award resolving such disputes. *See AFGE, Local 1156 & Laborers Int'l Union, Local 1170*, 57 FLRA 602, 603 (2001).

Here, the Arbitrator's interim award directed the parties to explore alternative means for providing the requested information to the Union and the Arbitrator specifically retained jurisdiction to resolve any disputes over the implementation of this remedy. Furthermore, the Agency provides no authority to support its allegation that the interim award became final because the Agency issued the Arbitrator a check.

As the Arbitrator expressly retained jurisdiction to resolve disputes over the implementation of her remedy, she was not functus officio. Therefore, we deny this exception.

C. The Arbitrator did not exceed her authority by addressing issues not contained in the grievance.

The Agency claims that the Arbitrator's remedy directing the Agency to post a notice acknowledging that it violated the Statute "was never mentioned or discussed by the parties[]." Exceptions at 13-14. We construe this as an allegation that the Arbitrator exceeded her authority by ordering a remedy that was not requested by the Union.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

The Arbitrator did not err in requiring the Agency to post a notice. Even though the parties never addressed a notice posting as a potential remedy, Authority precedent gives arbitrators broad discretion to fashion remedies. *See, e.g., U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 47 FLRA 98, 101 (1993). Here, the Arbitrator framed the issue as encompassing fashioning of an appropriate remedy. Furthermore, the Authority has specifically upheld an arbitrator's order of a notice posting as a remedy. *See, e.g., Gen. Servs. Admin.*, 53 FLRA 925, 933 (1997) (upholding arbitrator's remedy of a notice posting for agency's failure to provide union with notice of and opportunity for representation at settlement negotiations).

Accordingly, we deny this exception.

D. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The Agency has not met its burden to prove that the award should be set aside as contrary to law because it requires the Agency to provide the Union with proprietary information.

The Agency claims that it cannot furnish the requested information to the Union because the information is proprietary. We construe this as an exception that the award is contrary to law.

The Agency's understanding of the Arbitrator's awards is incorrect. Neither award specifies that the Agency's only recourse is to provide the Union with the requested information. The final award directed the Agency either to do so or to "affirmatively show cause why specific parts of said information cannot be provided." Final Award at 20. Similarly, the interim award directed that the parties "cooperate immediately in an effort to find alternative means for

providing the requested information to the Union." Interim Award at 34. The interim award then specified that such means could include sanitization or redaction of protected information and/or attempting to obtain permission from the contractor to disclose the requested information. *Id.* Such a misconstruction of the award does not constitute a basis for finding the award contrary to law. *See, e.g., AFGE, Local 900*, 63 FLRA 536, 538-39 (2009) (because excepting party misinterpreted award, no basis was provided for finding that award was contrary to law).

Furthermore, the Agency has not provided a legal basis for its claim that it cannot be compelled to disclose proprietary information to the Union. Section 7114(b)(4) of the Statute states that an agency must furnish information to the exclusive representative involved "to the extent not prohibited by law." Although the Agency argues that it cannot be made to furnish the requested information to the Union, the Agency does not identify any statute, regulation, or appropriate judicial or administrative precedent that prohibits it from furnishing the requested information. *See U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 50 FLRA 544, 547 (1995) (finding that nothing in statute cited by agency prohibited agency from disclosing proprietary information that Union requested).[2]

For these reasons, we deny this exception.

2. The Agency has not met its burden to prove that the award should be set aside as contrary to law because the Union has not shown a particularized need for the requested information.

The Agency argues that the Union did not prove it had particularized need for the information it requested because the parties have already agreed to a new CBA that resolves the issues between the parties concerning pay.

Where the parties are unable to agree on whether, or to what extent, requested information must be provided and the matter is presented for adjudication, each party must establish its reasons for requesting and denying a request for information. *E.g., U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Del Rio, Tex.*, 51 FLRA 768, 774 (1996); *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 681 (1995). The Authority will find that an agency has unlawfully withheld information if the union has established a particularized need for the information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need.

The Arbitrator found that the Union established it had particularized need for the requested information. Specifically, the Arbitrator found that, even though the parties had agreed to a new CBA, the requested market survey information relates to the bargaining unit members' pay bands, which the CBA requires the parties to review every year. In its exceptions, the Agency reiterates the argument it made to the Arbitrator, that the Union has not proven that it has a particularized need for the information because the parties have already agreed to a new CBA that resolves the issues between the parties concerning pay. However, the Agency does not dispute any of the Arbitrator's factual findings upon which she bases her determination that the Union has proven a particularized need for the information. Furthermore, although the Agency argues that its countervailing interest in the nondisclosure of the information is that the information is proprietary, the Authority has rejected that premise. *See supra* Section IV.D.1. Therefore, we find that the Agency's contrary to law argument concerning particularized need does not establish a basis upon which to find the Arbitrator's award deficient.

Accordingly, we deny this exception.

2. As noted above, the Agency argues that there are restrictions on the release of proprietary information that are similar to restrictions on the Federal Government's dissemination of copyrighted material. Exceptions at 17. However, the Agency's reliance on 17 U.S.C. § 105 and a decision regarding copyright law is misplaced because the Agency has not identified any legal restrictions on the dissemination of copyrighted material that is comparable to the legal restrictions on the dissemination of proprietary information. The Agency also claims that its asserted management right to contract out for services in a cost-effective manner would be violated if it is required to provide the Union with the requested information. However, this argument is based on the faulty premise that the Arbitrator's awards would necessarily result in the Agency being required to devise its own method for determining pay raises. Accordingly, we reject it.

E. 5 C.F.R. § 2429.5 bars the Agency's argument that the information the Union requested is not "readily" available to the Agency or maintained by the Agency.

The Agency claims that it cannot provide the information the Union requested because the information is held by the contractor and is therefore neither "readily" available to the Agency nor maintained by it. Exceptions at 20.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[3] Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

A review of the record, including both the Arbitrator's interim and final awards, as well as the correspondence that the Agency sent to the Arbitrator and the Union, indicates that the Agency never presented these claims to the Arbitrator although it had the opportunity to do so. Because the Agency could have raised before the Arbitrator claims that the information sought is neither reasonably available to the Agency nor maintained by it and there is no evidence in the record establishing that the Agency did so, we dismiss this exception.

## V. Decision

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

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.