

67 FLRA No. 112

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION
CENTER, GUAYNABO
SAN JUAN, PUERTO RICO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISONS LOCALS C-33
LOCAL 4052
(Union)

0-AR-4228
(66 FLRA 81 (2011))

—————
DECISION

May 27, 2014

—————

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

I. Statement of the Case

Arbitrator David M. Helfeld awarded the grievants a remedy of home leave, which is a type of leave that may be earned by federal employees through service abroad. In *U.S. DOJ, Federal BOP, Metropolitan Detention Center, Guaynabo, San Juan, Puerto Rico (BOP I)*,¹ the Authority set aside this remedy because it was contrary to federal law. Consequently, the Authority remanded the matter with instructions to the Arbitrator to formulate an alternative remedy. The Arbitrator then issued a second award, to which the Agency now excepts.

The Authority must resolve two issues. First, we must determine whether the Arbitrator exceeded his authority because he resolved issues that were unrelated to the remanded issue. Because the Arbitrator went beyond the scope of the sole issue before him, we find that he exceeded his authority. Second, we must decide whether the Arbitrator's award is contrary to law because he awarded home leave despite the Authority finding

such an award to be unlawful in *BOP I*. We find that the Arbitrator's award of home leave is deficient and must, therefore, be set aside. Moreover, because the underlying violation remains in place, we remand this matter to the parties for resubmission to this Arbitrator, or a different one, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Awards**A. Arbitrator's original award (original award) & *BOP I***

The Arbitrator found that the Agency had improperly denied home leave, post-exchange (PX) privileges, and the use of Department of Defense (DoD) school facilities to employees who resided and worked in Puerto Rico. As a remedy, he granted these employees home leave, PX privileges, and school access. The Agency filed exceptions to this award.

As relevant here, in *BOP I*, the Authority found that federal law prohibits individuals from receiving home leave if they "work and permanently reside in Puerto Rico."² Because the Arbitrator had awarded home leave to such individuals, the Authority vacated that portion of his award and remanded it to the parties for resubmission to the Arbitrator, absent settlement, "to formulate an alternative remedy."³

B. Arbitrator's award on remand (remand award)

Because the parties were unable to agree regarding an alternative remedy to home leave, they jointly submitted this issue to the Arbitrator. Before the Arbitrator, the Union again requested home leave as a remedy. The Union also claimed that the Agency had improperly limited PX privileges to the date of the original award's issuance. As a remedy, the Union sought an order granting permanent privileges and monetary compensation for the Agency's denial of these privileges. Finally, the Union requested an order directing the parties to bargain over the impact and implementation of access to DoD schools.

In his remand award, the Arbitrator noted that the Union's request for home leave had "merit" and "urge[d]" the Authority to adopt it.⁴ Acknowledging that the Authority had found that such a remedy was contrary to law, the Arbitrator stated that the "adoption" of the home leave remedy "*depends on the Authority's decision*

² *Id.* at 88.

³ *Id.* at 88-89.

⁴ Remand Award at 7.

¹ 66 FLRA 81 (2011).

to reconsider its ruling on [h]ome [l]eave” in *BOP I*.⁵ The Arbitrator also ordered the Agency to cease discriminating against employees with respect to home-leave usage.

Addressing the PX issue, the Arbitrator found that the Agency was improperly denying PX privileges to employees. Thus, he ordered the Agency to “cease and desist” its “discriminatory practices” regarding such privileges.⁶ He further ordered the Agency to compensate employees who were denied these privileges for the period between the issuance of the original award and the issuance of the remand award. The Arbitrator “urge[d]” the Authority “to adopt” these PX-related remedies in “mitigation of the negative consequences of past delay, and in the interest of justice.”⁷

The Arbitrator denied the Union’s request for a bargaining order over access to DoD schools because he found that such access was “very far removed from the core issues [he] considered.”⁸ Finally, in light of delays in this matter and other federal-sector arbitration matters, the Arbitrator ordered the parties to contact their “respective national headquarters” and Congress to discuss how “excessive delay has harmed the efficacy of the arbitration process in federal labor relations.”⁹

The Agency filed exceptions to the remand award, and the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Issue: The Union did not timely file an exception.

In its opposition to the Agency’s exceptions, the Union challenges the Arbitrator’s denial of the Union’s request for a bargaining order over DoD school access. According to the Union, “the Arbitrator is empowered to grant bargaining . . . as a remedy.”¹⁰ To the extent that the Union is raising an exception to the remand award, we find that it is untimely. Under 5 U.S.C. § 7122(b), exceptions to arbitration awards must be filed “during the [thirty]-day period beginning on the date the award is served on the party.”¹¹ The Arbitrator served his remand award on the parties on January 17, 2013.¹² The Union

filed its opposition, which contains its exception, on March 23, 2013. The Union, therefore, filed its exception well beyond the “[thirty]-day period” established by § 7122(b).¹³ Accordingly, we will not consider the Union’s exception.¹⁴

IV. Analysis and Conclusions

- A. The Arbitrator exceeded his authority by resolving issues other than the remanded issue.

The Agency argues that the Arbitrator exceeded his authority by considering “issues other than home leave” as part of the remand award.¹⁵ That is, the Agency claims the Arbitrator resolved issues that were not submitted to arbitration, specifically the issues of PX privileges and delays in federal-sector arbitration.¹⁶ 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.¹⁷

The Authority has not previously addressed whether an arbitrator exceeds his authority on remand by addressing an issue that neither the Authority nor the parties, by way of joint stipulation, asked him to resolve.¹⁸ The exceeds-authority ground for review is derived from private-sector precedent.¹⁹ Thus, the Authority has sometimes looked to federal-court precedent to resolve issues arising under this ground.²⁰

In *Brown v. Witco Corp. (Brown)*,²¹ the U.S. Court of Appeals for the Fifth Circuit addressed a situation that is similar to this matter. There, a magistrate judge remanded an arbitration award with instructions to

⁵ *Id.* (emphasis added); see also *id.* at 9 (reiterating that his “directive” concerning home leave “depends on whether the [Authority] responds affirmatively to [his] recommendation that it reconsider [*BOP I*] with regard to [h]ome [l]eave”).

⁶ *Id.* at 8.

⁷ *Id.* at 6-7.

⁸ *Id.* at 8.

⁹ *Id.* at 9.

¹⁰ Opp’n at 10-11.

¹¹ 5 U.S.C. § 7122(b).

¹² Remand Award at 10.

¹³ 5 U.S.C. § 7122(b).

¹⁴ See *U.S. DHS, U.S. CBP*, 65 FLRA 88, 89 n.4 (2010).

¹⁵ Exceptions at 5.

¹⁶ See *id.* at 5-7.

¹⁷ See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 303-04 (2011) (*Coleman*); *U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, Va.*, 57 FLRA 559, 565 (2001); *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

¹⁸ Cf. *Coleman*, 66 FLRA at 303-04 (holding that arbitrator exceeded his authority following Authority’s remand of award because he went beyond the parties’ jointly stipulated issue).

¹⁹ See *Dep’t of the Air Force, McGuire Air Force Base*, 3 FLRA 253, 255 (1980) (citations omitted).

²⁰ See, e.g., *IRS, Birmingham Dist. Office*, 6 FLRA 143, 147 (1981) (citation omitted); cf., e.g., *AFGE, Nat’l Border Patrol Council, Local 1929*, 63 FLRA 465, 467-68 (2009) (citations omitted) (examining federal-court precedent to examine unclear substantive arbitrability issue).

²¹ 340 F.3d 209 (5th Cir. 2003).

the arbitrator to address only an issue regarding the calculation of an employee's wages.²² On remand, the arbitrator issued an award that broadened the scope of wages that the employee could receive because the union requested that he do so.²³

The court concluded that the award should be set aside because the arbitrator exceeded the scope of the authority granted to him on remand. In this regard, the court found that the magistrate judge "clear[ly]" limited the arbitrator to resolving a limited issue on remand.²⁴ It further found that the arbitrator "disregard[ed] . . . the limited scope and purpose of the magistrate's remand order."²⁵ The court determined that the arbitrator could not take such action, however, because he lacked "the authority to disregard the express terms" of a remand order.²⁶ Thus, the court concluded "that if the arbitrator exceeds the scope of a limited remand order, then the court may vacate those portions of the arbitrator's decision on remand that go beyond his limited authority to clarify, complete, or correct the award that he has already made."²⁷ We find it appropriate to apply the court's approach here.

The Authority remanded this matter with instructions solely "to formulate an alternative remedy" to home leave.²⁸ And the parties did not jointly agree to place any other issue before the Arbitrator. Rather, the Union submitted the issue of PX privileges over the Agency's objection,²⁹ and the Arbitrator raised the issue of federal-sector arbitration delays *sua sponte*.³⁰ Thus, consistent with *Brown*, the Arbitrator's authority on remand was limited to formulating an alternative remedy to home leave. Accordingly, by addressing the issues of PX privileges and federal-sector arbitration delays, the Arbitrator exceeded his authority because these issues were not properly before him.

The Union claims that the Arbitrator did not exceed his authority by addressing the issue of PX privileges because arbitrators have broad discretion to fashion remedies.³¹ As noted above, such discretion is not limitless, however, and must be related to the issue

properly before him.³² As stated above, the Arbitrator had only one issue to resolve on remand: determining an alternative remedy to home leave. PX privileges, and any issue related to that issue, were not properly before him, and the Arbitrator exceeded his authority by fashioning a remedy regarding this issue. The Union also avers that the issue of PX privileges arose from the issues presented in the original award.³³ But the issues arising from the original award were not before the Arbitrator on remand. Finally, the Union claims that arbitrators are permitted to issue awards that "clarify or correct an award after it has been issued."³⁴ But the Arbitrator did not clarify or correct any issues in his remand award. He considered and resolved new ones.

The Union also contends that the Arbitrator was empowered to address the issue of delays in arbitration because this issue "reflect[s] his interpretation of one of several issues to be resolved."³⁵ Specifically, the Union argues that this issue concerns the Arbitrator's interpretation of the "grievance[-]arbitration process" in the parties' agreement, which requires a fair and expeditious process.³⁶ Even if the Union is correct regarding what the agreement requires, the Arbitrator was not tasked with addressing the requirements of the parties' agreement or arbitration delays in general. The Union's argument, therefore, is unpersuasive.

Based on the foregoing, we find that the Arbitrator exceeded his authority by considering and resolving the issues of PX privileges and delays in federal-sector arbitration. Accordingly, we set aside these related remedies.³⁷

B. The award of home leave is contrary to law.

The Agency also contends that the Arbitrator's grant of home leave is contrary to the Authority's decision in *BOP I*. When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award *de novo*.³⁸ In applying the standard of *de novo* review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.³⁹

²² See *id.* at 214.

²³ See *id.* at 214-15.

²⁴ *Id.* at 221.

²⁵ *Id.*

²⁶ *Id.*; see also *id.* (stating that, on remand, arbitrator was limited "in his review to the specific matter or matters remanded for his clarification" (citations omitted)).

²⁷ *Id.*

²⁸ *BOP I*, 66 FLRA at 88.

²⁹ See Exceptions, Attach. 3, Agency's Reply to Union's Brief on Remedy at 2.

³⁰ See Remand Award at 9.

³¹ See Opp'n at 2-3.

³² See, e.g., *U.S. Dep't of HHS, FDA, New Orleans, La.*, 54 FLRA 90, 95 (1998).

³³ See Opp'n at 3-4.

³⁴ *Id.* at 4.

³⁵ *Id.* at 6.

³⁶ *Id.*

³⁷ See *Coleman*, 66 FLRA at 304.

³⁸ E.g., *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).

³⁹ *Id.*

On remand, the Arbitrator noted that the Union's request for home leave had "merit" and "urge[d]" the Authority to adopt it.⁴⁰ The Arbitrator stated that the "adoption" of his remedy of home leave, however, "depends on the Authority's decision to reconsider its ruling on [h]ome [l]eave" in *BOP I*.⁴¹ That is, the Union would be entitled to its requested remedy *only* if the Authority reconsidered this ruling.

We decline to reconsider the holding of *BOP I*. As the Agency notes in its opposition, the legal framework that governs the use of home leave has not changed since *BOP I*.⁴² Thus, we see no reason why our conclusion regarding home leave should be modified or set aside. In addition, we note that the Arbitrator is not a "party to the proceeding before the Authority," and, therefore, cannot move for reconsideration under § 2429.17 of the Authority's Regulations.⁴³

Because the Arbitrator's remedy of home leave was explicitly conditioned on our reconsideration of *BOP I*, and because we have declined to reconsider our decision in that case, the question of remedy remains.⁴⁴ Accordingly, we must once again remand this matter to the parties, and the Arbitrator, if necessary, for the sole purpose of formulating an alternative remedy to home leave.⁴⁵

When remanding a case, the Authority may also "take such action and make such recommendations concerning [an arbitration] award as it considers necessary, consistent with applicable laws, rules or regulations."⁴⁶ Pursuant to this authority – and because the Arbitrator's disregard of the issue he was to address on remand raises a question regarding his ability to resolve the remaining issue – we remand this matter to the parties with the option that either may object to resubmission of this matter to the Arbitrator. In the event of such an objection, the parties will jointly seek a new arbitrator.⁴⁷ This new arbitrator, or the current Arbitrator, should the parties choose to retain him, will be limited to addressing one issue: what is an appropriate alternative remedy to home leave. To be clear, no other issue is properly before him unless the parties *jointly* agree to place other matters before him for resolution.⁴⁸

V. Decision

We grant the Agency's exception that the Arbitrator exceeded his authority by considering and resolving the issues of PX privileges and delays in federal-sector arbitration and set aside these portions of his award. We further find that the Arbitrator's award of home leave is deficient and set aside that portion of his award. We remand this issue to the parties for resubmission to arbitration, absent settlement, for the sole purpose of formulating an alternative remedy to home leave. On remand, either party may object to resubmission of this matter to the Arbitrator. Should such an objection arise, the parties are directed to select a different arbitrator.

⁴⁰ Remand Award at 7.

⁴¹ *Id.* (emphasis added).

⁴² Exceptions at 8.

⁴³ 5 C.F.R. § 2429.17.

⁴⁴ See *U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009).

⁴⁵ *E.g., id.*

⁴⁶ 5 U.S.C. § 7122(a).

⁴⁷ See *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 854 (2000).

⁴⁸ See *Brown*, 340 F.3d at 215; *Coleman*, 66 FLRA at 303-04; *U.S. Dep't of Transp., FAA*, 64 FLRA 612, 614 (2010).

Member Pizzella, concurring:

I agree with my colleagues that the Arbitrator exceeded his authority and that his grant of home leave is contrary-to-law. I write separately, however, to express my dismay at the Arbitrator's actions and explain why I believe the Authority's instruction that the parties may select a different arbitrator on remand is more than warranted.

In awarding home leave a second time, the Arbitrator willfully ignored our instructions in *U.S. DOJ, Federal BOP, Metropolitan Detention Center, Guaynabo, San Juan, Puerto Rico (BOP I)*¹ to award something *other than* home leave. In so doing, the Arbitrator has created doubt that he can be trusted to properly resolve this issue if he were to consider it on remand again. Indeed, the Arbitrator did not even express what other remedies might be available should the Authority not agree to reconsider its decision in *BOP I*. Instead, the Arbitrator issued an award that ignores the issue before him, resolves issues that were not properly submitted, and contains his unsolicited musings on arbitration. And then he charged the parties \$5,000.² By choosing to ignore the Authority's instructions, the Arbitrator needlessly prolonged this matter.

I realize that remanding this issue may cause further delay in a case which, as the Arbitrator noted, has been pending in various stages since 1997,³ and may require the parties to utilize further resources. I note, however, that the Union had the audacity to seek an illegal remedy and place other issues before the Arbitrator.⁴ Moreover, the Arbitrator's conscious refusal to adhere to our decision in *BOP I* has contributed to the very "additional delay" he sought to address in his remand award.⁵

Thank you.

¹ 66 FLRA 81 (2011).

² Remand Award, Cover Letter at 1.

³ See Remand Award at 1-2.

⁴ See Opp'n, Attach., Reply to Agency's Motion & Request of Imposition of Appropriate Remedies at 6-9.

⁵ Remand Award at 6.