68 FLRA No. 60

BROADCASTING BOARD OF GOVERNORS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
AFL-CIO
(Charging Party)

WA-CA-12-0532

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DECISION AND ORDER

March 10, 2015

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

I. Statement of the Case

In the attached decision, the Federal Labor Relations Authority's (FLRA's) Chief Administrative Law Judge (the Judge) found that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with an arbitrator's merits award and remedy award (the awards).[1] This unfair-labor-practice (ULP) case is before the Authority on exceptions to the Judge's decision filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The Respondent now, during this ULP case involving the Respondent's failure to comply with the earlier arbitration awards, challenges the original grievance and the awards as outside the arbitrator's jurisdiction as well as the Authority's jurisdiction. Because the Respondent's exceptions neither show that the Authority lacked jurisdiction nor raise any valid challenges to the arbitrator's jurisdiction, we deny the Respondent's exceptions.

[1] 5 U.S.C. § 7116(a)(1), (8).

II. Background and Judge's Decision

A. Background

As the awards have already come before the Authority on exceptions,[2] and the facts are further set forth in detail in the Judge's decision, we only briefly summarize the facts here. Prior to the current case, the Union filed a grievance alleging that the Respondent had violated the parties' agreement, dated September 22, 2005, by hiring non-citizens instead of qualified United States citizens. The matter was unresolved and the parties submitted the matter to arbitration. The arbitrator sustained the grievance, finding that the Respondent had violated the parties' agreement by failing to give preferential consideration to bargaining-unit employees. The arbitrator also found that the Respondent had violated 22 U.S.C. § 1474 (Smith-Mundt Act). As part of the remedy, the arbitrator ordered the Respondent to issue vacancy announcements that complied with the parties' agreement and to give three named grievants, who were not selected for positions to which they applied, backpay and interest as well as equivalent positions when available.

The Respondent then appealed the awards to the Authority. The Respondent argued, in part, that the arbitrator "exceeded his authority in ruling on" the Smith-Mundt Act because it was "not intended to regulate or affect employees' working conditions."[3] The Authority upheld the arbitrator's ruling that the Respondent violated the parties' agreement. However, the Authority did not address the merits of any statutory arguments because "the [a]rbitrator's finding of a contractual violation constitute[d] a separate and independent basis for his awards."[4] The Authority dismissed the Respondent's exceptions, in part, and denied them, in part. The Respondent appealed the Authority's decision to the U.S. Court of Appeals for the District of Columbia Circuit, but later requested that its appeal be dismissed, and the court dismissed it.

After the awards became final and binding, the Respondent issued a vacancy announcement that did not comply with the awards. Additionally, the Respondent failed to give the named grievants equivalent positions as well as backpay and interest as ordered. In response, the Charging Party filed a ULP charge, and the GC issued a complaint, alleging that the Respondent had violated § 7116(a)(1) and (8) of the Statute by failing to comply with the arbitrator's awards.[5]

[2] *Broad. Bd. of Governors*, 66 FLRA 380 (2011) (*BBG I*) (Member Beck dissenting).
[3] *Id.* at 382 (quoting original Exceptions at 41) (internal quotation marks omitted).
[4] *Id.* at 386.
[5] 5 U.S.C. § 7116(a)(1), (8).

B. Judge's Decision

The GC filed a motion for summary judgment, alleging violations of § 7116(a)(1) and (8) of the Statute, to which the Respondent filed an opposition and a cross motion for summary judgment. In response, the GC filed an opposition to the Respondent's motion. Because there were no genuine issues as to any material facts, including the fact that the Respondent failed to comply with the arbitrator's awards, the Judge resolved the matter based on these motions. In its motion, the Respondent did not dispute that it had failed to comply with the arbitrator's awards, but argued that neither the arbitrator nor the Authority had jurisdiction over the grievance. In summarizing the Respondent's position, the Judge noted that

> after voluntarily participating in the grievance process [the Respondent] negotiated with the Union, after submitting the matter to arbitration and getting merit[s] and remedy awards, and after having all exceptions to those awards denied or dismissed by the Authority, the Respondent now argues that the matter was not a proper subject for the grievance process established within the parties[']negotiated agreement.[6]

In its motion, the Respondent presented three arguments in support of this contention: (1) the grievance alleged a violation of the Smith-Mundt Act, which, the Respondent argued, is not subject to the grievance process; (2) 5 C.F.R. § 335.103(d), which states that "nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a . . . grievance," removed the grievance from the grievance process because it was based on such a nonselection;[7] and (3) the grievance, the awards, and the remedy concerned an initial appointment, which is a matter excluded from the grievance process under § 7121(c)(4) of the Statute.

The Judge found that the Respondent had violated § 7116(a)(1) and (8) of the Statute. In his decision, the Judge first acknowledged that "arguments regarding the Authority's jurisdiction may be raised at any stage of the Authority's proceedings."[8] The Judge then proceeded to address the Respondent's arguments. As to the first argument, the Judge ruled that the Smith-Mundt Act, a statute giving the Respondent legal authority to hire non-citizens, "has more than a mere incidental [e]ffect upon working conditions."[9] As such, the Judge concluded that a violation of this statute is properly addressed in the grievance process.

As to the second argument, the Judge rejected this argument, noting that, because the arbitrator found that the Respondent violated the parties' agreement in selecting a group of candidates, the Respondent's selection "did not involve a group of properly ranked and certified candidates."[10] As a consequence, the Judge ruled that "the prohibition of 5 C.F.R. § 335.103(d) is inapplicable."[11]

Addressing the final argument, the Judge ruled that the nonselection of qualified bargaining-unit employees is "entirely appropriate for the grievance procedures established under the Statute, and constitute[s] a subject matter over which the Authority has clear jurisdiction."[12]

In conclusion, the Judge granted the GC's motion for summary judgment and denied the Respondent's cross-motion for summary judgment, ruling that the Respondent had committed a ULP by failing to comply with the final and binding arbitration awards.[13]

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to those exceptions.

III. Preliminary Matter: The Authority has jurisdiction to adjudicate this matter.

The Respondent argues that "the Authority has no subject[-]matter jurisdiction over th[e] grievance because the grievance alleges a violation of a statute that was not issued for the purpose of affecting conditions of [employment of] unit employees"[14] – specifically, the Smith-Mundt Act.[15] The Respondent also argues that "[t]he grievance and arbitration [awards] concern initial appointments and hiring," and that "[s]uch matters are not grievable and are therefore not within the arbitrator's and the Authority's jurisdiction."[16] Additionally, the Respondent contends that 5 C.F.R. § 335.103(d) "serves as a legal bar to the grievance and [to] the arbitrator's and [the] Authority's jurisdiction."[17]

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[6] Judge's Decision at 6.
[7] *Id*. at 6-7.
[8] *Id.* at 5 (citing *U.S. Dep't of VA, VA Med. Ctr., Asheville, N.C.*, 57 FLRA 681, 683 (2002) (*Medical Center*); *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999)).
[9] *Id.* at 7 (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 690 (D.C. Cir. 1994)).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 6.
[13] *Id.* at 8.
[14] Exceptions at 3.
[15] *See id.* at 4-8 (discussing the Smith-Mundt Act).
[16] *Id.* at 11.
[17] *Id.*

Parties may raise arguments regarding the Authority's jurisdiction at any stage of the Authority's proceedings.[18] Therefore, as far as the Respondent's arguments challenge the Authority's jurisdiction, the Respondent properly raises them here.

But these arguments provide no basis for finding that the Authority lacks jurisdiction as alleged. The Respondent bases all of these arguments on the premise that the subject matter of the grievance was not arbitrable. But, as discussed below, the Respondent's arguments regarding the arbitrability of the grievance lack merit. As the premise of the Respondent's arguments is faulty, the Respondent's challenges to the Authority's jurisdiction are without merit.

Accordingly, we find that we have jurisdiction over this matter.

IV. Analysis and Conclusions

In addition to challenging the Authority's jurisdiction over the grievance and the awards, the Respondent also challenges the jurisdiction of the arbitrator over the grievance. Even assuming, without deciding, that the Respondent could raise statutory jurisdictional claims at this juncture, the Respondent does not raise any valid jurisdictional arguments. Here, the Respondent argues that the Judge erred in ruling that the arbitrator had jurisdiction over the grievance in three instances: the Judge erred in ruling that: (1) the Smith-Mundt Act "[c]oncern[ed] [c]onditions of [e]mployment" and is therefore grievable;[19] (2) 5 C.F.R. § 335.103(d) did not apply; and (3) the grievance did not involve initial hiring and appointments.

Turning to the first of these arguments, the Respondent argues that the arbitrator lacked jurisdiction over the grievance because "an arbitrator . . . only ha[s] jurisdiction over statutes with the purpose of affecting employment and not those only incidentally affecting employment and working conditions of employees."[20] The Respondent further argues that the grievance involved the Smith-Mundt Act, which "was not issued for the purpose of affecting conditions of unit employees."[21]

However, this argument ignores the arbitrator's conclusions and the Authority's review of the awards. In addition to finding that the Respondent violated the Smith-Mundt Act, the arbitrator found that the Respondent had violated the parties' agreement – a decision made under his jurisdiction granted by that agreement and not based on a violation of any statute.[22] In *Broadcasting Board of Governors*, the Authority did not address any statutory violations because the "contractual violation constitute[d] a separate and independent basis for [the arbitrator's] awards."[23] Where an arbitrator bases an award on separate and independent grounds, a party must establish that all grounds are deficient in order to demonstrate that the award is deficient.[24] However, the contractual basis for an award cannot be challenged in a ULP proceeding alleging the failure to comply with an arbitrator's award.[25] Because the Respondent does not, and indeed may not, challenge the separate and independent contractual grounds for the awards, its first argument has failed to show that the arbitrator lacked jurisdiction. Therefore, we reject this argument.[26]

Second, the Respondent argues that § 335.103(d) "serves as a legal bar to the grievance and the arbitrator's . . . jurisdiction."[27] Section 335.103(d) states that "nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a . . . grievance."[28]

In part, the Respondent argues that "[t]he [merits] award and remedy allow[] bargaining[-]unit employees on properly ranked U.S. citizen certificates to be given the position they applied for despite the fact there are other qualified U.S. candidates on the certificate"[29] and that "[t]he [merits] award and remedy [award] require the Respondent to select only bargaining[-]unit employees from the uncontested properly ranked citizen certificates."[30] These arguments, however, merely collaterally challenge the remedy, not the arbitrator's jurisdiction over the grievance. As the GC correctly notes, "[t]he arbitrator's remedy award d[oes] not transform a grievance [that] was grievable in

[18] *Medical Center*, 57 FLRA at 683.
[19] Exceptions at 3.
[20] *Id.* at 4.
[21] *Id.* at 3.
[22] *BBG I*, 66 FLRA at 381.
[23] *Id.* at 386.
[24] *Id.* at 385 (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[25] *HHS, SSA v. FLRA*, 976 F.2d 1409, 1416 (D.C. Cir. 1992), *aff'g Dep't of HHS, SSA*, 41 FLRA 755, 766 (1991) (*SSA*) ("The FLRA's determination that contractual limitations on an arbitrator's jurisdiction may not be raised in [a ULP] proceeding is a reasonable interpretation of its governing statute.").
[26] Member Pizzella notes that the Authority has not decided, and does decide not here, whether a violation of the Smith-Mundt Act is a matter that can be grieved under the Statute. As such, this case does not implicate the concerns of overreach into other statutes that he expressed in *U.S. DHS, U.S. ICE*, 67 FLRA 501, 507-08 (2014) (Dissenting Opinion of Member Pizzella) and *AFGE, Local 1547*, 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella).
[27] Exceptions at 11.
[28] 5 C.F.R. § 335.103(d).
[29] Exceptions at 12.
[30] *Id.* at 13.

the first instance into one that [is] not grievable."[31] In short, these arguments simply constitute an impermissible collateral attack on the merits of the awards. Consequently, we reject these arguments.[32]

The Respondent also argues that § 335.103(d) acts as a jurisdictional bar because "[t]he grievance . . . [is] contending that [bargaining-unit employees] were not selected from [a] certificate, which has other qualified candidates,"[33] and "[t]he grievance . . . permit[s] complaints about nonselections from rankings and ratings of citizen certificates" in violation of § 335.103.[34] The Respondent premises this argument on the allegation that the Judge misinterpreted the parties' agreement. The Respondent alleges that the Judge erred by suggesting that bargaining-unit employees "are entitled to an automatic preference for a vacant position."[35] Based on this allegedly incorrect interpretation of the parties' agreement, the Judge determined that, because bargaining-unit employees were not given a preference, the certificate was not properly ranked and certified and, "[t]herefore, the prohibition of . . . § 335.103(d) [was] inapplicable."[36]

Despite the Respondent's interpretation of the parties' agreement, the Judge's reliance on the Respondent's "contractual obligation to select and promote suitably qualified candidates from within the bargaining unit whenever possible" comports with the arbitrator's interpretation of the parties' agreement.[37] The arbitrator stated that the parties' agreement includes a "policy to promote from within whenever possible."[38] Therefore, this exception challenges the arbitrator's interpretation of the parties' agreement, not his jurisdiction. As such, this exception is an impermissible collateral attack on the awards.[39] Accordingly, we deny it.

Finally, the Respondent argues that the grievance involved an initial hiring, which is excluded from the grievance procedure by § 7121(c)(4) of the Statute. Section 7121(c)(4) of the Statute excludes "any examination, certification, or appointment" from a grievance procedure. The Authority has held that the term "appointment" in this section relates only to the initial entry of an applicant into federal service and does not affect the arbitrability of claims regarding the hiring of grievants who were already federal employees when they applied for the position.[40]

The Respondent first argues that the grievance involved appointments because the grievance alleged that the Respondent "had been hiring non-[U.S.] citizens in spite of the existence of suitabl[e] U.S. citizens."[41] However, despite the Respondent's characterization of the grievance, it concerned the failure to promote and select bargaining-unit employees, not appointments. The grievance addressed "[a]ll [a]ffected [b]argaining[-u]nit [e]mployees" who were not selected for or promoted to positions – not appointments within the meaning of § 7121(c)(4) of the Statute.[42] Because the grievance concerns an action affecting current federal employees, § 7121(c)(4) of the Statute does not bar it.[43]

The Respondent further argues that the arbitrator's awards concerned appointments because the remedy "formulated how the Respondent would fill all vacant positions, including initial appointments and non-bargaining[-]unit positions."[44] The Respondent also points to the fact that both the ULP complaint and the Judge's decision state that a general schedule (GS)-9 vacancy announcement violated the arbitrator's awards as evidence that the awards involved initial appointments. According to the Respondent, the GS-9 position is "[c]learly . . . an entry level position" and therefore an initial appointment.[45]

As with the second exception, a challenge to the arbitrator's remedy fails to challenge his jurisdiction to arbitrate the dispute; it merely impermissibly collaterally attacks the merits of the awards.[46] Because this exception fails to demonstrate that the arbitrator lacked jurisdiction, we deny it.

In conclusion, the Judge properly ruled that the Respondent committed a ULP when it violated § 7116(a)(1) and (8) of the Statute by failing to comply with the final and binding awards.

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[31] Opp'n at 16.
[32] *SSA*, 41 FLRA at 766.
[33] Exceptions at 13.
[34] *Id.* at 14.
[35] *Id.* at 12.
[36] Judge's Decision at 7.
[37] *Id.*
[38] *BBG I*, 66 FLRA at 381 (quoting Merits Award at 10).
[39] *SSA*, 41 FLRA at 766.
[40] *USDA, Rural Dev. Centralized Servicing Ctr., St. Louis, Mo.*, 57 FLRA 166, 168 (2001).
[41] Exceptions at 9 (quoting Union's Motion for Summary Judgment) (internal quotation marks omitted).
[42] Ex. 2 at 1.
[43] *NFFE, Local 1636*, 48 FLRA 511, 514 (1993).
[44] Exceptions at 10.
[45] *Id.* at 11.
[46] *SSA*, 41 FLRA at 766.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118(a)(7) of the Statute, the Respondent shall:

(1.) Cease and desist from:

(a) Failing and refusing to fully comply with the merits and remedy awards issued by Arbitrator George E. Marshall, Jr., on August 27, 2007, and June 15, 2010.

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

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

(a) Comply with Arbitrator Marshall's awards by providing those employees individually identified by Arbitrator Marshall an equivalent position, backpay, and interest. The backpay should be calculated starting from the date the employee should have been selected for the position and end on the date the employee is placed in an equivalent position. To the extent the employees now occupy a position equivalent to the position that they were denied, grant the individuals backpay and interest from the date of their non-selection to the date they were placed in an equivalent position. For positions where the employee would have initially received the same pay grade as in the employee's previous position, but where the new position had a higher career ladder, the employee should receive backpay for the next higher grade starting one year after the date the employee should have been selected for the position and should receive all subsequent annual career-ladder promotions.

(b) The Respondent will issue all open vacancy announcements to only U.S. citizens. If, after the closing for a particular vacancy announcement, it is determined no U.S. citizen is suitably qualified for the position (using the criteria in the vacancy announcement) the Respondent may issue another vacancy announcement for the position that is open to U.S. citizens and non-U.S. citizens. If any U.S. citizens are deemed suitably qualified (using the criteria in the vacancy announcement) a U.S. citizen must be selected for the position.

(c) Meet with the Union about remedy for the remaining class members contained in the Union's remedy brief.

(d) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached notice on forms to be provided by the FLRA. Upon receipt of such forms, they shall be signed by the presiding Governor, and shall be posted and maintained for sixty consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Disseminate a copy of the notice to all bargaining-unit employees through the Respondent's electronic mail system.

(f) Pursuant to § 2423.41(e) of the Authority's Regulations and within thirty days from the date of this order, notify in writing, the Regional Director, Chicago Regional Office, FLRA, a report regarding what compliance actions have been taken.

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

The Federal Labor Relations Authority (FLRA) has found that the Broadcasting Board of Governors violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully comply with the merits and remedy awards issued by Arbitrator George E. Marshall, Jr., on August 27, 2007, and June 15, 2010.

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

WE WILL promptly comply with the final and binding awards of Arbitrator George E. Marshall, Jr., by providing certain employees an equivalent position, backpay, and interest, by issuing vacancy announcements in accordance with the procedures outlined by the Arbitrator, and by meeting with the Union about the other class members that may be entitled to relief.

_____
Broadcasting Board of Governors

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

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

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, FLRA, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.

Member Pizzella, concurring:

I join my colleagues in concluding that the Chief Administrative Law Judge (the Judge) properly ruled that the Respondent committed an unfair labor practice (ULP) by violating § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) in failing to comply with the arbitrator's awards.[1] I write separately to note alternate grounds for denying the Respondent's exceptions. While I agree with my colleagues' analysis of the merits of the Respondents' exceptions, I would find it unnecessary to reach the merits of the exceptions. I would find that the Respondent cannot bring these jurisdictional claims before the Authority at this juncture because the Respondent had the right of direct review of the award.

During the ULP alleging the Respondent's failure to comply with the earlier arbitration awards, the Respondent challenges the jurisdiction of the arbitrator over the grievance. Although the Authority has repeatedly held that the Authority's jurisdiction may be challenged at any stage of its proceedings,[2] the Authority has not held that the same is true for an arbitrator's jurisdiction. On the contrary, it is well established that once an arbitration award is final, a party may not use a ULP charge to collaterally attack it.[3] The Authority has held that allowing such a collateral attack would circumvent congressional intent with respect to statutory review procedures and the finality of arbitration awards.[4] Nonetheless, the Authority has recognized an exception to this general rule in certain limited situations involving challenges to an arbitrator's statutory jurisdiction.[5] Specifically, the Authority has allowed collateral statutory challenges to an arbitrator's jurisdiction "where a party wishing to challenge an arbitrator's jurisdiction has no *right* of direct review."[6] This narrow exception, however, does not apply here. The Respondent not only

[1] 5 U.S.C. § 7116(a)(1), (8).
[2] *U.S. Dep't of VA, VA Med. Ctr., Asheville, N.C.*, 57 FLRA 681, 683 (2002) (*Medical Center*); *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999), *overruled on other grounds*; *Dep't of HHS, SSA*, 41 FLRA 755, 766 (1991) (*SSA*), *aff'd sub nom.*, *Dep't of HHS, SSA v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992).
[3] *SSA*, 41 FLRA at 766.
[4] *U.S. DHS, U.S. CBP, Swanton, Vt.*, 65 FLRA 1023, 1029 (2011) (citations omitted).
[5] *Veterans Admin, Cent. Office, Wash. D.C. and Veterans Admin, Med. & Reg'l Office Ctr., Fargo, N.D.*, 27 FLRA 835, 838-40 (1988), *aff'd sub nom., AFGE v. FLRA*, 850 F.2d 782 (1988).
[6] *Id.* at 786.

had a right of direct review of the arbitrator's award but exercised it.[7]

The Respondent relies on *U.S. Department of VA, Medical Center, Asheville, North Carolina* (*Medical Center*), for the broad proposition that it has "a legal right to bring jurisdictional claims" challenging the arbitrator's jurisdiction during this ULP proceeding because the complaint focuses on the Respondent's failure to implement the award.[8] However, *Medical Center* only addressed a challenge to the Authority's jurisdiction – not the arbitrator's jurisdiction – and provides no basis for allowing a challenge to the arbitrator's jurisdiction here.[9] The Respondent has provided no rationale for creating a new exception that permits a challenge to an arbitrator's jurisdiction during an enforcement action where it has a right of direct review. I would decline to create such an exception. Consequently, I would find that the Respondent cannot raise these arguments here, and would deny the exceptions for that reason.

Thank you.

[7] *Broad. Bd. of Governors*, 66 FLRA 380 (2011) (Member Beck dissenting).

[8] Exceptions at 3 (citing *Medical Center*, 57 FLRA at 686).

[9] *Medical Center*, 57 FLRA at 683 ("As the Respondent's argument challenges the Authority's jurisdiction, it is properly raised here.").

Office of Administrative Law Judges

BROADCASTING BOARD OF GOVERNORS
Respondent

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1812, AFL-CIO
Charging Party

Alicia E. Weber
For the General Counsel

Patricia Armstrong Hargrave
For the Respondent

David A. Borer
Judith D. Galat
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The General Counsel (GC) filed a motion for summary judgment to which the Respondent filed an opposition and a cross motion for summary judgment. In response, the GC and the Charging Party filed oppositions to the Respondent's motion. As there is no genuine issue as to any material fact, resolution of this case upon summary judgment is appropriate, and I find that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute), by failing to comply with a final arbitration award. As a result of the violation, the Respondent is ordered to cease and desist from failing to comply with the awards issued by Arbitrator George E. Marshall, Jr., on August 27, 2007 and June 15, 2010, and to post a notice of the violation.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Federal Labor Relations Authority's (Authority/FLRA) regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Nat'l Labor Relations Bd., Wash., D.C.*, 65 FLRA 312, 315 (2010). In their pleadings, the parties acknowledge that there is no genuine issue of material fact in dispute, thus, I find that summary judgment is appropriate in this matter.

FINDINGS OF FACT

1. The unfair labor practice complaint and notice of hearing was issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Broadcasting Board of Governors (Respondent), is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

4. The American Federation of Government Employees, Local 1812, AFL-CIO (Union/Charging Party), is an agent of AFGE for the purpose of representing the recognized bargaining unit employed by the Respondent.

5. The charge in Case No. WA-CA-12-0532 was filed by the Charging Party with the Washington Regional Director on May 25, 2012, and a copy of the charge was served on the Respondent.

6. During the time period covered by this complaint, the following individuals held the position opposite their names and were supervisors or management officials within the meaning of § 7103(a)(10) and (11) of the Statute and were agents acting on behalf of the Respondent:

April Bennett Cabral	Assistant General Counsel
Jurmell James	Attorney

7. The Respondent and the Charging Party are parties to a collective bargaining agreement (CBA) covering employees in the bargaining unit.

8. In 2006, the Union filed a grievance under the parties' CBA about the Respondent's hiring of aliens to fill positions for which bargaining unit employees who were U.S. citizens, were eligible to apply.

9. The grievance was unresolved and the parties selected Arbitrator George E. Marshall, Jr., to decide the matter.

10. On August 27, 2007, Arbitrator Marshall issued a merits award sustaining the Union's grievance on the merits and remanded the matter to the parties to determine the remedy.

11. The Respondent filed exceptions to the merit award, which were dismissed by the Authority on March 31, 2008, because the exceptions were interlocutory.

12. The parties were unable to resolve the issue of remedy and on or about July 15, 2008, the Respondent invoked Arbitrator Marshall's retained jurisdiction to determine remedies.

13. On May 6, 2010, the Respondent submitted a brief to Arbitrator Marshall, styled as "Agency's Proposed Remedy", which set forth its position on the remedy.

14. On May 6, 2010, the Union submitted a brief to Arbitrator Marshall outlining the Union's position on the remedy.

15. In his remedy award dated June 15, 2010, Arbitrator Marshall ordered the following actions:

> 1. The Agency is to stop violating the NLMA between the parties effective September 22, 2005 and to stop misinterpreting and misapplying the United States Information and Education Act of 1948, as amended (Act) in such manner as to deprive employee members of the Union employment and promotional opportunities under the NLMA and the Act.
>
> 2. The Agency is ordered to apply policies and procedures for issuing vacancy announcements that are in compliance with the Act and the NLMA. The Agency will issue all open vacancy announcements to only U.S. citizens. If after the closing for a particular vacancy announcement, it is determined no U.S. citizen is suitably qualified for the position (using the criteria in the vacancy announcement) the Agency may issue another vacancy announcement for the position that is open to U.S. citizens and non-U.S. citizens. If any U.S. citizens are deemed suitably qualified (using the criteria in the vacancy announcement) a U.S. citizen must be hired.
>
> 3. Since the filing of the grievance and during all times pertinent to the grievance, C.G., M.H. and A.V.[1], in addition to other persons identified in the Union's Remedy Brief (pages 9-10), applied for positions in the bargaining unit of a higher grade or with a higher promotion potential and received communication from the Personnel Office identifying them as qualified for the position to which they applied and were not selected in lieu of a non-U.S. Citizen. Each of these individuals (including those no longer with the Agency) should be given an equivalent position, back pay and interest. The back pay should be calculated starting from the date the employee should have been selected for the position and end on the date the employee is placed in an equivalent position. For positions where the employee would have initially received the same pay grade as in the employee's previous position, but where the new position had a higher career ladder, the employee should receive back pay for the next higher grade starting one year after the date the employee should have been selected for the position and should receive all subsequent annual career ladder promotions.
>
> 4. The Agency has reviewed the list of potential class members supplied by the Union in its Remedy Brief and has virtually eliminated and/or supplied reasons why those persons discussed are not entitled to relief pursuant to this Award. The arbitrator does not have sufficient information concerning the eliminated class members to confirm or deny the Agency's position, except as follows. C.G., irrespective of her status when initially hired, was a U.S. citizen when she applied for the position to which she was denied when the grievance was filed. The arbitrator disagrees with the Agency position and concludes she is entitled to relief because the selectee, T. D. was not a citizen at the time of selection. The Agency and the arbitrator are in agreement "an arbitrator's remedy

[1] While the employees' names appear in the Arbitrator's Remedy Award, disclosure of the names is not necessary to this decision and their initials are substituted throughout.

should reflect a reconstruction of what management would have done if management had not violated the law or contractual provision at issue" (citation omitted), but the arbitrator disagrees with the Agency remedy, except to the extent it acknowledges E. B., N. L., and A.V. are entitled to relief and the Agency's proposal to pay these individuals back pay. Ms. V., but for the Agency violation, would have been hired and at this juncture should be compensated as indicated above and be awarded the next vacant position without the necessity of a new application.

5. If M.H.'s Merit Systems Protection Board promotion decision involved this claim, then she is probably not entitled to further relief. Any disputes the Union may have as to M.H., and any of the other class members contained in the Union's Remedy Brief are remanded to the parties for resolution for lack of sufficient information for the arbitrator to resolve the dispute.

16. The Respondent filed exceptions to Arbitrator Marshall's merits and remedy awards with the Federal Labor Relations Authority.

17. On November 25, 2011, the Authority dismissed in part and denied in part the Respondent's exceptions in a decision reported at 66 FLRA 380 (2011).

18. On January 23, 2012, the Department of Justice filed a petition for review of the Authority's decision with the United States Court of Appeals for the District of Columbia.

19. On April 19, 2012, the Department of Justice moved to dismiss the petition for review of the Authority's decision.

20. On April 24, 2012, the Court of Appeals for the District of Columbia granted the Department of Justice's motion to dismiss.

21. In July 2012, the Respondent issued vacancy announcements that did not comply with the remedy award set forth in the decision issued by Arbitrator Marshall on June 15, 2010, to which all exceptions were dismissed or denied by the Authority in a decision to which the petition for review was dismissed.

22. In addition to failing to comply with the remedy award's directive regarding vacancy announcements, the Respondent has not given C.G., E.B., N.L., and A.V., an equivalent position, back pay and interest as directed by the remedy award issued by Arbitrator Marshall on June 15, 2010.

23. The Respondent failed to comply with the remedy award issued by Arbitrator Marshall after its issuance on June 15, 2010, failed to comply after the exceptions it filed to the merits and remedy awards were dismissed or denied by the Authority on November 25, 2011, and continued to refuse to comply after the Department of Justice abandon its defense of the Respondent's failure to comply by seeking and receiving a dismissal of the petition for review on April 24, 2012. To date, the Respondent has not complied with the remedies awarded by Arbitrator Marshall and has, through its agents acted in direct contravention thereof on multiple occasions.

DISCUSSION

The Respondent concedes that there are no material facts in dispute and acknowledges that it has not complied with the remedy award issued by Arbitrator Marshall, however, it now contends that neither the arbitrator nor the Authority has jurisdiction to resolve this matter. The Respondent accurately asserts that arguments regarding the Authority's jurisdiction may be raised at any stage of the Authority's proceedings. *Dep't of VA, VA Med. Ctr., Ashville, N.C.*, 57 FLRA 681, 683 (2002). *U.S. Dep't of the Interior, NPS, Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999). However, after traveling the grievance process highway to distasteful, bitter failure, the ability to belatedly raise jurisdictional arguments does not equate to drawing a card that returns you to go. You actually must prevail upon one of those jurisdictional arguments, and at that, the Respondent continues to fail.

In essence, after voluntarily participating in the grievance process it negotiated with the Union, after submitting the matter to arbitration and getting merit and remedy awards, and after having all exceptions to those awards denied or dismissed by the Authority, the Respondent now argues that the matter was not a proper subject for the grievance process established within the parties negotiated agreement. Furthermore, in November 2012, an agent of the Respondent indicated that the Respondent would use "all legally available means" to contest the decisions and would oppose any effort to "force" upon it the policy underlying the award. Thus, the Respondent has made no attempt to engage in any reasonable construction of the awards. However, the

Respondent's opposition ceased to have any legitimate legal basis on April 24, 2012, when the Court of Appeals for the District of Columbia dismissed the petition for review of the Authority's decision. Since that dismissal, the Respondent has continued to refuse to comply with the awards and is now using illegal means to avoid the obligations imposed by its own negotiations as well as the Statute.

In making his awards, the arbitrator found that the Respondent had improperly interpreted the term "suitably qualified" set forth in section 1474 of the United States Information and Education Act of 1948, commonly referred to as the Smith-Mundt Act, to mean that a U.S. citizen applicant had to be "equally or better qualified" than any alien being considered for employment. 22 U.S.C. § 1474. The arbitrator concluded that such an interpretation ignored the plain meaning of the statutory term and the explicit intent of Congress that suitably qualified U.S. citizens be given preference over aliens. Using that erroneous interpretation, the Respondent engaged in a comparison of qualifications when suitably qualified U.S. citizens should have been given preference over alien applicants even when the aliens were better qualified. Therefore, the Respondent failed to follow the Negotiated Labor-Management Agreement (NLMA) effectuated on September 22, 2005, when it failed to select and promote bargain unit employees who were suitably qualified for positions within the bargaining unit since the agreement signed by the Respondent required it to promote from within whenever possible.

Because the arbitration awards that were reviewed and upheld by the Authority involved an interpretation of a NLMA negotiated by the parties that provided bargaining unit employees with the right to have vacancies and promotions in the unit filled from within the agency whenever possible, and the Smith-Mundt Act gave suitably qualified U.S. citizens preference over better qualified alien applicants, those bargaining unit employees who were suitably qualified for positions filled by aliens whom the Respondent found better qualified had cognizable and legitimate grievances over the Respondent's failure to select them. Furthermore, whether filed as individual or institutional grievances, such grievances arising from a negotiated labor agreement are entirely appropriate for the grievance procedures established under the Statute, and constitute a subject matter over which the Authority has clear jurisdiction. Thus, the Respondent's contention that the Authority did not have jurisdiction over the matter by virtue of 5 U.S.C. § 7121(c)(4) or 5 C.F.R. § 335.103(d) is without merit.

The arbitration award arose from the Respondent's failure to comply with its contractual obligation to select and promote suitably qualified candidates from within the bargaining unit whenever possible. In short, the Respondent cannot violate the NLMA and deny U.S. citizens who are bargaining unit employees the preference to which they were entitled under the Smith-Mundt Act by improperly using an examination, certification, or appointment process that results in the selection of an alien and then contend that its improper use of that process precludes the Authority's jurisdiction over its failure to honor the agreed to bargaining it agreed to in the NLMA. Furthermore, the process that resulted in aliens being selected over suitably qualified candidates from the bargaining unit who were U.S. citizens did not involve a group of properly ranked and certified candidates because the aliens should not have been considered once it was determined that there was a U.S. citizen suitably qualified. Therefore, the prohibition of 5 C.F.R. § 335.103(d) is inapplicable.

While the Respondent's argument that the arbitrator and the Authority lacked jurisdiction to interpret the Smith-Mundt Act is a closer question, the argument ultimately fails because the provision interpreted by the arbitrator and upheld by the Authority upon review, has more than a mere incidental affect upon working conditions. This statutory provision was issued specifically for the purpose of addressing the working condition that inherently flows from filling vacancies within the bargaining unit. Although the Court of Appeals for the District of Columbia has previously held that an arbitrator and the Authority lacked jurisdiction over a grievance and arbitration award when the grievance was predicated upon a claim of violation of a law that was not directed toward employee working conditions, that lack of direction is not present in this case. *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 689 (1994) (*DOT Customs*).

Here, the Respondent contends that the aliens considered and ultimately hired were applicants rather than employees, and thus, §1474 of the Smith-Mundt Act giving the Respondent the legal authority to hire aliens did not affect the working conditions of bargaining unit employees. However, this contention fails to acknowledge that the aliens were hired to fill positions within the bargaining unit. Thus, the facts of this case fit squarely within the Authority's decision in *U.S. Dep't of Commerce, Patent & Trademark Office*, 53 FLRA 858 (1997) (*PTO I*), *reaff'd on other grounds, U.S. Dep't of Commerce, Patent & Trademark Office & POPA*, 54 FLRA 360 (1998) (*PTO II*). In that case, the Authority rejected the contention that the agency's decision to give newly hired applicants term appointments did not concern conditions of employment in the bargaining unit because the term appointments only affected individuals who were applicants and not employees. The Authority held that the agency's

characterization of its decision as one directed at applicants rather than employees ignored the fact that the decision involved the method used to fill bargaining unit positions and changed the composition of the bargaining unit, *PTO I*, 53 FLRA at 868. The very same affect is present in this case and there is an even greater impact upon the bargaining unit because the positions being filled represented promotion opportunities for U.S. citizens in the bargaining unit.

Therefore, the Respondent's contention that a review of the decision to hire of aliens in lieu of current employees was beyond the jurisdiction of the arbitrator and the Authority is misguided. Unlike the statute in *DOT Customs*, which was only tangentially related to the agency's employees and which the court determined was not enacted with the interests of Customs officers in mind, *Id*. at 685, § 1474 was issued to authorize the hiring of aliens only when suitably qualified U.S. citizens, including those already in the bargaining unit were not available and precluded the Respondent from hiring an alien when a suitably qualified citizen could be hired into the bargaining unit. This is not the sort of incidental, indirect and tangential impact present by the statutory provision reviewed in *DOT Customs*, which the court used to find jurisdiction over an arbitration award despite the judicial preclusion of 5 U.S.C. § 7123(a), and to conclude that the matter was outside the jurisdiction of an arbitrator or the Authority. In this case, the statutory provision was issued for the purpose of affecting the working conditions of U.S. citizens seeking employment or promotion including those already within the bargaining unit and resolving questions related to such a situation falls within the expertise of the Authority recognized by the court in *DOT Customs*.

As discussed in *DOT Customs*, because the matter is an unfair labor practice arising from the enforcement of an arbitration award interpreting a collective bargaining agreement that involved the interstices of a federal statute designed to deal directly with employee working conditions, further judicial review of the matter is precluded by operation of 5 U.S.C. § 7123(a). *DOT Customs*, 43 F.3d at 686-89; *Griffith v. FLRA*, 842 F.2d 487, 491 (D.C. Cir. 1988).

It is unlawful to fail to comply with a final and binding arbitration award. *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash*., 55 FLRA 293, 296 (1999); *Dep't of the Navy & Dep't of the Navy, Portsmouth Naval Shipyard (Portsmouth, N.H.*), 21 FLRA 195, 197 (1986), vacated on other grounds, 28 FLRA 209 (1987), and disregarding an arbitration award violates the Statute. *U.S. Dep't of the Air Force, 6th Air Mobility Wing, MacDill AFB, MacDill AFB, Fla.*, 59 FLRA 38, 40 (2003). When exceptions are filed, an arbitration award becomes final when the exceptions are dismissed or denied by the Authority. *U.S. Dep't of the Air Force, Carswell AFB, Tex.*, 38 FLRA 99, 104 (1990).

In this case, the Authority dismissed or denied all of the Respondent's exceptions to the arbitration awards and a petition for judicial review of that decision was dismissed on April 24, 2012. Since that date, the Respondent has refused to comply with the provisions of the remedy award issued by Arbitrator Marshall and has acted in direct contravention thereof, therefore I find that the Respondent violated § 7116(a)(1) and (8) of the Statute.

CONCLUSION

For the reasons set forth above, I recommend that the Authority grant the General Counsel's motion for summary judgment, deny the Respondent's motion for summary judgment, and adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's regulations and § 7118(a)(7) of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Broadcasting Board of Governors, shall:

1. Cease and desist from:

   (a) Failing and refusing to fully comply with the merits and remedy awards issued by Arbitrator George E. Marshall, Jr., on August 27, 2007 and June 15, 2010.

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

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

   (a) Comply with Arbitrator Marshall's award by providing those employees individually identified by Arbitrator Marshall an equivalent position, back pay and interest. The back pay should be calculated starting from the date the employee should have been selected for the position and end on the date the employee is placed in an equivalent

position. To the extent the employees now occupy a position equivalent to the position they were denied, grant the individuals back pay and interest from the date of their non-selection to the date they were placed in an equivalent position. For positions where the employee would have initially received the same pay grade as in the employee's previous position, but where the new position had a higher career ladder, the employee should receive back pay for the next higher grade starting one year after the date the employee should have been selected for the position and should receive all subsequent annual career ladder promotions.

(b) The Respondent will issue all open vacancy announcements to only U.S. citizens. If, after the closing for a particular vacancy announcement, it is determined no U.S. citizen is suitably qualified for the position (using the criteria in the vacancy announcement) the Respondent may issue another vacancy announcement for the position that is open to U.S. citizens and non-U.S. citizens. If any U.S. citizens are deemed suitably qualified (using the criteria in the vacancy announcement) a U.S. citizen must be selected for the position.

(c) Meet with the Union about remedy for the remaining class members contained in the Union's remedy brief.

(d) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the presiding Governor, 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. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Disseminate a copy of the Notice to all bargaining unit employees through the Respondent's electronic mail system.

(f) Pursuant to § 2423.41(e) of the Authority's rules and regulations and within 30 days from the date of this Order, notify in writing, the Regional Director, Chicago Region, Federal Labor Relations Authority, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., May 28, 2014

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CHARLES R. CENTER

Chief Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Broadcasting Board of Governors violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to abide by and implement the final and binding Arbitrator's Award and Arbitrator's Remedy Award issued by George E. Marshall, Jr.

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

WE WILL promptly comply with the final and binding awards of Arbitrator George E. Marshall, Jr., by providing certain employees an equivalent position, back pay and interest, by issuing vacancy announcements in accordance with the procedure outlined by the Arbitrator, and by meeting with the Union about the other class members that may be entitled to relief.

_____
Broadcasting Board of Governors

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.