UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 17, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR

Respondent

and Case No. WA-CA-04-0540

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF LABOR Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO Charging Party	Case No. WA-CA-04-0540

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 20, 2006**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____
RICHARD A. PEARSON
Administrative Law Judge

Dated: February 17, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

U.S. DEPARTMENT OF LABOR Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO Charging Party	Case No. WA-CA-04-0540

Thomas F. Bianco, Esquire
H. Paul Vali, Esquire
For the General Counsel

M. Yusuf M. Mohamed, Esquire
Joseph Blake, Esquire
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Statement of the Case

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

Based on an unfair labor practice charge filed by the American Federation of Government Employees, Local 12, AFL-CIO (Union or Charging Party), a Complaint and Notice of Hearing was issued by the Regional Director of the Washington Regional Office of the Authority. The Complaint alleges that the U.S. Department of Labor (the Agency or Respondent) violated section 7116(a)(1) and (8) of the Statute by failing to comply with an arbitration award issued on May 21, 2003, as required by sections 7121 and 7122 of the Statute. Specifically, the Complaint alleges that the Respondent has failed to consider positions in OSHA for purposes of promoting a bargaining unit employee pursuant to the Arbitration Award and has failed to provide the same employee any back pay pursuant to the Award. The

Respondent filed an Answer admitting in part and denying in part the allegations set forth in the Complaint.

A hearing was held in Washington, D.C., on October 28, 2004, at which time all parties were afforded full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Both the General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The U.S. Department of Labor is an agency under 5 U.S.C. § 7103(a)(3). G.C. Exs. 2 and 3. The Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA) are two separate components within the Respondent. The American Federation of Government Employees, Local 12, AFL-CIO (the Union or Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4) and the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. G.C. Exs. 2 and 3. At all times material to this case, David C. Hershfield (Hershfield or the Grievant) was an employee of the Respondent, occupied a position as a GS-110-13 Economist in OSHA, and was a member of the bargaining unit represented by the Union.

This dispute involving Mr. Hershfield first arose in February of 1998, when he applied for a position as GS-110-14 Economist in MSHA. When he was not selected, he filed a grievance concerning the action, and the Union and Agency reached a Settlement Agreement on February 5, 2001. The Settlement Agreement provided that Hershfield "will be given priority consideration for the next Economist GS-110-14 position in the national office of the Mine Safety and Health Administration." G.C. Ex. 6, p. 4. Just such a position was advertised in May 2001; Hershfield applied for the position but was not given priority consideration, and he was not selected for it. The Union filed another grievance, and this ultimately was submitted to arbitration.

On May 21, 2003, Arbitrator S.R. Butler issued an "Opinion And Award In The Matter Of The Arbitration Between: U.S. Department of Labor and the American Federation of Government Employees, Local 12." The Award states:

> The Agency violated the applicable Settlement Agreement and Article 16 of the Collective Bargaining Agreement when it did not select the Grievant, David Hershfield, for a GS-110-14 position, Vacancy Announcement MSHA-01-043, on or about June 1, 2001.
>
> The remedy shall be as follows:
>
> > 1. The Agency is directed to promote the Grievant retroactively to June 1, 2001 to the next appropriate GS-14 position available in MSHA, OSHA or any other Department of Labor agency agreed upon by the Parties.
> >
> > 2. The Agency is directed to make the Grievant whole retroactive to June 1, 2001 pursuant to the Back Pay Act, 5 U.S.C. 5596.
> >
> > 3. In the event of a dispute over the implementation of the remedy in this matter, the Arbitrator shall retain jurisdiction over any said dispute for a period of ninety (90) calendar days following the date of this Award.

G.C. Ex. 6, p. 15.

The Respondent filed exceptions to the Award, and on January 8, 2004, the Federal Labor Relations Authority issued its decision in *United States Department of Labor, Washington, D.C. and American Federation of Government Employees, Local 12,* 59 FLRA 560 (2004) (*DOL*), in which it denied the Respondent's exceptions. Specifically, the Authority held that the Award did not violate the Agency's right to make selections under section 7106(a)(2)(C) of the Statute; that the Award did not violate the Back Pay Act; and that the Arbitrator did not exceed her authority by ordering the Agency to promote Hershfield to a position in OSHA or MSHA. The Award became final upon the Authority's decision.

Eleanor Lauderdale, the Head Steward for Local 12, subsequently stayed in contact with the Agency in order to see to it that Hershfield was promoted to a GS-14 position. Lauderdale mainly communicated with Joseph Blake, the Human Resources Specialist in the Labor Management Branch who is primarily responsible for OSHA. Tr. 28, 33, 34. Lauderdale testified that she asked several times what the Respondent was doing in order to abide by the Arbitration Award. She

was generally told that there were no positions available, so they had not looked for any GS-14 positions. Tr. 32-33. Blake also told her that they were only going to look for GS-14 positions in MSHA, since that agency had been the subject of the arbitration. Tr. 40. Lauderdale disputed Blake's position that the Respondent was only obligated to look in MSHA for a GS-14 position. Sometime in the summer of 2004, Lauderdale sent an e-mail to Blake regarding a vacancy for a GS-14 economist position in ASP, which is an organization within DOL, but separate from both MSHA and OSHA. Tr. 40-43. She did not recall ever receiving a response from Blake or anyone else in DOL. Tr. 43.

Alex Bastani, Executive Vice President for Local 12, was also in contact with DOL regarding the Arbitration Award. Tr. 35, 38. On April 1, 2004, Bastani sent an e-mail to Carol Qualls and Sandra Keppley of the Office of the Assistant Secretary for Administration and Management (OASAM), stating that the Union had received no information from the Agency since the Arbitration decision was upheld by the Authority. The e-mail further stated, "We would like to know the status of 1) the back pay from the time of the selection at the GS-14 level and 2) has the Department found an appropriate GS-14 Economist position for Dr. Hershfield." G.C. Ex. 1, p. 4. Bastani renewed his request by e-mail dated April 28, 2004. *Id.* On May 13, 2004, Bastani received a letter from Blake, which stated:

> This responds to your e-mail inquired [sic] dated April 10, 2004, in which you requested the status of managements efforts to place Mr. Hershfield in a GS-14 position and process back pay. Currently there are no GS-14 positions open in MSHA for which Mr. Hershfield qualifies.
>
> With respect to back pay, Arbitrator Butler's award clearly directs the Agency to "...make the Grievant whole retroactive to June 1, 2001 pursuant to the Back Pay Act, 5 U.S.C. 5596." Accordingly, back pay will be computed from June 1, 2001 once Mr. Hershfield is placed in a GS-14 position.

G.C. Ex. 1, p. 3; Tr. 35.

The Union filed the unfair labor practice charge in this case on June 25, 2004. At the time that post-hearing briefs were filed, the Grievant had still not been placed in a GS-14 position, and he had not been paid any back pay under the Arbitration Award.

Rhonda Long, Supervisory Human Resources Specialist at MSHA, testified that MSHA has not hired any economists or posted any vacancy announcements between January 8, 2004 and the date of the hearing. Tr. 52-53. In September 2004, Long was told that MSHA was seeking to fill a vacancy as Supervisory Management Analyst (Impact Analyst), GS-343-14. She reviewed an application on file for the Grievant in order to determine whether he was qualified for the position. Resp. Ex. 1, Tr. 55-56. On October 4, 2004, she offered the position to Mr. Hershfield, but he declined it. Resp. Ex. 2, 3.

Issues

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitration Award issued on May 21, 2003, and finalized on January 8, 2004, as required by section 7122(b) of the Statute, by refusing to consider the Grievant for positions in OSHA and by refusing to pay him back pay pursuant to the Award.

Positions of the Parties

General Counsel

The General Counsel asserts that, at a minimum, the Award required the Department of Labor to search for an appropriate GS-14 position for the Grievant in both MSHA and OSHA. The Arbitrator knew that Hershfield was an OSHA employee and had twice been wrongfully denied promotion in MSHA. It was against this backdrop that the Arbitrator, in her remedy, singled out and distinguished both MSHA and OSHA for specific attention by the Respondent. According to the GC, the evidence shows, and the Respondent does not dispute, that it looked only in MSHA for an appropriate position. Even if the Agency learned subsequently that no appropriate positions had been vacant in OSHA between the date the Award became final and the date the Union filed its ULP charge, the Agency's failure to look in OSHA for many months constituted a refusal to comply with the Award. Further, the GC urges that the Award is undermined when, as occurred here, the Union and the Grievant are put in the position of having to repeatedly ask the Agency if anything has been done to find a position. The undisputed evidence is that the Respondent did not bother to look in OSHA for a position for the Grievant, despite the direct requirement that it do so, and this violated not only the Award but also the Statute.

The General Counsel further asserts that the Agency's ongoing failure to pay the Grievant the back pay ordered by

the Arbitrator constitutes an additional violation of the Statute. The Agency does not deny that it has refused to pay back pay to this date, but contends that it is not legally permitted to do so until the Grievant has actually been promoted. The GC asserts that the two remedies ordered by the Arbitrator are separate and distinct, and there is no indication that the Arbitrator intended to make the payment of back pay dependent on the Grievant's ultimate promotion. If the Respondent wished to object to this construction of the Award, it had an obligation to do so in its exceptions to the Authority; having not done so in that forum, the Respondent may not now raise that objection or argument in the instant case. Both the Authority and the courts refuse to allow a party to collaterally attack a final and binding arbitration award as part of a ULP proceeding for refusing to comply with the award. *See U.S. Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers' Association*, 54 FLRA 480, 483 (1998) (*FAA*); *see also United States Marshals Service v. FLRA,* 778 F.2d 1432, 1436-7 (9th Cir. 1983).

The General Counsel further argues that neither 5 C.F.R. § 550.804 nor FPM 296-33, Guide to Processing Personnel Actions, supports the Agency's contention that it is prohibited from giving the Grievant any back pay until he is promoted. The Arbitrator found that, but for the Agency's violation of the Settlement Agreement and the Collective Bargaining Agreement, Hershfield would have been promoted to the GS-14 position he applied for in June 2001; therefore, an appropriate authority has made an administrative determination that corrective personnel action is warranted, as required by 5 C.F.R. section 550.804. FPM 296-33 contains instructions on how to "prepare personnel actions" (Ch. 1, Sec. 1-2). This guide also contemplates "unusual cases" and instructs agencies to contact OPM's Center for HR Systems Requirements and Strategies about such cases. The Respondent offered no evidence that it sought or received OPM's help with the circumstances of the instant case, or that OPM supported its legal position. The GC concludes that the Agency's position, if upheld, would totally undermine the integrity of arbitration awards, as it would allow agencies to avoid compliance altogether by delaying indefinitely.

After the complaint was issued in this matter, the Respondent attempted to promote the Grievant to a Supervisory Management Analyst, GS-343-14, position in MSHA. The GC argues that the belatedly offered supervisory position was not an "appropriate" position as contemplated by the Award. The Respondent, faced with defending against a ULP complaint, tried to force the Grievant into a

supervisory role that he had not sought, in which he would have responsibilities for which he himself acknowledged that he is unqualified, with the likelihood that he could lose his employment if he fails. Under these circumstances, the offered position was not an appropriate one under the Arbitration Award, and the Respondent has not satisfied its obligations under the Award.

To remedy the unfair labor practices, the General Counsel seeks an order requiring the Respondent to (1) provide Mr. Hershfield with back pay from June 1, 2001, to the date of the final order in this case, with the remainder of back pay due to be paid upon his promotion to an appropriate position; (2) continue to search for an appropriate GS-14 position in both MSHA and OSHA; (3) provide the Grievant and the Union, on a weekly basis, a listing of all vacant GS-14 positions within MSHA and OSHA for which the Grievant is qualified, together with an explanation for the failure to promote him; and (4) post an appropriate notice signed by the Secretary of Labor. The GC asserts that the immediate back pay is necessary both to comply with the Award and to deter further delayed compliance by the Respondent. It also argues that the Union and the Grievant need ongoing information from the Agency about job vacancies to facilitate the Grievant's speedy promotion to an appropriate GS-14 position.

Respondent

The Respondent first argues that because the Complaint alleges that David Lauriski (then the Assistant Secretary of Labor for MSHA) or his agent committed the alleged unfair labor practices, the case against the Respondent should be limited to violations by MSHA officials, and not by officials of OSHA or other DOL components. Since the Grievant is employed by OSHA, and the GC attacks the Respondent's failure to look for a position for Hershfield in OSHA or pay him back pay, Respondent asserts that the GC has not shown that any MSHA official committed any unfair labor practice, and the Complaint must therefore be dismissed. According to the Respondent, neither Lauriski nor anyone under his supervision had authority to consider Hershfield for a position at OSHA or pay him back pay. The GC never amended the Complaint, even though it was aware of this issue (Tr. 48-49), and the Respondent argues that the GC is therefore bound by the terms of the Complaint. Citing Judge Oliver's comment that "I will hold the General Counsel responsible for the specific content of his complaint[,]" Respondent urges that actions by officials outside of MSHA are beyond the scope of this case. *See United States*

Immigration and Naturalization Service, Washington, D.C., 56 FLRA 721, 731 (2000).

The Respondent next asserts that it is not required to include OSHA in its search for an appropriate position for the Grievant in order to comply with the Arbitration Award. Citing the language of the Award, it was ordered to promote the Grievant "to the next appropriate GS-14 position available in MSHA, OSHA or any other Department of Labor agency agreed upon by the Parties." The Respondent argues that this language is most reasonably read to require the placement of the Grievant in a position in OSHA or MSHA, and that placement in any other component of DOL would require the agreement of the parties. Since the parties' mutual agreement is only necessary if Hershfield is placed in a third agency, the Respondent argues that it retained the discretion to place him in either MSHA or OSHA. The Respondent rejects the General Counsel's interpretation that the Respondent was required to consider positions in OSHA, and it argues that its interpretation of the Award is reasonable and therefore must stand. Respondent cites *Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 52 FLRA 225, 231 (1996) ("If the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not constitute a clear and patent breach of the terms of the agreement.") The Respondent notes that the Union did not seek clarification of the Award, even though the Arbitrator indicated that she would retain jurisdiction over the case to resolve any disputes over its implementation. G.C. Ex. 6 at 15. *Cf., Headquarters, U.S. Army Communications Command, et al., Ft. Huachuca, Arizona, and American Federation of Government Employees, Local 1662*, 2 FLRA 786, 789 (1980).

Further, even if the Award required the Respondent to consider positions within OSHA, such a search would have been futile. An MSHA human resources official testified that there were no vacancies filled for such positions within OSHA between the date the Award became final and the date of the hearing. Tr. 119-21. OSHA had seven GS-14 openings during this time frame: they included one health scientist, one electrical engineer, one information technology specialist, two human relations specialists, and two program analysts. Tr. 119. The Grievant would not have been minimally qualified for the first five positions; of the two program analyst positions, one was not competitively filled and Hershfield would not have minimally qualified for the other. Tr. 119-20. Since there is no conceivable scenario under which the Grievant would have been awarded

any of these seven positions at OSHA, a search there would have been futile. The evidence was not disputed by the GC.

The Respondent asserts that MSHA has consistently looked to see if it had a vacancy suitable for the Grievant. Tr. 54, 72. After becoming aware of the Supervisory Management Analyst position, Ms. Long reviewed Hershfield's qualifications, based on application materials he had submitted for a previous vacancy. Tr. 58-59; Resp. Ex. 4. She concluded that the Grievant was qualified for the supervisory position, and he was then offered the position. Although the Grievant rejected the position, claiming that he was not qualified for it, the Respondent asserts that the documents he submitted to MSHA show that he was qualified.

The Grievant has never been employed by MSHA and has rejected the position that he was offered by MSHA. Thus, Respondent argues that the Assistant Secretary, Mr. Lauriski, had no logical or legal obligation to pay the Grievant any back pay, contrary to the GC's narrowly pleaded allegations. Had the Grievant accepted the position that was offered to him, he would have received the back pay that was due to him. The Respondent therefore argues that it has fulfilled its obligations under the Arbitration Award.

The Respondent further argues that there is no provision of the Back Pay Act that permits it to pay the Grievant back pay under the facts of this case. Cases that have reviewed back pay issues under the Back Pay Act found that no monies are due to an employee who did not actually suffer a "withdrawal or reduction" in pay, as required by that Act. 5 U.S.C. § 5996(b)(1). This issue is a sovereign immunity question, and courts have required evidence of a waiver of such immunity by Congress before imposing monetary damages. *See Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995).

According to the Respondent, the seminal case on this issue is *U.S. v. Testan*, 424 U.S. 392 (1976). Though stated there in the context of a classification case, the applicable rule is that "the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed duties of another position or claims that he should have been placed in a higher grade." 424 U.S. at 406. There is no evidence in the instant case or in the arbitrator's decision that the Grievant was demoted, fired or had any portion of his pay withheld by the Agency. However, the back pay that might be due to the Grievant would have resulted from the failure of Respondent to promote the Grievant as required by the Award, a situation that is not compensable under the *Testan*

decision. In a 1978 decision, the Third Circuit agreed and wrote, "the unwarranted failure timely to promote plaintiff in accordance with Army regulations, though a wrongful act, is not the type of personnel action calling for back pay under the Back Pay Act, for the action has not caused plaintiff to suffer any reduction in grade but has only delayed his advancement to a higher level." *Donovan V. U.S.*, 580 F.2d 1203 (3rd Cir. 1978)

In *Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990), the court wrote that "Back Pay Act relief is available only to compensate for a reduction in pay or a decrease in grade." *Id.* at 218. It further added that unless an employee had a "virtually automatic" right to a position, no relief was available under the Act. *Id.* at 220. Though the GC might argue that the promotion at issue here was automatic, further language in the decision negates such reasoning. Since the grievance was for a particular vacancy announcement for which the Grievant should have been given priority consideration, the agency "could have decided to eliminate, or not to create, the sought-after position." *Id.* at 220. Because in this case, the Respondent could choose to never post another vacancy announcement or make any further hires, then nothing would have made the Grievant's entitlement to the position automatic in any way. Thus, Respondent asserts the Back Pay Act offers no relief.

The Back Pay Act states that back pay is to be paid "on correction of the personnel action." 5 U.S.C. § 5596(b)(1)(a). Thus, if the wrongful personnel action is the denial of a particular position, only upon its correction - by appointing the employee to the correct position – is he entitled to any monies due. See also 5 C.F.R. § 550.805 (2005). Although the Award specified a beginning date for the back pay that might be due, it gave no ending date for that period, thus leaving the Respondent's personnel staff without a basis of calculating the payment due to the Grievant. If the Grievant had accepted the position offered to him, the Agency could have processed an SF-50 to effectuate the promotion and set an end date for the back pay, but his rejection of the offered position precluded the Agency from calculating or paying any back pay. Violet Parker, a human resources employee of the Respondent, testified that there is no method by which an employee can be paid back pay without a personnel action form, or SF-50, being issued. Tr. 129. Respondent could not simply write the Grievant a lump sum check for back pay, since (among other things) this would not result in his receiving proper retirement credit for his position, because there would be no SF-50 generated showing the position for which the Grievant was promoted. Tr. 133.

Parker's testimony was not rebutted in any way and stands as the only evidence in the record of the manner by which back pay payments may be made to the Grievant. Since the Respondent complied with the Award and could have paid the Grievant the back pay due to him, had he accepted the offered position, his actions prevented the Respondent from complying with this portion of the Award.

Respondent further argues that any obligation it had to pay the Grievant back pay was terminated by his failure to mitigate damages. "Employees entitled to relief under the Back Pay Act have a duty to mitigate damages in cases brought under the Act." *American Federation of Government Employees, Local 12 and United States Department of Labor*, 32 FLRA 771, 775 (1988). The NLRB has adopted a similar rule; *see Black Magic Resources*, 317 NLRB 721 (1995). The Grievant's rejection of the offered position served to frustrate the Agency's attempt to comply with the Award.

Had the Grievant accepted the offered position, the Respondent argues that he would have been able to immediately receive his back pay. He then could have grieved the appropriateness of the position. If the position was not deemed "appropriate" under the Award, the Grievant would have continued in the new position until he was appointed to another position. If the position was found to be appropriate, he would have been paid his back pay and continued in the offered position. In either case, however, he would have mitigated his damages and received all of the benefits of a retroactive promotion, including the proper crediting of his retirement benefits.

By offering Hershfield the position as Supervisory Management Analyst in October 2004, the Respondent argues that it complied with the Award. It submits that Ms. Long's testimony established that the Grievant was qualified for the position, based on the Grievant's own application materials. Thus, if the Grievant is owed any back pay, it is limited to the period between June 1, 2001 and October 17, 2004.

Analysis and Conclusions

1. Pleading Issue

The Complaint in this case was issued against the Department of Labor, which encompasses both MSHA and OSHA. David Lauriski, the Assistant Secretary of Labor for MSHA, was the only named supervisor, management official or agent named in the Complaint. (G.C. Ex. 2, ¶¶ 6-8). Paragraph 13

alleges that "Since January 8, 2004, the Respondent, through Lauriski or his agent, has failed to consider positions in OSHA for purposes of promoting Hershfield pursuant to the Award." The Respondent correctly identified a problem with regard to the pleading, i.e., that no one from authority within OSHA is alleged in the Complaint and there is no evidence in the record to show that Lauriski or his agent had any authority over OSHA. However, the gist of the case, that the Department of Labor did not comply with the Arbitration Award, is apparent from the pleadings and the evidence presented at the hearing.

The Authority has long held that it does not judge a complaint on rigid pleading requirements. *OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California,* 51 FLRA 797, 807-08 (1996). Rather, the Authority will consider matters not specified in the complaint, if those matters are fully and fairly litigated. The test of full and fair litigation is "whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." *U.S. Department of Labor, Washington, D.C.*, 51 FLRA 462, 467 (1995). "[F]airness requires that any doubts about due process be resolved in favor of the respondent." *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona*, 52 FLRA 421, 431. The Authority has recently stated that these due process principles are the appropriate framework to resolve questions concerning the identity of a respondent. *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas*, 57 FLRA 787, 788 (2002); *see also United States Department of the Air Force, Headquarters, 96th Air Base Wing, Eglin Air Force Base, Florida,* 58 FLRA 626, 628-29 (2003).

The record here amply demonstrates that the Respondent fully understood that the General Counsel was alleging unlawful acts by officials within both MSHA and OSHA, and it fully defended the actions of all such officials. The Respondent was not harmed in any way by the technical defect in the Complaint. Moreover, since the Complaint was brought against the Department of Labor as a whole, the allegations against MSHA officials are attributable as well to DOL. Resp. Ex. 3, as well as Ms. Lauderdale's testimony, make it clear that Joseph Blake, an official within the Office of the Assistant Secretary for Administration and Management, was involved in limiting the Agency's search for a position for the Grievant to positions within MSHA. Since the Respondent was well aware of the allegations against it and those matters were fully and fairly litigated, this portion of the Respondent's defense is rejected.

2. Compliance with the Arbitration Award

The Arbitration Award directed the Respondent[1] to promote Mr. Hershfield ". . . retroactively to June 1, 2001 to the next appropriate GS-14 position available in MSHA, OSHA or any other Department of Labor agency agreed upon by the Parties." G.C. Ex. 6, p. 15. The Respondent admits that it did not look in OSHA for any GS-14 positions for the Grievant, but only considered positions within MSHA. One of the exceptions to the Arbitration Award filed by the Respondent with the Authority argued that the Arbitrator exceeded her authority by including OSHA in her ordered relief. There, the Agency argued that "MSHA was the only agency involved in this matter[,]" and it challenged the Arbitrator's ability to order it to promote the Grievant to a position in OSHA. 59 FLRA at 563. The Authority found that the Arbitrator had not disregarded any specific limitations on her authority, noting that the disputed position was in MSHA, that the grievant worked for OSHA at the time, and that both activities are part of the Department of Labor. *DOL*, 59 FLRA at 563.

After the Award became final, Respondent's officials continued to assert to the Union that it was only obligated to look for a position for Hershfield within MSHA, and it continued to argue this position at the hearing. As summarized above, Respondent continues to assert that the Award is somehow vague and allows Respondent the discretion as to whether or not to look for a position in OSHA. It is apparent, therefore, that the Respondent is pursuing the same basic legal issues that it previously raised in its exceptions to the Authority. Under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes final and binding. *See U.S. Department of Health and Human Services, Health Care Financing Administration*, 35 FLRA 491, 494-95 (1990), and cases cited therein. As a result, both the Authority and the courts refuse to allow an agency respondent to collaterally attack a final and binding arbitration award as part of an unfair labor practice proceeding for refusing to comply with the award. *See U.S. Department of Justice v. FLRA*, 792 F.2d 25 (2d Cir. 1986), enf'g *U.S. Department of Justice and Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut)*, 20 FLRA 39 (1985); *United States Marshals Service v. FLRA*, 778 F.2d

[1] The Department of Labor, not simply MSHA or OSHA, was the respondent at the arbitration hearing as well as in the instant proceeding.

1432 (9th Cir. 1985), *enf'g United States Marshals Service*, 13 FLRA 351 (1983); *Department of the Air Force v. FLRA*, 775 F.2d 727, 733 (6th Cir. 1985), *aff'g United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151 (1984). *See also FAA*, supra, 54 FLRA 480.

Therefore, since the Respondent has admitted that it failed to search or consider appropriate GS-14 vacancies in OSHA, it has refused to comply with the Arbitration Award in this respect, in violation of the Statute. The Award itself is quite clear that the Agency must look for a position for the Grievant in both OSHA and MSHA, and (contrary to the Agency's claim) there is nothing discretionary about that portion of the Award. The Authority reiterated this in its decision on exceptions. Further, I find that Respondent's attempts to excuse its conduct, by asserting that there were not actually any appropriate available GS-14 positions in OSHA, are both self-serving and insufficient. The evidence clearly shows that Agency officials gave no consideration to the Grievant for OSHA positions until after the complaint was issued and then only in the context of rejecting them as possible appropriate positions.[2] Agency officials clearly communicated to the Union for several months after the Arbitration Award became final that it was flatly ignoring at least one aspect of the Award, and this constituted an unfair labor practice.

3. The Appropriateness of the Position Offered to the Grievant

The complaint was issued in this matter on September 16, 2004. At roughly the same time, a job as Supervisory Management Analyst - Impact Analyst, GS-343-14, became available in MSHA. In her position as Supervisory Human Resources Specialist for MSHA, Rhonda Long reviewed an application on file for Mr. Hershfield that he had submitted for a previous, unrelated position. Long, without consulting either the Union or the Grievant, determined that he was qualified for the position. The Respondent asserts that this was an "appropriate" position and that it therefore complied with the Award; accordingly, it argues that any back pay liability it had, terminated when the Grievant declined the job. As stated above, the General Counsel asserts that this position was not appropriate under the Award, that the Agency has a continuing obligation to

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[2] Even then, Douglas Goodell, Human Resources Officer for OSHA, admitted that Dr. Hershfield was minimally qualified for the management specialist position. Tr. 120, 122-123.

promote the Grievant, and that its back pay liability continues to mount.

The Supervisory Management Analyst (Impact Analyst) position in question ". . . manages a staff that implements MSHA's program that ensures compliance with the Paperwork Reduction Act, OMB circular A-119, federal record retention requirements of the National Archives and Records Administration, and Privacy Act systems of records requirements." Resp. Ex. 1. The "knowledge and skills" required for the position included: expert knowledge of Federal laws, regulations, policies and procedures pursuant to the Paperwork Reduction Act (PRA); ability to conduct or review analyses of the economic burden of information collection, recordkeeping, or reporting requirements for submission to the Office of Management and Budget; general knowledge of the Privacy Act sufficient to analyze the impact on proposed or revised individual privacy of requirements subject of the PRA; knowledge of management and organizational principles and practices sufficient to direct the work of an organizational unit; broad knowledge of data resources, data flow, and systems interactions of automated systems; ability to translate user requirements into technical specifications for contract development and to evaluate vendor proposals for technical merit and feasibility; and skill in managing a program having far-reaching effects down to the lowest field office. *Id.*

With regard to supervisory abilities, candidates for this position must have demonstrated in their experience that they possess, or have the potential to develop, the qualities of successful supervision. Long determined that Hershfield directed other economists in their research during a 90-day assignment as a Supervisory Program Analyst in 1991. She also noted that he was a retired Lt. Colonel in the U.S. Army Reserve, and she concluded that the combination of these experiences gave him the ability to supervise a staff of fully qualified journeyman management analysts. Resp. Ex. 4.

Long determined that the Grievant was minimally qualified for the position, based on the following areas of competency: (1) his supervisory experience; (2) his "broad knowledge of data resources, data flow, and systems interactions of automated system"; (3) his ability to translate user requirements into technical specifications for contract development and to evaluate a number of proposals for technical merit and feasibility; (4) his expert knowledge of the PRA and Federal laws and regulations applicable to the PRA (such as MSHA regulations and the Privacy Act); his knowledge of the Clinger-Cohen Act, the

Freedom of Information Act, OMB Circular A-130, developing budgets or preparing performance evaluations; (6) his ability to manage a program "down to the lowest field office at MSHA"; (7) his understanding of criteria used in evaluating whether applications or applicants meet minimum requirements; and (8) his contracting expertise.[3] Tr. 65-68, 81, 85-86.

Mr. Hershfield, however, denied that he met the minimal qualifications for the supervisory analyst position. He testified that (1) he had never had any subordinates and had never supervised anyone while in the Army Reserves; (2) he knows nothing about data resources, data flow, and systems interactions of automated systems, and his experience with interactive computer systems was limited to doing user-testing; (3) he has no ability to translate user requirements into technical specifications for contract development or to evaluate a number of proposals for technical merit and feasibility; (4) he has no expert knowledge of the PRA or other applicable laws or regulations, and that any PRA-related work in his current job was given to a PRA expert. Further, he said that he knows nothing about the Clinger-Cohen Act, the Freedom of Information Act, OMB Circular A-130, developing budgets or preparing performance evaluations; he has no experience in managing a program; he has no experience in evaluating whether applications or applicants meet minimum requirements; and his contracting expertise was limited to reviewing drafts, correcting grammatical errors, errors in economics, reviewing invoices, ensuring compliance and technical qualifications of contractor agents. (Tr. 144-147, 149, 150-154, 160-70, 173, 174-75, 179-184)

In comparing the testimony of the witnesses in this regard, it appears to me that Long over-inflated and Hershfield under-inflated his experience and abilities. Nonetheless, it is clear that Ms. Long made many incorrect assumptions when she initially reviewed an old job application from the Grievant's file, without consulting with the Grievant himself, and that Hershfield lacked many of the basic requirements of the supervisory position. The management analyst position is in an entirely different job series than the economist job the Grievant had long performed, and there is no basis in the record to conclude that Hershfield had sufficient experience with statutes such

[3] In reviewing the Grievant's qualifications for several positions in OSHA that Hershfield was not offered (including two positions in the same GS-343 series that was later offered to him), Goodell testified that the Grievant did not meet the minimum contracting requirements. Tr. 121.

as the PRA, FOIA, the Privacy Act and the Clinger-Cohen Act, or technical regulations such as OMB Circular A-130, to supervise the work of experienced management analysts on these subjects. Given the Grievant's lack of any meaningful supervisory experience and the lack of knowledge of the PRA and other legislation specific to the position, I find that the Supervisory Management Analyst position offered to the Grievant in September 2004 was not an "appropriate position" under the Arbitration Award.

I am also mindful of the fact that this was a supervisory position, in which the Grievant would not have many of the protections of the Statute, and he would be subject to a probationary period, with the possibility of removal from the position. It would be unfair to require the Grievant to accept such a risky position, for which he appears less than minimally qualified, as a remedy for the Agency's previous failure, on two separate occasions, to promote him to a GS-14 economist position.[4]

Since the position offered to the Grievant in September 2004 was not an "appropriate position" under the Award, it did not relieve the Respondent of its obligations under the Award. Respondent must continue to search, within both MSHA and OSHA (as well as other parts of DOL, with the agreement of the Union and Hershfield), for an appropriate GS-14 position. Such a position need not be only within the GS-110 Economist series, but it must be one for which the Grievant's skills and experience make him at least minimally qualified. Moreover, the Respondent's officials should consult with the Union and the Grievant during the search

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The irony has not escaped me regarding the shifting perspectives of the parties at different stages of this case. Between February 1998 and August 2004, Hershfield and the Union were pushing the Agency to give the Grievant the broadest consideration possible in promoting him to a GS-14 position, while the Agency repeatedly found reasons to select other employees over him, or not even to consider him at all. After twice being found to have committed unwarranted personnel actions against the Grievant and having lost its appeal to the Authority regarding the Arbitration Award, the Agency suddenly in September 2004 gave Hershfield the benefit of every possible doubt in evaluating his qualifications for a supervisory position; in turn, the Grievant is now pleading how unqualified he is for this job. Notwithstanding these facts, I find Hershfield's reluctance to take this supervisory position far more rational and credible than the Agency's newfound confidence in the Grievant's ability to supervise an office of management analysts.

process, so that questions can be answered and misunderstandings can be minimized.

4. Backpay

In her Award, the Arbitrator directed the Agency "to make the Grievant whole retroactive to June 1, 2001 pursuant to the Back Pay Act, 5 U.S.C. 5596." The Respondent argues before me that the payment of back pay to the Grievant pursuant to the Award is not lawful under the Back Pay Act. This argument, however, was specifically raised by the Respondent in its exceptions to the Award, and was rejected by the Authority.

In that regard, the Authority stated that it has long held that an award of back pay under the Back Pay Act is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials. 59 FLRA at 563. The Authority further stated that under its precedent, an agency's breach of both a settlement agreement and a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Back Pay Act. It noted that "the Arbitrator expressly found that the Agency's failure to select the grievant constituted an 'unjustified personnel action [that] resulted in the reduction of pay[.]' Award at 15. Therefore, the Award satisfies the requirements of the Back Pay Act. . . ." *Id.*

Under these circumstances, it is inappropriate to raise this same issue in the unfair labor practice forum. *See FAA,* 54 FLRA at 483-85 and cases cited above. While the Respondent adds some new wrinkles to its Back Pay Act argument, such as its inability to pay the Grievant until he is actually promoted, this does not alter the fact that the Authority upheld the legality of the Award directing the Respondent to pay back pay to Hershfield promptly.

Even assuming it would be appropriate to consider the Respondent's position in this matter, the evidence does not support the Respondent's contentions that it is unable to pay Mr. Hershfield the rquired back pay until he is actually placed in a GS-14 position. The Respondent cites *United States v. Testan*, 424 U.S. 392 (1976), in support of its position. The General Counsel, however, correctly points out that *Testan* was decided prior to the enactment of the Civil Service Reform Act of 1978 (CSRA), which had significant ramifications for the Back Pay Act. In *Brown v. Secretary of the Army*, 918 F. 2d 214, 219-20 (D.C. Cir.

1990), the Circuit Court recognized that the CSRA included within "unjustified and unwarranted personnel action" the "omission or failure to take an action or confer a benefit" in non-discretionary promotions, such as in this matter. *See also Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994), adopting *Brown's* interpretation that the Back Pay Act covers illegal refusals to make mandatory promotions.

Further, neither 5 C.F.R. § 550.804 nor FPM 296-33 supports the Agency's contentions. As found by the Authority, the Arbitrator's Award in this matter is consistent with the Back Pay Act. FPM 296-33 contains instructions on how to prepare personnel actions. The Respondent presented no evidence that it sought or received guidance from the Office of Personnel Management as to how to pay back pay to Mr. Hershfield, or that OPM supports its contentions on this issue.

Therefore, I find that the Respondent's failure to pay the Grievant back pay in accordance with the Arbitration Award is a violation of section 7116(a)(1) and (8) of the Statute.

5. Remedy

As requested by the General Counsel, I agree that an appropriate notice should be signed by the Secretary of Labor and posted throughout the bargaining unit for which the Charging Party is the exclusive representative, in all places where notices to unit employees are customarily posted. *See U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 322 (1997); *U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 55 FLRA 388, 394 (1999). Particularly since the Respondent here has tried to restrict its affirmative responsibilities to MSHA alone, it is necessary to have the notice signed by the Secretary.

It is worth repeating here that the Respondent voluntarily accepted the obligation on February 5, 2001, to give the Grievant priority consideration for the next GS-14 Economist position. The Grievant and the Union have been seeking to have the Respondent fulfill its obligation ever since. On May 21, 2003, the Arbitrator ordered the Respondent to pay the Grievant back pay retroactive to June 1, 2001, and the Respondent has been avoiding that obligation ever since. Testimony at the hearing indicated that Union officials at times advised Agency officials of positions that the Grievant might qualify for, and that the Union would get no response. Moreover, at the risk of

stating the obvious, the Agency's back pay liability continues to mount each day it fails to promote the Grievant. It is in this context that I seek a remedy that will, to the extent possible, make the Grievant whole and ensure that the Respondent complies with the Arbitration Award (i.e., promotes the Grievant to an appropriate GS-14 position and pays him back pay in a timely manner). *See Federal Aviation Administration, Airways Facilities Division, Northwest Mountain Region, Renton, Washington*, 60 FLRA 819, 821 (2005).

With this goal in mind, the General Counsel has requested, and I agree, that Respondent should make a partial payment of back pay immediately upon this decision becoming final. Thereafter, in order not to reward further delay on the Respondent's part, I find that Respondent should continue to pay the Grievant back pay annually until he is actually promoted.

I further find it appropriate that the Respondent be required to provide the Grievant and the Charging Party a listing of all vacant GS-14 positions within the Department of Labor, on a weekly basis. The Arbitrator's Award directed the Respondent to promote him to the next appropriate GS-14 position "in MSHA, OSHA or any other Department of Labor agency agreed upon by the Parties." As previously noted, this requires the Respondent to search in both MSHA and OSHA for an appropriate position; it also allows for the possibility of promoting the Grievant to a position in another DOL agency, with the mutual consent of all parties. Given the Respondent's failure to keep the other parties informed of available positions or even to consider the Grievant for some positions up until now, the best way to enable the parties to communicate regularly on these issues is to require the Respondent to provide a list of all GS-14 vacancies regularly. I do not, however, believe it is appropriate to require the Respondent to explain, absent a request from the Union, why the Grievant is or is not qualified for every GS-14 position. Such a requirement would potentially engage Agency officials in time-consuming paperwork concerning positions that the Grievant has no interest in.

Based on the above findings and conclusions, I conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitration Award as required by 5 U.S.C. §§ 7121 and 7122, and I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Labor (the Agency), shall:

1. Cease and desist from:

(a) Failing to comply with the final and binding Award of Arbitrator S.R. Butler dated May 21, 2003 (the Award), by failing to search in MSHA and OSHA, as well as in any other Department of Labor agency on which the Agency and the American Federation of Government Employees, Local 12, AFL-CIO (the Union), agree, for the next appropriate GS-14 position available to promote David Hershfield (the Grievant).

(b) Failing to pay back pay to the Grievant at the appropriate GS-14 rate retroactive to June 1, 2001.

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

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

(a) Provide to the Grievant and the Union, on a weekly basis, a listing of all vacant GS-14 positions within the Department of Labor.

(b) In accordance with the Award, promote the Grievant, retroactively to June 1, 2001, to the next appropriate GS-14 position available within MSHA, OSHA or any other Department of Labor agency agreed upon by the parties.

(c) In accordance with the Back Pay Act, 5 U.S.C. § 5596(b), and the Award, pay to the Grievant back pay at the appropriate GS-14 rate retroactive from June 1, 2001 to the date this Order becomes effective, and thereafter on an annual basis until the Grievant is promoted to a GS-14 position.

(d) Post at its facilities, where bargaining unit employees are employed, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary of Labor, 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) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, February 17, 2006.

_____

RICHARD A. PEARSON
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 U.S. Department of Labor violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to comply with the final and binding Award of Arbitrator S.R. Butler dated May 21, 2003 (the Award), by failing to search in MSHA and OSHA, as well as in any other Department of Labor agency on which the Agency and the American Federation of Government Employees, Local 12, AFL-CIO (the Union), agree, for the next appropriate GS-14 position available to promote David Hershfield (the Grievant).

WE WILL NOT refuse to pay back pay to the Grievant at the appropriate GS-14 rate retroactive to June 1, 2001.

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

WE WILL provide to the Grievant and the Union, on a weekly basis, a listing of all vacant GS-14 positions within the Department of Labor.

WE WILL comply with the Award by promoting the Grievant retroactively to June 1, 2001, to the next appropriate GS-14 position available in MSHA, OSHA or any other Department of Labor agency agreed upon by the Parties and to make the Grievant whole retroactive to June 1, 2001 pursuant to the Back Pay Act, 5 U.S.C. § 5596.

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U.S. Department of Labor

Dated: _____

By: _____

Secretary of Labor (Signature)

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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: Federal Labor Relations Authority, 1400 K Street, NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: 202-357-6029.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CA-04-0540, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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REGULAR MAIL:

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AFGE
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Washington, DC 20001

Dated: February 17, 2006
Washington, DC