



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-24

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
BROWNSVILLE, TEXAS

RESPONDENT

AND

Case No. DA-CA-14-0343

NATIONAL TREASURY EMPLOYEES UNION

CHARGING PARTY

Michael A. Quintanilla
For the General Counsel

Jennifer M. Sims
For the Respondent

Walter E. Dresslar
Frank Barczykowski
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), part 2423.

On June 12, 2014, the National Treasury Employees Union (Charging Party/Union/NTEU) filed an unfair labor practice (ULP) charge against the Department of Homeland Security, U.S. Customs and Border Protection, Brownsville, Texas (Agency/Respondent). (G.C. Ex. 1(a)). On September 29, 2015, the Regional Director of the Dallas Region of the

FLRA issued an amended Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with arbitration awards concerning officer reassignments. (G.C. Exs. 1(c) & (e)). The Respondent filed an Answer to the amended Complaint on October 19, 2015, and admitted some of the factual allegations, but denied that it committed the alleged ULP. (*Id.*).

A hearing in this matter was held on December 3, 2015, in Harlingen, Texas. The parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel, Respondent, and Charging Party filed post-hearing briefs, which have been fully considered.

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

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. At all times material to this matter, Frank H. McKinnis III, Assistant Chief Counsel, was a supervisor and/or management official under § 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c); Tr. 28-29). NTEU is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Exs. 1(c) & (h)). Customs and Border Protection (CBP) and NTEU are parties to a collective bargaining agreement (CBA), which has been in effect at all times relevant here. (Jt. Ex. 1 at 1).

Article 13 of the CBA enables officers to annually bid to be assigned to a preferred “work unit,” which is “the smallest organizational component . . . to which groups of employees are normally assigned . . .” (*Id.* at 5). In most circumstances, the Agency assigns officers to the work unit to which they have bid (the “bid-to” work unit). (Tr. 51).

This dispute arose at the Brownsville port of entry (Brownsville). Within Brownsville, there are four bridge crossings (Gateway, Brownsville and Matamoros, Veterans International, and Los Indios), as well as a seaport, an airport, and a rail port. (Tr. 84; Jt. Ex. 1 at 2). There are approximately 350 officers in the bargaining unit at Brownsville. (Tr. 84).

Brownsville contains several cargo-processing work units, at least one passenger-processing work unit, and other work units that are neither “cargo” nor “passenger” work units. (Tr. 52, 66).

In September 2010, five officers at Brownsville bid to be assigned to cargo-processing work units for fiscal year 2011.¹ The officers were ultimately assigned to those work units. (Jt. Ex. 1 at 2).

¹ Fiscal year 2011 ran from October 2010 to September 2011. (Jt. Ex. 1 at 2).

On November 19, 2010, the Union filed a grievance alleging that the Agency was violating Article 13 of the CBA by reassigning officers from their "bid-to" cargo-processing work units to other work units, specifically the passenger-processing unit. (Jt. Ex. 1 at 2). At Step 2 of the grievance procedure, the Union requested as a remedy that officers be allowed to remain in their "bid-to" work units. (*Id.* at 9). At Step 3 of the grievance procedure, the Union also requested a remedy of backpay for any lost overtime that occurred as a result of the reassignments. (*Id.*). The grievance was unresolved, the Union invoked arbitration on December 20, 2010, and a hearing was held before Arbitrator Carol Kyler on February 17, 2011, and June 30, 2011. (*Id.* at 1-2).

Meanwhile, on September 27, 2011, NTEU filed a national grievance alleging that CBP was violating the CBA by requiring employees to work in multiple work units. (R. Ex. 1 at 2). The grievance was unresolved and moved to arbitration before Arbitrator Jay D. Goldstein.

On October 7, 2011, Arbitrator Kyler issued her award regarding the Brownsville grievance (initial award). Arbitrator Kyler framed the following issues:

1. Whether CBP violated Article 13 of the [CBA] by assigning [officers] in the [cargo-processing] work units to work portions of, or their entire shift, in other work units? If so, what is the appropriate remedy?
2. Whether CBP violated Article 13 . . . by assigning [officers] in other work units to also work portions of their shifts in different work units? If so, what is the appropriate remedy?

(Jt. Ex. 1 at 2).

Interpreting Article 13, Arbitrator Kyler found that an officer assigned to a cargo-processing work unit as a result of bidding is "limited to performing duties only in that work unit." (*Id.* at 8). Arbitrator Kyler stated that the five officers named in the grievance "had bid and were awarded positions in cargo[-processing work units], not in [the passenger-processing work unit]," and found that the Agency's practice of regularly reassigning "the officers in cargo[-processing work units] to work a portion of their shift in [the passenger-processing work unit]" violated Article 13 of the CBA. (*Id.*).

Arbitrator Kyler then addressed the Agency's claim that the Union failed to request backpay at Step 2 of the grievance procedure and therefore should be barred from requesting backpay at arbitration. (*Id.* at 9). Arbitrator Kyler determined that the Agency did not object to the Union's request for backpay at Step 3 of the grievance procedure and therefore waived its right to challenge the Union's request for backpay. (*Id.* at 10).

Arbitrator Kyler concluded that "the Agency's practice of pulling officers from their bid positions in cargo[-processing work units] to work a portion of their shift in [the passenger-processing work unit], on a routine and continuous basis, is a violation of

Article 13 of the [CBA].” (*Id.*). Under the heading “Award,” Arbitrator Kyler stated:

1. The grievance is sustained, in part, and denied in part.^[2]
2. The Agency will immediately cease and desist in its practice of pulling officers from their bid positions in cargo[-processing work units] to work open slots in [the passenger-processing work unit].
3. Overtime back pay is, hereby, awarded. However, to the extent that this matter constituted a continuing violation, the award of overtime back pay will be limited to the immediate 14 day period preceding the filing of the grievance on November 19, 2010.
4. Attorney fees are, hereby, awarded.
5. Jurisdiction will be retained in the event a dispute arises concerning the implementation of this award.

(*Id.*).

The Agency filed exceptions to Arbitrator Kyler’s award with the Authority. On February 15, 2012, the Authority issued a decision dismissing in part, and denying in part, the Agency’s exceptions. *U.S. DHS, Customs & Border Prot.*, 66 FLRA 495, 495 (2012).

Subsequently, Walter Dresslar, the NTEU attorney representing the grievants, contacted Andrew Stevens, an Agency attorney, to discuss the Agency’s compliance with the initial award. (Tr. 27). Dresslar and Stevens disagreed about how long the recovery period for backpay should be and about who was eligible to receive backpay. (*Id.*).

Arbitrator Kyler held a conference call on March 22, 2012, to discuss these issues. (Jt. Ex. 3 at 2). During the conference call, the parties asked Arbitrator Kyler to issue a supplemental award to resolve the outstanding disputes. (*Id.* at 1-2).

On July 13, 2012, Arbitrator Kyler issued a Supplemental Award Clarification of Back Overtime Pay Award (first supplemental award). With regard to the period of recovery for backpay, Arbitrator Kyler ruled that the period for recovery “shall commence on November 5, 2010, ‘the immediate 14 day period preceding the filing of the grievance on November 19, 2010,’ and end on February 15, 2012,” when the FLRA issued its decision dismissing and denying the Agency’s exceptions to the initial award. (*Id.* at 8). With regard to who was entitled to receive backpay, Arbitrator Kyler stated:

² Arbitrator Kyler later stated that she denied the grievance in party by ruling that the period of recovery for backpay was “limited to ‘the immediate 14 day period preceding the filing of the grievance on November 19, 2010.’” (Jt. Ex. 3 at 6).

Back overtime pay is, hereby, awarded to those affected [officers] who would have been assigned to cover any open slots or vacancies in the [passenger-p]rocessing, or other work units, on overtime, but for the Agency's violation of Article 13 of the [CBA] when, instead, it moved [officers] from their bid preference work units to cover those open positions on regular time.

(*Id.* at 7).

No exceptions were filed to the first supplemental award. (Tr. 40; Jt. Ex. 4 at 4).

Subsequently, Dresslar contacted Frank McKinnis, who was now representing the Agency in this matter, to discuss the Agency's compliance with the awards. (Tr. 28-29). According to Dresslar, the Agency was still concerned about "who should get paid and how." (Tr. 29).

On September 27, 2012, Dresslar filed a motion with Arbitrator Kyler for attorney fees. (G.C. Ex. 3 at 3). Arbitrator Kyler sent an email to McKinnis, on December 9, 2012, asking for the Agency's position on Dresslar's motion. (*Id.*)³

On January 4, 2013, McKinnis sent Arbitrator Kyler an email stating that the Agency was in the process of paying attorney fees billed by the Union. McKinnis added that the Agency "anticipate[s] it will . . . need your service for purposes of implementing" the awards. (*Id.* at 2). Later that day, Dresslar sent Arbitrator Kyler an email asserting that the Agency had not complied with the awards (including the order that the Agency pay attorney fees). Dresslar also seconded, McKinnis's request for assistance. (*Id.* at 1).

On January 31, 2013, Arbitrator Kyler held a conference call with Dresslar and McKinnis. (G.C. Ex. 4). During the call, McKinnis stated that the Agency would provide backpay and any outstanding attorney fees by March 4, 2013. (*Id.*). March 4, 2013, passed without the Agency paying any backpay. The Agency eventually paid the attorney fees billed by the Union. (Tr. 45).

³ On January 3, 2013, Dresslar filed a Step 1 grievance on behalf of the Union alleging that the Agency failed to comply with Arbitrator Kyler's initial award and her first supplemental award, and that the Agency thereby violated the CBA and § 7116(a)(1) and (8) of the Statute. (G.C. Ex. 2; Jt. Ex. 4 at 4; Tr. 30; *see also* G.C. Br. at 6 & n.4; C.P. Br. at 5). Shortly thereafter, McKinnis called Dresslar and persuaded him to "send [the matter] back to Arbitrator Kyler." (Tr. 31). As stated in the facts, Arbitrator Kyler then issued another supplemental award, on December 21, 2013. Subsequently, on June 12, 2014, the Union filed the ULP charge in this case. The fact that the Union's January 3, 2013, grievance contains allegations similar to the ones in the ULP charge raises the question of whether at least some aspects of the ULP charge are barred under § 7116(d) of the Statute. However, it appears that the parties agreed to send the issue to Arbitrator Kyler and there is no evidence that the grievance was processed beyond the initial filing. And, because the Respondent has not claimed that the ULP charge is barred under § 7116(d) (*see* R. Br. at 6-7, 19-20), and as the General Counsel and the Charging Party have not specifically addressed this issue (*see* G.C. Br. at 12; C.P. Br. at 16), I will not consider it further. *See U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 36 (2008).

On April 5, 2013, the Agency submitted a brief, Response to Order to Effect Back Pay Payment, to Arbitrator Kyler and to the Union. (Jt. Ex. 4 at 6). In that brief, the Agency argued that Arbitrator Kyler's awards violated the Back Pay Act. Specifically, the Agency asserted that Arbitrator Kyler did not: (1) determine whether a grievant suffered a reduction in pay as a result of the Agency's actions; (2) based her award on calculations applicable to individual employees; and (3) made express findings that employees would have performed overtime work. (*Id.*). In addition, the Agency argued that the recovery period for backpay could not extend past May 11, 2011, "the date the new provision of the collective bargaining [agreement] took effect." (*Id.*) (emphasis omitted).

Dresslar and McKinnis asked Arbitrator Kyler for further assistance, and on April 22, 2013, the three participated in another conference call. (*Id.*). None of the disputed issues were resolved during the call. (*Id.*).

On or about May 9, 2013, the Union submitted a brief in response to the Agency's April 5, 2013, brief. (*Id.*). The Union argued that: (1) the award of backpay became final and binding after the Authority resolved the Agency's exceptions to the initial award; (2) the recovery period for backpay was established in the first supplemental award, which was now final and binding; and (3) the recovery period for backpay should be extended, since the Agency was still reassigning officers from their "bid-to" work units. (*Id.* at 7-8).

On August 25, 2013, Arbitrator Goldstein issued an award resolving the national grievance NTEU filed on September 27, 2011. Arbitrator Goldstein sustained the grievance in part and ordered CBP to "cease and desist from its practice of . . . reassigning [officers]" from their "bid-to" work units. (R. Ex. 1 at 14). He also ordered CBP to pay backpay to adversely affected employees. (*Id.*).

On December 21, 2013, Arbitrator Kyler issued a Supplemental Award (second supplemental award). Arbitrator Kyler began by summarizing the history of the dispute. In so doing, she noted that the first supplemental award was served on the parties by regular U.S. mail and became final and binding on August 17, 2012, thirty-five days after the date of the first supplemental award. (Jt. Ex. 4 at 3-4 & n.3).

Arbitrator Kyler then addressed the Agency's claims regarding the Back Pay Act, stating:

[T]he evidence is sufficient to support a finding that the award of [backpay] as ordered in the [initial award and the first supplemental award], is "compensable." Furthermore, the Agency never presented this argument in the proceedings before the Arbitrator. Therefore, the issue is not a matter properly before the Arbitrator.

(*Id.* at 10).

Arbitrator Kyler further stated that because the Agency “continues to regularly . . . move officers from their bid work unit to cover open slots in [the passenger-processing work unit] in violation of Article 13 . . . the evidence . . . does not support a finding that . . . the period of the award cannot exceed May 11, 2011.” (*Id.* at 11). The Arbitrator added that “to hold otherwise would be in direct conflict with” the Back Pay Act. (*Id.*)

In addition, Arbitrator Kyler determined that the relevant contractual provisions in effect at the time of the February 17, 2011, hearing remained in effect after May 11, 2011. Accordingly, she rejected the Agency’s contractual claim that the recovery period for backpay could not extend past May 11, 2011. (*Id.* at 10-11).

Arbitrator Kyler stated that the Agency’s brief was “denied,” and further stated:

1. The Arbitrator reaffirms the decision in the [initial award] that “the Agency’s practice of pulling officers from their bid position in cargo[-processing work units] to work a portion of their shift in [the passenger-processing work unit], on a routine and continuous basis, is a violation of Article 13 of the [CBA],” dated May 17, 2010.
2. The Agency is, again, directed to “immediately cease and desist in its practice of pulling officer[s] from their bid positions in cargo[-processing work units] to work open slots in [the passenger-processing work unit].”
3. The Agency is directed to immediately issue back overtime payment to the adversely affected employees as previously ordered in the [initial award and the first supplemental award]. In accordance with 5 U.S.C. § 5596(b)(1)(A),^[4]

⁴ 5 U.S.C. § 5596 states, in pertinent part:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which . . . shall be awarded in accordance with . . . section 7701(g) of this title

....

(2)(A) An amount payable . . . shall be payable with interest.

back overtime pay will be awarded to the affected employees “for the period for which the personnel action was in effect.”

5. [sic] In accordance with 5 U.S.C. § 5596(b)(1)(A), reasonable attorney fees “related to the personnel action” are awarded that have not previously been reimbursed.

6. [sic] Pursuant to 5 U.S.C. § 5596(2)(A), the award of back overtime pay is, hereby, payable with interest.

(*Id.* at 12).

No exceptions were filed to the second supplemental award. (Tr. 40).

At the hearing, witnesses for the GC and the Respondent provided testimony with respect to the issue of whether the Agency had complied with Arbitrator Kyler’s awards. With regard to backpay, Dresslar testified that the Agency “issued no [backpay] for any of the periods the personnel action has been in effect.” (Tr. 41). With regard to attorney fees, Dresslar stated that he planned to bill the Agency for attorney fees that have accrued since the Agency’s previous payment. (Tr. 41, 45).

With regard to Arbitrator Kyler’s cease and desist orders, Dresslar testified that the Agency “[has] not ceased or desisted in pulling officers from their bid positions” and moving “them to other slots.” (Tr. 41). Brent Studnicka, an officer at Brownsville, similarly testified that the Agency reassigned officers from their “bid-to” work units from 2011 through 2014. (Tr. 68-69, 74). Further, Studnicka stated that in 2012, these types of reassignments occurred “quite frequently,” on “a day-to-day basis.” (Tr. 74). However, Studnicka added that such reassignments “tapered [off]” for him personally when he was working in a cargo-processing work unit in 2013, since officers in that work unit were “very scarce” (Tr. 74). David Valdez, an officer at Brownsville and the Vice President of NTEU Chapter 160 (Tr. 49-50), indicated that the Agency reassigned officers from their “bid-to” work units in fiscal years 2012-2014, and that the practice was “ongoing.” (Tr. 60-61).

Ricardo Casanova, a supervisory officer who has worked in the Agency’s scheduling department since February 2013, indicated that the Agency reassigned officers from their “bid-to” work units in 2013 and 2014. (Tr. 83, 107-08). Casanova testified that the Agency is not currently reassigning officers from their “bid-to” work units, stating, “Now, it’s strictly within their bid. I don’t see it – if it does happen out of their bid, it’s very, very[,] infrequent and . . . would probably be due to an emergency” (Tr. 91). Asked whether the Agency was regularly reassigning officers from “bid-to” positions in cargo-processing work units to the passenger-processing work unit, Casanova replied, “I don’t see it happen on a regular basis.” (Tr. 98).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) and (8) of the Statute by refusing to comply with Arbitrator Kyler's awards. *U.S. Dep't of Treasury, Customs Serv., Wash., D.C.*, 39 FLRA 749, 758 (1991). (G.C. Br. at 7-8). Specifically, the GC asserts that the Respondent has failed to pay backpay, failed to pay interest on the backpay, and failed to cease and desist the practice of reassigning officers from their "bid-to" work units. (*Id.* at 8-9). With regard to attorney fees, the GC acknowledges that the Agency complied with the order in Arbitrator Kyler's initial award that the Agency pay attorney fees. (*Id.* at 9). However, the GC asserts that attorney fees are "still owed" under Arbitrator Kyler's second supplemental award, and that the Agency has "fail[ed] to pay them." (*Id.*).

Respondent

The Respondent denies that it violated the Statute as alleged, even though it "acknowledges that *no* back pay and interest payments have issued," and that "presumably some amount is due to some employees." (R. Br. at 7 & n.3). In this regard, the Respondent argues that Arbitrator Kyler's award of backpay is limited to officers who lost overtime by virtue of "movements of officers from their cargo bid unit to passenger processing." (*Id.* at 8). In addition, the Respondent contends that the "the Union is collaterally estopped from relying on the Kyler [a]wards for recovery" for periods after fiscal year 2011 which, the Respondent argues, are covered by Arbitrator Goldstein's award. (*Id.* at 10).

The Respondent maintains that it has complied with Arbitrator Kyler's cease and desist orders, as it no longer reassigns officers from cargo-processing work units to the passenger-processing work unit. (*Id.* at 11-14). Finally, the Respondent argues that it has paid the attorney fees that the Union has billed. (*Id.* at 18).

Charging Party

The Charging Party asserts that the Agency has failed to comply with Arbitrator Kyler's awards by failing to pay backpay and by failing to cease and desist reassigning officers from their "bid-to" work units to other work units. (C.P. Br. at 11-12).

ANALYSIS AND CONCLUSIONS

Preliminary Matter

On January 26, 2016, the Charging Party submitted a Motion to Strike Respondent's Closing Brief for failing to "timely file, or serve, its post-hearing brief[]" by the January 14, 2016, deadline. (Mot. at 1). In this regard, the Charging Party asserts that: the Respondent served its brief on the Charging Party by mail; the date of service is determined by the postmark date; and the postmark date for the Respondent's brief is January 15, 2016. (*Id.* at 2) (citing 5 C.F.R. §§ 2429.21 and 2429.27). To support this claim, the Charging Party provides a photocopy of an envelope addressed to the Charging Party (the identity of the sender is not shown, but presumably it is the Respondent) postmarked January 15, 2016. (Mot., Attach. 1). The Charging Party acknowledges that the statement of service attached to the Respondent's post-hearing brief certifies that the brief was filed on January 14, 2016.⁵ (Mot. at 2 n.1; *see also* R. Br. at 21).

Post-hearing briefs may be filed with the Administrative Law Judge within a time period set by the Judge and "shall satisfy the filing and service requirements of part 2429 of this subchapter." 5 C.F.R. § 2423.33.

The date a mailed document is served on a party is "the date on which you have . . . deposited the served documents in the U.S. mail[.]" *Id.* § 2429.27(d). By contrast, the date a mailed document is filed with the FLRA is, as relevant here, the "postmark date." *Id.* § 2429.21 (b)(1)(i).

The Charging Party claims that the Respondent failed to timely serve its post-hearing brief on the Charging Party. Even assuming that the photocopy of the envelope, which does not show the identity of the sender, is in fact the envelope used to send the Respondent's post-hearing brief, it is common knowledge that a letter can be postmarked a day (or more) after it was deposited in the mail. Accordingly, the January 15, 2016, postmark does not cause me to doubt the Respondent's claim that it deposited the envelope in the mail on January 14, 2016, and thus timely served the Charging Party. (R. Br. at 21).

As for the Charging Party's claim that the Respondent failed to timely file its post-hearing brief, our records indicate, consistent with the Respondent's statement of service, that the Respondent timely filed the brief on January 14, 2016.

⁵ In fact, the statement of service states: "I hereby certify that on January 14, 2016, I served the foregoing *Response to the Motion to Amend Complaint* and *Motion to Postpone the Hearing* upon the interested parties in this action by certified mail." (R. Br. at 21) (emphasis added). However, the Respondent could not have intended to refer to those motions, since they were served in October 2015. It is much more likely that the Respondent intended to refer to the *post-hearing brief*, which was attached to the statement of service. Accordingly, I find that the reference to the motions was akin to a typographical error, and that the Respondent intended to state that it served the *post-hearing brief* upon the parties on January 14, 2016.

For these reasons, I deny the Charging Party's motion.

The Respondent Violated § 7116(a)(1) and (8) of the Statute

It is well established that under § 7122(b) of the Statute an agency must take the action required by an arbitrator's award when the award becomes "final and binding." *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA*). An award becomes final and binding under § 7122 of the Statute when: (1) the 30-day period for filing exceptions expires; (2) the Authority issues a decision resolving exceptions; or (3) exceptions are withdrawn. *U.S. Dep't of Hous. & Urban Dev.*, 68 FLRA 631, 634 (2015); *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 48 FLRA 938, 940 (1993). When an agency disregards an unambiguous award, or portions of an award, it fails to comply with the award within the meaning of § 7122(b) of the Statute and thereby violates § 7116(a)(1) and (8) of the Statute. *U.S. Dep't of the Air Force, Carswell AFB, Tex.*, 38 FLRA 99, 105 (1990). Where an award is ambiguous, an agency will not be found to have violated the Statute if its actions are consistent with a reasonable construction of the award. *U.S. DOJ, Fed. BOP, FCI, Marianna, Fla.*, 59 FLRA 3, 4 (2003).

In an unfair labor practice proceeding for enforcement of a final and binding award, the award is not subject to collateral attack, and the Authority will not review the merits of the award. *FAA*, 55 FLRA at 297. The Authority has repeatedly stated that "to allow a respondent to litigate matters that go to the merits of the award would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards." (*Id.* at 296). Thus, generally speaking, the only issue for resolution in a ULP proceeding for enforcement of an award is whether there was non-compliance. *See Dep't of HHS, SSA*, 41 FLRA 755, 765 (1991).

I first consider whether Arbitrator Kyler's awards were final and binding on the Agency. I find that the initial award became final and binding on February 15, 2012, when the Authority issued a decision dismissing in part, and denying in part, the Agency's exceptions. With regard to the first and second supplemental awards, I find, based on Dresslar's undisputed testimony, that Arbitrator Kyler served the first and second supplemental awards on the Agency, and that the Agency failed to file timely exceptions to them. (Tr. 40). I further find, based on Arbitrator Kyler's undisputed finding, that the first supplemental award became final and binding on August 17, 2012. (Jt. Ex. 4 at 3-4 & n.3). In addition, I find that Arbitrator Kyler served the second award on the parties on December 21, 2013, *see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 730, 731 (2011) (when an arbitration award's date of service is not in the record, the date of an award is presumed to be the date of service), and that the second supplemental award became final and binding no later than January 27, 2014. *See* 5 U.S.C. § 7122(b); 5 C.F.R. §§ 2425.2, 2429.21, 2429.22.

Having found that Arbitrator Kyler's awards were final and binding on the Agency, I now consider whether Agency failed to comply with the awards.

With regard to backpay, Arbitrator Kyler unambiguously ordered the Agency to pay backpay in all three awards. Specifically, in the initial award, Arbitrator Kyler stated that “back pay is, hereby, awarded.” (Jt. Ex. 1 at 10). In the first supplemental award, Arbitrator Kyler stated that “[b]ack overtime pay is, hereby, awarded . . .” (Jt. Ex. 3 at 7). And in the second supplemental award, Arbitrator Kyler stated that the Agency “is directed to immediately issue back overtime payment to the adversely affected employees as previously ordered,” and to pay interest on the backpay. (Jt. Ex. 4 at 12). By failing to pay backpay (and interest on the backpay), the Agency has disregarded unambiguous aspects of Arbitrator Kyler’s awards.

The Respondent appears to argue that Arbitrator Kyler’s awards are ambiguous with regard to who is eligible to receive backpay. In the initial award, Arbitrator Kyler awarded backpay without specifying which officers were eligible to receive backpay. In the first supplemental award, Arbitrator Kyler specified which officers were eligible to receive backpay, stating that backpay was available to “those affected [officers] who would have been assigned to cover any open slots or vacancies in the [passenger-p]rocessing, or other work units, on overtime,” but for the Agency’s violation of Article 13. (Jt. Ex. 3 at 7). In the second supplemental award, Arbitrator Kyler ordered the Agency to pay backpay “as previously ordered . . .” (Jt. Ex. 4 at 12). That is, Arbitrator Kyler ordered the Agency to provide backpay, as stated in the initial award, and to provide it to certain employees, as specified in the first supplemental award. These orders are unambiguous, and the Agency failed to follow them. Further, even if it could be argued that Arbitrator Kyler’s awards are ambiguous as to who should receive backpay, the awards are unambiguous in ordering the Agency to pay at least some amount of backpay to some officers. As such, it cannot be said that the Agency’s decision to pay zero backpay is a reasonable construction of Arbitrator Kyler’s awards.

The Respondent also argues that the Union is “collaterally estopped from relying on the Kyler [a]wards for recovery” for periods after fiscal year 2011 which, the Respondent argues, are covered by Arbitrator Goldstein’s award. (R. Br. at 10). This argument seeks to disrupt an aspect of the remedy set forth in Arbitrator Kyler’s awards, and I reject it as an obvious attempt to collaterally attack Arbitrator Kyler’s awards. *FAA*, 55 FLRA at 297. Moreover, arbitration awards are not precedential, and an arbitrator generally is not bound by another arbitrator’s award. *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 314 (2015) (*Prisons*); *SSA, Office of Hearings & Appeals, Falls Church, Va.*, 55 FLRA 349, 352 (1999). As such, there is no basis for finding that Arbitrator Goldstein’s award has a preclusive effect on Arbitrator Kyler’s awards under the doctrine of collateral estoppel. *See Prisons*, 68 FLRA at 314.

As for whether the Agency complied with Arbitrator Kyler’s cease and desist orders, the evidence strongly indicates that from 2011-2014, the Agency regularly reassigned officers from their “bid-to” work units to other work units throughout Brownsville. (Tr. 41, 60-61, 68-69, 74, 83, 91, 108). In addition, Studnicka testified credibly that in 2011 and 2012, the Agency reassigned officers from their “bid-to” work units on a daily basis. (Tr. 74). It is likely, then, that the Agency was reassigning officers from their “bid-to” cargo-processing work units to the passenger-processing work units after February 15, 2012, when Arbitrator

Kyler's initial award became final and binding on the Agency. Further, while Studnicka indicated that in 2013 the Agency stopped reassigning officers from cargo-processing work units, Casanova acknowledged that even after December 21, 2013, when Arbitrator Kyler issued her second supplemental award, the Agency still reassigned officers from their "bid-to" cargo-processing work units to the passenger-processing work units. (Tr. 74, 91, 98). As such, the Agency failed to comply with Arbitrator Kyler's orders that the Agency "cease and desist" that practice. (Jt. Ex. 1 at 10, Jt. Ex. 4 at 12).

With regard to attorney fees, Arbitrator Kyler stated in the second supplemental award that "reasonable attorney fees . . . are awarded that have not previously been reimbursed." (Jt. Ex. 4 at 12). I interpret this order as requiring the Agency to pay outstanding attorney fees that the Union has actually billed. In so doing, I reject as absurd the General Counsel's claim that the order requires the Agency to make a payment even without receiving a bill showing how much is owed. Because the Union has not billed the Agency for attorney fees that have accrued since the Agency's last payment (Tr. 41, 45), there is no basis for finding that the Agency has failed to comply with this aspect of the second supplemental award. Further, to the extent this aspect of the second supplemental award is ambiguous, I find that it would be consistent with a reasonable construction of the award for the Agency to insist on receiving a bill before paying attorney fees.

CONCLUSION

I find that the Agency has disregarded unambiguous portions of Arbitrator Kyler's awards and thus failed to comply with Arbitrator Kyler's awards within the meaning of § 7122(b) of the Statute. Therefore the Respondent violated § 7116(a)(1) and (8) of the Statute.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Homeland Security, U.S. Customs and Border Protection, Brownsville, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the final and binding award of Arbitrator Carol Kyler issued October 7, 2011, and later clarified on July 13, 2012, and December 21, 2013.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the 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 the final and binding award of Arbitrator Carol Kyler issued October 7, 2011, and later clarified on July 13, 2012, and December 21, 2013, including paying backpay with interest, and ceasing and desisting from the practice of reassigning officers from their bid positions in cargo-processing work units to work open slots in the passenger-processing work unit.

(b) Post at its facilities where bargaining unit employees represented by the National Treasury Employees Union (Union) are located, 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 Port Director, Brownsville, Texas, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous 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.

(c) In addition to the physical posting of the Notice, Respondent shall distribute electronically, such as by e-mail, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., May 5, 2016



SUSAN E. JELEN
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 Department of Homeland Security, U.S. Customs and Border Protection, Brownsville, Texas, 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 refuse to comply with the final and binding award of Arbitrator Carol Kyler issued on October 7, 2011, and later clarified on July 13, 2012, and December 21, 2013.

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 comply with the final and binding award of Arbitrator Carol Kyler issued on October 7, 2011, and later clarified on July 13, 2012, and December 21, 2013, including paying backpay with interest, and ceasing and desisting from the practice of reassigning officers from their bid positions in cargo-processing work units to work open slots in the passenger-processing work unit.

(Agency/Respondent)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin St., Dallas, TX 75202, and whose telephone number is: (214) 767-6266.