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

OALJ 24-02

DEPARTMENT OF THE AIR FORCE
KIRTLAND AIR FORCE BASE, NEW MEXICO

RESPONDENT

AND

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 2263, AFL-CIO

CHARGING PARTY

Case No. DE-CA-22-0204

Adam Johnson
For the General Counsel

Phillip G. Tidmore
For the Respondent

Thomas F. Muther, Jr.
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION

In this case, an arbitrator issued an (unambiguous) award nearly two years ago, to which the Agency did not file timely exceptions. As a result, the award became final and binding. Nevertheless, since then, the Agency has failed to comply with the award. The Agency alleges that it is trying to comply to the extent the award is consistent with law, but argues that much of the award is inconsistent therewith. However, the question of whether the award is contrary to law is simply not appropriately raised in this unfair labor practice proceeding to enforce compliance with the award, as it is a collateral attack on the merits of the award. Such questions may only be raised in exceptions to the award before the Authority.

The Agency also alleges that the arbitrator mischaracterized the case as a temporary, retroactive promotion, when it was instead a classification appeal, which means that the arbitrator lacked statutory jurisdiction to decide the case under 5 U.S.C. § 7121(c)(5) and that the award violates sovereign immunity to the extent it requires back pay in excess of promotion regulations. While the issues of the arbitrator's jurisdiction under the Statute and sovereign immunity may appropriately be raised in this unfair labor practice proceeding, as both matters may be raised at any time, the Agency is incorrect on both counts. The case did not involve a classification appeal that would have been barred by the Statute, but rather involved the question of whether the grievant was entitled to a temporary, retroactive promotion under the collective bargaining agreement. Further, there is no violation of sovereign immunity as the back pay award was based squarely on the Back Pay Act, which waives sovereign immunity and, as well, the back pay award was not in excess of that allowed by the Back Pay Act. Given that, the Agency engaged in an unfair labor practice in violation of § 7116 (a)(1) and (8) of the Statute by failing and refusing to comply with a final and binding arbitration award in violation of §§ 7121 and 7122 of the Statute.

I. Statement of the Case

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

On February 11, 2022, the American Federation of Government Employees, Local 2263 (the Union or the Charging Party) filed a ULP charge (Charge) against the Department of the Air Force, Kirtland Air Force Base, New Mexico (the Agency or Respondent). The Charge alleged that the Agency had not complied with an arbitrator's award (the Award) which required the Agency to temporarily promote grievant Aaron Herweg from April 18, 2016 to September 2, 2019. GC Exhibit (GC Ex.) 1(a).

Thereafter, the Regional Director of the Authority of the Denver Region issued a Complaint and Notice of Hearing (Complaint) on July 26, 2023, on behalf of the Acting General Counsel (GC). The Complaint alleged that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing and refusing to comply with a final and binding arbitration award as required by §§ 7121 and 7122 of the Statute. GC Ex. 1(b) at ¶¶ 10-12. On August 11, 2023, the Respondent filed its Answer to the Complaint, denying that it violated the Statute. GC Ex. 1(c) at ¶¶ 10-12.

On August 21, 2023, the GC filed a Motion for Summary Judgment (GC MSJ), arguing that no material facts are in dispute and that it is entitled to a decision as a matter of law. On August 28, 2023, the Respondent filed a Motion to Dismiss for Lack of Jurisdiction and Response to the Motion for Summary Judgment (Mot. Dis. and Resp.). On August 31, 2023, the GC filed an Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction and Response to Motion for Summary Judgment (GC Opp'n).

II. Discussion of Motions

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995).

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In its Motion for Summary Judgment, the GC asserts that the material facts are either admitted to by the Respondent in its Answer or are demonstrated not to be in dispute by its cited exhibits, numbering 1(a - d) -14, which establish that the Respondent has failed and refused to comply with a final and binding arbitration award. In its Motion to Dismiss for Lack of Jurisdiction and Response to the Motion for Summary Judgment, the Respondent does not concede this and further argues that the Complaint should be dismissed. Because the Respondent provided exhibits in support of its pleading, numbering 1-8, the Respondent's Motion to Dismiss will also be treated as a Motion for Summary Judgment. *See Langley v. Napolitano*, 677 F. Supp. 2d 261, 263 (D.D.C. 2010). In this decision, I will address the parties' motions together, as the same facts and legal issues are involved in both.

III. Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of employees of the Respondent. GC Exs. 1(b) at ¶ 3, and 1(c) at ¶ 3. The Union an agent of AFGE for the purpose of representing the unit employees employed at the Respondent. GC Exs. 1(b) at ¶ 4, and 1(c) at ¶ 4. While the Complaint alleges that the Respondent is an agency within the meaning of § 7103(a)(3) of the Statute, GC Ex. 1(b) at ¶ 2, which the Respondent denies, GC Ex. 1(c) at ¶ 2, this dispute is not material, as the Respondent explained that it denied the allegation simply because the Respondent is an activity, rather than an agency, of the United States Air Force, which is an agency under § 7103(a)(3) of the Statute, and subject to the requirements of the Statute. GC Ex. 1(c). As such, the dispute over the characterization of the Respondent as an activity versus an agency is not material, as the Respondent does not dispute that it is subject to the requirements of the Statute. *Id.* at ¶ 2.

The Union and the Respondent are parties to a collective bargaining agreement (CBA), covering employees in the bargaining unit of a unit of employees of the Respondent. GC Exs. 1(b) at ¶ 6, and 1(c) at ¶ 6. Pursuant to the grievance procedure of the CBA, the Union filed a grievance alleging that bargaining unit employee Aaron Herweg was performing duties of a higher-graded position and should have received a promotion and back pay commensurate with that. GC Ex. 2 at 4. At Step 1, the Respondent partially granted the grievance for the period of September 10, 2019 to March 15, 2020. Respondent's Exhibit (Resp. Ex.) 1 at 1. The Union pursued the grievance to Step 2 in order to receive a promotion and back pay for Mr. Herweg to a higher-graded position, GS-9, for the remainder of the period involved, from April 18, 2016 to September 2, 2019. GC Ex. 2 at 4. At this level of the grievance, Respondent's Step 2 official upheld the promotion for the period from September 10, 2019 to March 15, 2020, but denied the back pay for that period and otherwise denied the grievance. The official included as a reason for mostly denying the grievance that the process for addressing such issues was through a classification appeal. Resp. Ex. 1 at 1-2. Thereafter, the Union invoked arbitration. GC Ex. 2 at 4.

The stipulated issue at arbitration was: "Did the Agency violate Article 13.1 of the Master Labor Agreement when it assigned the grievant, Aaron Herweg, GS-9 job duties between April 18, 2016 and September 2, 2019 without compensating him? If so, what is the appropriate remedy?"

GC Ex. 2 at 2. Article 13.1 states that:

> When an employee is temporarily assigned to a higher-grade position or the grade-controlling duties of a higher graded position for more than 30 consecutive calendar days, the employee shall be temporarily promoted into and receive the rate of pay of that position commencing on the 31st day. The employee must be qualified to fill the position on a permanent basis.

Id.

Even though the parties stipulated to the issue described above, the Respondent provided a declaration from the Respondent's representative at arbitration that she raised with the Arbitrator, Donald Petersen, that the Respondent did not believe the matter was substantively arbitrable because it involved a classification appeal. Resp. Ex. 2 at 1. The Respondent's representative also raised the matter in the post-arbitration brief. Resp. Ex. 2 at 11.

Arbitrator Petersen issued his Opinion and Award (Award) on October 7, 2021. GC Ex. 2 at 11. He found that the Agency violated Article 13, Section 13.01 when it failed to temporarily promote Mr. Herweg to the GS-9 Freight Rate Specialist position when it assigned him the duties of that position for the period involved and did not pay him accordingly. GC Ex. 2 at 10-11. Specifically, Arbitrator Petersen assessed whether Mr. Herweg performed the duties of the previously classified GS-9 Freight Rate Specialist position based on the duties he was assigned and found that he did. GC Ex. 2 at 11. As a result, the Arbitrator ordered the Agency to "temporarily promote Mr. Herweg into the position of Freight Rate Specialist [GS-9], from April 18, 2016 until September 2, 2019," and "[p]ursuant to the Back Pay Act… pay Mr. Herweg all lost wages [including interest] that he did not receive because of the failure of the Agency to temporarily promote him…." *Id.* The Arbitrator retained jurisdiction until December 31, 2021, for purposes of resolving implementation issues with the Award and to rule on any attorney's fees motion. *Id.* The Agency did not file exceptions to the Award. GC Ex. 1(c) at ¶ 9.

Thereafter, in early 2022, when the Union asked the Agency about compliance with the Award, the Agency indicated it was reviewing the decision. GC Ex. 4. By February 2022, when there was still no indication that the Agency had complied with the Arbitrator's Award, the Union filed the ULP Charge, alleging that the Agency had not complied with Arbitrator Petersen's Award. GC Ex. 1(a).

On May 25, 2022, the Respondent provided its Position Statement regarding the Charge. GC Ex. 3. The Position Statement indicated that the Respondent had paid the Union's attorney's fees as required by the Award and had sent a request for personnel action to the Defense Finance and Accounting Service (DFAS) for a temporary promotion for Mr. Herweg from September 2, 2019 to December 30, 2019, to a GS-7 position. It further indicated that the Respondent would not otherwise comply with the award because it was (allegedly) impermissible under the Back Pay Act and federal regulations, other than a possible 120-day temporary promotion pending determination as to whether the Respondent found him qualified. GC Ex. 3.

Thereafter, on March 1, 2023, the Union and the Respondent entered into a settlement agreement (Agreement) over the ULP Charge and the Regional Director of the GC approved the Agreement on March 2, 2023. GC Ex. 1(d). The Agreement required the Respondent to comply with the Award by retroactively promoting Mr. Herweg to the GS-9 position of Freight Rate

Specialist from April 18, 2016 to September 2, 2019 and awarding him back pay for all lost wages from that time, including interest, as well as posting a notice. Further, the Agreement required the Respondent to notify the GC regarding the status of compliance at the 21-day and 60-day marks. GC Ex. 1(d) at 1-2.

On April 18, 2023, the GC contacted the Respondent to determine whether Mr. Herweg had received his back pay and retroactive promotion consistent with the Award and the Agreement. The Respondent reported that documentation for a promotion from October 31, 2016 until December 31, 2016 had been created. GC Ex. 6. Consistent with that report, there is a notification of personnel action for Mr. Herweg for that two-month period of a promotion to the GS-9 Freight Rate Specialist position. GC Ex. 7. The Respondent could not confirm whether back pay for that two-month period had been provided. GC Ex. 6. Further, when notified that the two-month promotion did not comply with the requirement to promote Mr. Herweg for the entirety of the period between April 18, 2016 and September 2, 2019, the Respondent indicated it was unaware of this requirement. GC Ex. 9.

On May 1, 2023, the second report date required by the Agreement, the GC requested an update on compliance. GC Ex. 10 at 1. The Respondent reported that payment was being processed with DFAS and that the Agency lacked control over DFAS. *Id.* at 2. Thereafter, the GC requested proof that the instructions to DFAS included the entire period involved in the Award. *Id.* In an email dated May 4, 2023, the Respondent indicated that DFAS would be paying Mr. Herweg on May 26, 2023, but did not provide proof that the instructions to DFAS were for the entire period of the Award. *Id.* at 3. In response, on May 8, 2023, the GC again requested proof regarding whether DFAS had been provided instructions for the entire period. *Id.* Receiving no response for over a week, on May 16, 2023, the GC reiterated its request. *Id.* at 4. The Respondent again did not provide proof or otherwise answer the question, but simply stated by email dated May 17, 2023, that the Respondent was trying to "expedite processing of the matter." *Id.*

Approximately three weeks later, on June 6, 2023, the GC requested an update and notified the Respondent that Mr. Herweg "still had not been made whole." *Id.* at 5. There is no indication that the Respondent responded to this email. On June 13, 2023 and thereafter in June and July 2023, the GC followed up and received only apologies for the delay and assurances that the Respondent was trying to expedite, but no proof that the Respondent had provided DFAS with the correct instructions. *Id.* at 6-9. On July 18, 2023, the GC notified the Respondent that, absent demonstration that the Respondent had complied with the Agreement, a Complaint would be issued. *Id.* at 9. There is no indication that the Respondent provided proof of compliance.

The Complaint issued on July 26, 2023. GC Ex. 1(b). In it, the GC alleges that the Respondent has failed, since on or about November 7, 2021, to perform the acts ordered by the Arbitrator in the Award. GC Ex. 1(b) at ¶ 10. The Respondent denies the same in its Answer. GC Ex. 1(c) at ¶10. However, the Respondent clarified that what it actually denies is that "it has failed to perform the *legally permissible* acts ordered by Arbitrator Petersen." *Id.* (italics added). The Respondent further clarified that,

> [s]ince the Arbitrator issued a decision contrary to law and regulation, Respondent has been working within the agency to determine what, if any, of the award is permissible. After a thorough and comprehensive review, it is the Agency's position the award was wrongly characterized as a temporary promotion rather than a misclassification. Misclassifications are not subject to the grievance process.

> Second, if it is determined to be a temporary promotion issue, law and regulations do not allow for the complete award issued by the Arbitrator.

Answer at ¶10. This clarification, the emails described above and the Agency's Position Statement to the ULP Charge establish that, consistent with the allegation in the Complaint, the Agency has not complied with the Arbitrator's Award since on or about November 7, 2021. GC Exs. 1(b) at ¶ 10, 1(c) at ¶ 10.

IV. Position of the Parties

The GC argues that the Respondent has admitted that it has failed and refused to comply with the final, unambiguous and binding Arbitrator's Award. Such a failure violates § 7116(a)(1) and (8) of the Statute. GC MSJ at 10. The GC further argues that the Respondent has demonstrated such unwillingness to comply with the law that the non-traditional remedies of ordering a short deadline for submitting evidence of compliance and bi-weekly updates to the GC are appropriate, in addition to traditional remedies. *Id.* at 15-16.

The Respondent alleges that it has complied with the Award because it is working on complying with a reasonable interpretation of the Award as the Award is contrary to federal law, which limits retroactive promotions to 120-days and which requires satisfaction of time-in-grade rules. Mot. Dis. and Resp. at 21-24. In response, the GC contends that the Authority will not review the merits of the Arbitrator's Award in a ULP proceeding over enforcement of the Award. Instead, the Respondent should have raised the contrary to law arguments in exceptions to the Award before the Authority, which it did not do. GC MSJ at 11-12; GC Opp'n at 1-3.

The Respondent further alleges that it need not comply with the Award because the matter involves a classification appeal that is statutorily excluded from the grievance process, rather than a temporary, retroactive promotion, as the Arbitrator found. Thus, according to the Respondent, the Arbitrator lacked statutory jurisdiction to issue the Award. Mot. Dis. and Resp. at 3-24. In response, the GC argues again that the Respondent's argument again is an attempt to collaterally attack the merits of the Arbitrator's Award, which cannot be done in a ULP proceeding to enforce the Award, but may only be heard on exceptions to the Award. GC Opp'n at 3-5. The GC further argues that, in any event, the Respondent is incorrect that this matter involves a classification appeal. Instead, according to the GC, the case involves a temporary, retroactive promotion based on the collective bargaining agreement and it was therefore properly before the Arbitrator. *Id.* at 7- 9.

Finally, the Respondent provided regulations in its brief that support an argument that the Award violates sovereign immunity because the Award is contrary to promotion regulations and because the Back Pay Act limits the waiver of back pay to amounts that "may not exceed that authorized by... regulation...." Mot. Dis. and Resp. at 18. The Respondent then provided two regulations that provide limits on promotions, which the Respondent argues limit the back pay and promotion the grievant could receive under the Back Pay Act. *Id.* Therefore, according to the argument, the Back Pay Act did not waive sovereign immunity to the extent of the back pay involved here. As such, the back pay award violates sovereign immunity. The GC argues in response that the Respondent's bare assertion, unaccompanied by analysis, should be dismissed as such and that it nevertheless fails because the Arbitrator based his Award on the Back Pay Act which provides a waiver of sovereign immunity.

V. Analysis and Conclusions

A. The Respondent has violated § 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitrator's Award.

The Respondent has failed to comply with the final, binding and unambiguous Award of Arbitrator Petersen. The Respondent's argument that the Award is contrary to law and thus excuses its compliance is not properly raised in this ULP proceeding to enforce the Award, but could only be heard on exceptions to the Award, which the Respondent did not pursue. While the Respondent would not be required to comply with the Award if it could establish either that the Arbitrator lacked statutory jurisdiction to decide the case or that the Award violates sovereign immunity, neither is established. As such, the Respondent is found to have violated § 7116(a)(1) and (8) of the Statute.

1. In this ULP proceeding brought to enforce the Award, the Respondent may not defend its failure to comply with the Award based on a contrary to law argument.

Under § 7122(b) of the Statute, an agency must take the actions required by an arbitration award, when the award becomes "final and binding." *Dep't of the Air Force, Carswell Air Force Base, Tex.*, 38 FLRA 99, 104 (1999) (*Carswell AFB*). An arbitrator's award becomes final and binding when no timely exceptions are filed or if timely filed exceptions are denied by the Authority. *Id.* at 105. This is so regardless of whether the arbitrator retains jurisdiction "solely for the purpose of resolving questions which might arise concerning implementation of the award." *U.S. Dep't of Def., Dependents Schools*, 49 FLRA 120, 122-23 (1994) (*Dependent Schools*).

Where an agency disregards portions of an arbitrator's award or otherwise changes an award, the agency fails to comply with the award within the meaning of § 7122(b) of the Statute. *Carswell AFB*, 38 FLRA at 104. An agency violates Section 7116(a)(1) and (8) of the Statute when it fails to comply with a final and binding arbitrator's award in violation of § 7122(b). *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA Renton*).

In this case, the Arbitrator issued his Award on October 7, 2021. GC Ex. 2 at 11; Resp. Ex. 4 at 11. The Respondent concedes that it did not file exceptions to the Award. GC Ex. 1(c) at ¶ 9. Therefore, the Award became final and binding on November 7, 2021 or within five days of November 7, 2021, depending on whether service was by first class mail or other means. *See* 5 C.F.R. § 2425.2(b) and (c). It is irrelevant that the Arbitrator retained jurisdiction for purposes of implementing the award. *See Dependents Schools*, 49 FLRA at 122-23.

The GC contends that the Agency has not complied with the Award since on or about November 7, 2021. GC Ex. 1(b) at ¶10. As explained above, while the Respondent does not fully concede that it has failed to comply with the Award, the totality of the facts and the Respondent's own statements establish that it has not. Specifically, the Respondent acknowledged in its Position Statement regarding the ULP Charge that, other than paying attorney fees, the only other aspect of compliance was that it had sent a request for personnel action to DFAS for a temporary promotion for Mr. Herweg from September 2, 2019 to December 30, 2019, to a GS-7 position. GC Ex. 3. It further indicated that the Respondent would not otherwise comply with the Award. *Id.* In response to the GC's inquiry on April 18, 2023, the Respondent reported only that documentation for a

promotion from October 31, 2016 until December 31, 2016 had been created. GC Ex. 6. Consistent with that report, there is a related notification of personnel action for Mr. Herweg for only that two-month period of a promotion to the GS-9 Freight Rate Specialist position. GC Ex. 7. The Respondent could not confirm whether the back pay for that two-month period had been provided. GC Ex. 6. Further, when notified that the two-month promotion did not comply with the requirement to promote Mr. Herweg for the entirety of the period between April 18, 2016 and September 2, 2019, the Respondent indicated it was unaware of this requirement. GC Ex. 9. In its Answer, the Respondent concedes in a roundabout way that it has not complied with the Award: "Respondent has been working within the Agency to determine what, if any, of the Award is permissible." GC Ex. 1(c) at ¶ 10. As such, it is undisputed that the Agency has not complied with the Award.

The Respondent argues however that it is entitled to take action and is taking action to comply consistent with a reasonable interpretation and/or construction of the Award. Mot. Dis. and Resp. It argues that a reasonable construction of the Award requires the Agency to comply only insofar as the Award is consistent with law and regulation. Therefore, because 5 C.F.R. § 335.103(c)(3)(iii) limits temporary promotions to 120 days or less, it need only comply with the Award to that extent. Further, 5 C.F.R. § 300.604(b)(1) requires 52 weeks of time-in-grade for promotions under 5 C.F.R. Part 300. Therefore, it cannot legally promote Mr. Herweg further consistent with that regulation and it is entitled to construe the Award consistent therewith.

In support of its proposition, the Respondent relies on *U.S. Dep't of VA, VA Med. Ctr, Newington, Conn.*, 49 FLRA 165 (1985) (*U.S. Dep't of VA, Newington*) and *Army Armament Res. Dev. and Eng., Picatinny Arsenal, NJ*, 52 FLRA 527 (1996) (*Army Armament*). In *U.S. Dep't of VA, Newington*, the Authority upheld an award finding that the agency had complied with a reasonable interpretation of a prior award. There, the prior award was for restoration of the grievant to a position title that did not exist and at a certain grade level. The most closely related position was at a grade level that was not consistent with the grade level indicated in the award. Therefore, given the ambiguity, the agency assigned the grievant to a position that was at the grade level specified in the award and with similar level job responsibilities as indicated by the title of the position in the award. In the second arbitration regarding whether the agency had complied, the arbitrator found that, "given the lack of precision [of the language in the award]… it certainly cannot be said that [the agency's] conduct was unreasonable." *U.S. Dep't of VA, Newington*, 49 FLRA at 167. On exceptions, the Authority upheld the award denying the grievance alleging failure to comply with the prior award. *Id.*

In this case, unlike in *U.S. Dep't of VA, Newington*, 49 FLRA at 167, there is no lack of precision in the language of the Award. Instead, the Arbitrator ordered the Agency to "temporarily promote Mr. Herweg into the position of Freight Rate Specialist [GS-9] from April 18, 2016 until September 2, 2019, to include noting on his OPF of this temporary promotion," and "[p]ursuant to the Back Pay Act… pay Mr. Herweg all lost wages [including interest] that he did not receive because of the failure of the Agency to temporarily promote him." GC Ex. 2 at 11. Unlike in *U.S. Dep't of VA, Newington*, 49 FLRA at 167, the position of Freight Rate Specialist [GS-9] exists within the Agency. That is clear from the Agency's own Notification of Personnel Action, which it created to start the process of temporarily promoting Mr. Herweg for a period of two months, GC Ex. 7, and from the Award itself, which discusses in great detail that position and its duties, GC Ex. 2 at 4-10. Further, unlike in *U.S. Dep't of VA, Newington,* 49 FLRA at 167, the position is consistent with the grade level indicated in the Award. Given that the Award is clear, and not ambiguous, *U.S. Dep't of VA, Newington*, 49 FLRA 165, does not provide support for the Agency's

position. It is further noted that *U.S. Dep't of VA, Newington* came to the Authority on exceptions to the arbitrator's award, rather than in the posture of a ULP proceeding brought to enforce the award, which further erodes its supportive value.

In *Army Armament,* the Authority had to interpret an arbitrator's award in light of changed factual circumstances. Based upon its interpretation in light of these new factual circumstances, the Authority found that the Agency had complied with a reasonable construction of the award and therefore had not violated the Statute. 52 FLRA at 528. This case also therefore does not support the Agency's position, as there are no new factual circumstances.

Instead, the Agency argues that legal circumstances render its interpretation of the Award reasonable. Specifically, it argues that it cannot comply with the Award because the Award runs afoul of the regulatory time limit for temporary promotions found in 5 C.F.R. § 335.103(c)(3)(iii) and a time-in-grade regulatory requirement for promotions, 5 C.F.R. § 300.604(b)(1). This argument is squarely an argument that the Award is contrary to law. *U.S. Marine Corps, Marine Corps Air Ground Com. Ctr., Twentynine Palms, Cal.*, 73 FLRA 379, 380 (2022) (*Twentynine Palms*) (issue of time in grade is a contrary to law argument).

However, as a general proposition, the Authority will not review the merits of an arbitration award in a ULP proceeding. *See, e.g., U.S. Army Adjutant Gen. Public'ns Ctr., St. Louis, Mo.*, 22 FLRA 200, 206 (1986). As the Authority has repeatedly stated, to allow a respondent to litigate matters that go to the merits of the award would circumvent Congressional intent with respect to the statutory review procedures and the finality of arbitration awards. *See, e.g., Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 15 FLRA 151, 152 (1984) (*Wright-Patterson*); *see also U.S. Dep't of HHS, SSA*, 41 FLRA 755, 765-66 (1991), *enforced sub nom. Dep't of HHS v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992) (under § 7122 of the Statute, arguments that go to the merits of an arbitration award are not litigable in a ULP proceeding brought to enforce the award).

Therefore, for example, in *Carswell AFB*, in a ULP proceeding for compliance with an arbitrator's award, the Respondent cited "several provisions of the C.F.R., the [Federal Personnel Manual], and title 5, United States Code" to argue that "its interpretation of the Arbitrator's award and clarification is consistent with applicable law, rules and regulations," and therefore it had complied with the final and binding arbitrator's award. The Authority held that, "to the extent that the Respondent argues that the clear wording of the award as clarified is inconsistent with applicable law, rules, or regulations, we reject that argument because it should have been raised as an exception to the Arbitrator's award or clarification." 38 FLRA at 104. Therefore, the Authority affirmed that the Respondent had violated the Statute by failing to comply with the award.

Similarly, here, as noted previously, no exceptions were filed to the Award. GC Ex. 1(c) at ¶ 9. Instead, the Respondent seeks to argue the merits of the Award, specifically that the Award is contrary to law, in this ULP proceeding to enforce compliance with the Award. As with *Carswell AFB*, the Respondent's contrary to law arguments should have been raised as an exception to the Arbitrator's Award. They were not. GC Ex. 1(c), ¶ 9. As with *Carswell AFB*, this ULP proceeding to enforce compliance with the Award does not provide a forum for such an attack.

The Respondent cites to various other cases that it argues support its claim that it need not comply with an award that is contrary to law, including *U.S. Dep't of VA Med. Ctr., Wash., D.C.*, 67 FLRA 194 (2014) (*VA Med Ctr., Wash., D.C.*). Mot. Dis. and Resp. at 22-24. In these cases,

the Authority found that retroactive, noncompetitive, temporary promotions over 120 days are contrary to law and the Authority limited the remedy accordingly. *VA Med Ctr., Wash., D.C.*, 67 FLRA at 196. However, these cases came to the Authority at a crucially different point in case proceedings, specifically on exception to arbitrators' awards, when the Authority is specifically tasked with determining whether arbitration awards are contrary to law, not as a ULP proceedings brought to enforce compliance with the awards. As such, these cases do not establish that the Respondent may raise such an argument in a ULP proceeding to enforce the Award. Again, to hold otherwise would undermine the statutory review process established by Congress and the finality of arbitration awards. *See, e.g.*, *Wright-Patterson*, 15 FLRA at 152; *see also Dep't of HHS, SSA*, 41 FLRA at 765-66.

As such, the Respondent does not have a basis for claiming that it is trying to comply with a reasonable construction of the Award consistent with law, rule and regulation. That claim is merely a contrary to law argument that should have been raised as an exception to the Award, but was not. Consistent with the statutory structure established by Congress and the need for finality for arbitration awards, the Respondent may not raise such a collateral attack on the Award in this ULP proceeding brought to enforce the Award.

2. The Arbitrator did not lack statutory jurisdiction to decide the case.

Despite the general prohibition on collateral attacks of arbitration awards in ULP proceedings to enforce them, there is a narrow exception, specifically where the arbitrator lacked statutory jurisdiction to decide the case. *U.S. Dep't of VA, Veterans Canteen Service*, 66 FLRA 944 (2012) (*Veterans Canteen Service*); *cf. Dir. of Admin., HQ, Air Force*, 17 FLRA 372 (1985) (refusal to arbitrate grievance over termination of probationary employee did not violate statute due to lack of statutory jurisdiction). Therefore, for example, the Authority has held that an agency did not commit a ULP when it refused to comply with an arbitrator's award requiring reinstatement of an employee who was appointed under a personnel system that statutorily excluded grievances of removals from the grievance process. *Veterans Canteen Service*, 66 FLRA at 950.

In the instant case, the Respondent makes such an argument. Specifically, the Respondent argues that the matter at issue involves a classification appeal, which is statutorily excluded from the grievance process under 5 U.S.C. § 7121(c)(5). In other words, the Respondent argues that the Arbitrator was statutorily barred from deciding the case. Mot. Dis. and Resp. at 3-24.

The GC argues that this is simply another collateral attack on the merits of the Award that cannot be raised in this ULP proceeding to enforce the Award. GC Opp'n at 3-5. The GC is incorrect, however, as this question falls within the exception to such collateral attacks and it is appropriate to consider in this ULP proceeding whether the Arbitrator lacked statutory jurisdiction to decide the matter. *See Veterans Canteen Service*, 66 FLRA at 950. Moreover, while the Respondent specifically points out that the question of the Arbitrator's statutory jurisdiction was raised prior to the arbitration and as well in the Respondent's post-arbitration brief, Mot. Dis. and Resp. at 3, that is an unnecessary prerequisite. The Authority has held that it is not necessary to establish that statutory jurisdiction or evidence related thereto was raised below in order to assert the matter. *Veterans Canteen Service*, 66 FLRA at 947-48.

Under 5 U.S.C. § 7121(c)(5), arbitrators lack jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee." *See, e.g.*, *Twentynine Palms*, 73 FLRA at 381. In *Twentynine Palms*, the Authority explained that the term

"classification" in § 7121(c)(5) involves "the analysis and identification of a position and placing it in a class under the position-classification plan established by [the Office of Personnel Management] under chapter 51 of title 5, United States Code." *Id.*

Not infrequently, when a grievance alleges that an employee is entitled to higher pay due to performing duties beyond that found in the employee's position description, the issue arises as to whether such a matter constitutes a classification appeal, which is prohibited from the grievance process by statute, or a temporary, retroactive promotion under the collective bargaining agreement which occurred constructively by virtue of the employee having performed higher level duties of a previously classified position. *See, e.g., U.S. Dept of the Navy, Naval Aviation Depot, Marine Corps Air Station, Cherry Point, N.C.*, 42 FLRA 795 (1991) (*Navy Cherry Point*); *AFGE, Local 987*, 37 FLRA 386 (1990); *Twentynine Palms*, 73 FLRA 379.

In *Twentynine Palms,* the Authority explained the distinction. Specifically,

> [w]here the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by an employee, the grievance concerns the classification of a position within the meaning of § 7121(c)(5). However, where the substance of the grievance concerns whether the employee is entitled to a temporary promotion under a collective-bargaining agreement because the employee has performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).

73 FLRA at 381-82.

In applying that standard to the grievance involved in *Twentynine Palms*, the Authority noted that

> the Arbitrator found the grievant performed higher-graded protocol-officer duties that are different from the duties of a protocol specialist [which was the grievant's current position]. The Arbitrator also found the Union's grievance alleged the grievant was entitled to a temporary promotion pursuant to an article in the parties' agreement specifically governing such matters. Consequently, the Arbitrator's findings demonstrate that the substance of the grievance concerned whether the grievant is entitled to a temporary promotion under the parties' agreement.

Id. at 382. Therefore, the Authority found that the grievance did not involve a classification and the grievance was not statutorily barred from the grievance process. *Id.*

Similarly, in the instant case, as the GC argues, the Arbitrator found the grievant performed the higher-graded duties of the Freight Rate Specialist [GS-9] position, which are different from the duties of the grievant's current position. The Arbitrator also found the grievance alleged the grievant was entitled to a temporary promotion pursuant to an article in the parties' agreement specifically governing such matters. GC Ex. 2 at 10-11. Thus, the Arbitrator's findings fall squarely within the parameters established for a retroactive, temporary promotion pursuant to *Twentynine Palms,* and do not involve a classification appeal that would be statutorily barred from the grievance process.

The Respondent cites to a number of cases in which the Authority set aside awards in which

arbitrators found that the grievance involved a retroactive, temporary promotion rather than a classification appeal, finding that they were actually classification appeals and thus excluded from the grievance process under 5 U.S.C. §7121(c)(5). Mot. Dis. and Resp. at 9-15. However, those cases were decided under a standard the Authority announced in 2018 in *U.S. Small Business Administration*, 70 FLRA 729, 729 (2018) (*SBA I*), which essentially created a "*presumption* that a grievance alleging entitlement to a temporary promotion actually concerns classification, and is therefore jurisdictionally barred under § 7121(c)(5)," unless certain standards were met. *Twentynine Palms*, 73 FLRA at 381. In *Twentynine Palms*, the Authority announced that it would no longer follow *SBA I* or the Authority decisions that apply it, as the new standard (or return to the standard that existed before *SBA* I) announced in *Twentynine Palms* "more closely hews to the language and purpose of § 7121(c)(5) of the Statute." 73 FLRA at 381. As such, the Respondent's cases decided under *SBA I* do not provide support for the Respondent's argument.

The Respondent also provides a declaration from a current Agency employee who works in classification and a former Agency employee who did to support its argument that the grievance at issue involved a classification appeal, rather than a temporary, retroactive promotion, as found by the Arbitrator. Resp. Exs. 5 and 6. Both offer opinions that the Arbitrator's Award sought to classify a position based on the duties the grievant was performing and to assign grade levels to those duties. Both declarations explain that the process for doing that, pursuant to Article 17, Section 17.03 and 17.04 of the CBA, involves a request for a desk audit and/or grieving the accuracy of the position description under which the employee is working in order to obtain a desk audit. Thereafter, a classifier would assess the duties being performed and whether those duties are consistent with the employee's current position description or whether they are different and should result in a newly classified position. *Id.* Both declarations also opine that it was improper and against classification rules for the Arbitrator to assess whether the grievant was performing the duties of the GS-9 Freight Rate Specialist position because that position did not exist at the Respondent's facility. *Id.*

However, the Arbitrator's Award very clearly did not attempt to classify a position or determine the grade level of the grievant's duties. Instead, the Arbitrator considered whether the grievant was performing the established duties of a previously classified position, the GS-9 Freight Rate Specialist position, consistent with a retroactive, temporary promotion grievance, and inconsistent with a classification appeal, and found that he did. The Arbitrator also assessed that that position existed as a previously classified position based on a position description which the Agency does not dispute exists. Finally, the Arbitrator relied on Article 13, Section 13.01, of the CBA to determine that the grievant was entitled to a temporary, retroactive promotion due to having performed the duties of the Freight Rate Specialist position, a previously established higher-level position, because that CBA provision required that in such a situation. The Arbitrator did not rely on Article 17, Sections 17.03 and 17.04 of the CBA, the desk audit procedures cited in the classifiers' declarations. As such, despite the opinions found in the declarations provided by the Respondent, the Arbitrator's Award finding that the grievance involved a temporary, retroactive promotion (and did not involve a classification appeal) falls squarely within the parameters established under *Twentynine Palms*, 73 FLRA at 381, for such.

The Respondent also provided declarations from the grievant's supervisors, who explained that the grievant did not perform duties other than those in his position description and to explain that the GS-9 Freight Rate Specialist position did not exist at the Agency's facility. Resp. Exs. 7 and 8. Those arguments are simply disagreements with the Arbitrator's factual findings and may not be raised in this ULP proceeding, as explained previously.

Therefore, because the Arbitrator's Award falls squarely within the parameters established in *Twentynine Palms* for temporary, retroactive promotions, the Award did not involve a classification appeal. As such, the grievance was not excluded from the grievance process and the Arbitrator had statutory jurisdiction to decide the case.

3. The Award does not violate sovereign immunity.

Finally, the Respondent argues that the Arbitrator's Award violates sovereign immunity. Mot. Dis. and Resp. at 18. In support of its argument, the Respondent mentions three regulations. Firstly, it mentions that 5 C.F.R. § 335.103(c)(3)(iii) provides for temporary, discretionary promotions limited to 120 days or less and that those promotions do not require application of competitive procedures. Secondly, it mentions that 5 C.F.R. § 300.604(b)(1) requires that certain employees must have 52 weeks of time-in-grade for competitive promotions. Thirdly, it mentions that 5 C.F.R. § 550.804(e)(1) provides that "the pay, allowances, and differential paid as back pay under this subpart (including payments made under any grievance arbitration decision or any settlement agreement) may not exceed that authorized by any applicable law, rule, regulation or collective bargaining agreement, including any applicable statute of limitations."

The Respondent does not articulate further in what manner these regulations prove its argument that the Award violates sovereign immunity. The GC argues therefore that the Respondent's sovereign immunity argument constitutes a "bare assertion which should be dismissed as such." GC Opp'n at 5. However, because sovereign immunity raises important constitutional concerns, and because the Respondent correctly argues that a claim of sovereign immunity may be raised at any time, *see, e.g., SSA ODAR*, 65 FLRA 334 (2010), the matter is entertained here.

Specifically, the Respondent is understood to argue that 5 C.F.R. § 550.804(e)(1), a regulation associated with the Back Pay Act, 5 U.S.C. § 5596, limits the back pay to which an employee is entitled under the Back Pay Act to that allowed by, among other things, regulation. The Respondent then cites to two regulations that could constitute a limit to the amount of back pay allowed in this circumstance, specifically the regulation that limits non-competitive promotions to 120 days and the regulation requiring certain employees to have 52 weeks of time-in-grade for promotion. The Respondent argues that the back pay award was in contravention of both regulations. Mot. Dis. and Resp. at 18, 22-24. Therefore, according to the argument, because the back pay under the Back Pay Act is limited to that allowed by regulation and these regulations limit the back pay to 120 days, any additional back pay is in excess of the sovereign immunity waiver in the Back Pay Act.

However, simply because the Respondent raises a sovereign immunity violation claim does not actually make it so. In *U.S. DHS v. FLRA*, the D.C. Circuit Court of Appeals was faced with a similar sovereign immunity violation claim to a back pay award under the Back Pay Act. 784 F. 3d 821, 823 (D.C. Cir. 2015). The challenge was similarly based on 5 U.S.C. § 5596(b)(4) (which is the basis for the regulation Respondent cites, 5 C.F.R. § 550.804(e)(1)), which limits the amount of back pay allowed under the Back Pay Act.

5 U.S.C. § 5596(b)(4) states that

the pay, allowances, or differentials granted under this section for the period for

> which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that [it cannot exceed a period of] 6 years…"

Regarding the sovereign immunity challenge associated with the back pay award under the Back Pay Act in that case, the Court found it lacked jurisdiction to entertain the Agency's argument that the award (which the ULP proceeding below was brought to enforce) violated the "shall not exceed" limitation in the Back Pay Act and therefore violated sovereign immunity. The Court explained that "[r]outine statutory and regulatory questions -- in this case, the meaning of the 'shall not exceed' clause in the Back Pay Act…and [the agency policy at issue] -- are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *U.S. Dep't of Homeland Sec.*, 784 F. 3d at 823.

According to the Court, "[o]therwise, Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the Back Pay Act authorizes would be reviewable." *Id.* In other words, in that case the question of whether the "shall not exceed" clause in the Back Pay Act was violated raised a question as to whether the arbitrator's award was contrary to law, a question over which the Circuit court had no jurisdiction. *Cf. Twentynine Palms*, 73 FLRA at 380 (the argument that the grievant did not serve time-in-grade is a contrary to law argument).

As explained above, the argument that the award is contrary to law is not a proper argument in a ULP proceeding. *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Complex Coleman, Fla.*, 67 FLRA 632 (2014) (whether the status-quo remedy is contrary to law because it interferes with the Respondent's management right to determine its internal-security practices under § 7106(a)(1) cannot be considered). Instead, such an argument "should have been raised as an exception to the Arbitrator's award or clarification." *Carswell AFB*, 38 FLRA at 104 (1999); *Dep't of the Air Force, HQ 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona*, 24 FLRA 1021, 1026-27 (1986) (question regarding consistency of night differential pay with Back Pay Act is not properly raised in unfair labor practice case regarding compliance with arbitrator's award); *Wright-Patterson* 15 FLRA 151 (1981), *affirmed sub nom. Dep't of the Air Force v. FLRA*, 775 F. 2d 727 (6th Cir. 1985). It was not and it cannot be considered here.

Moreover, it should be noted that, simply because an award may be contrary to a regulation does not mean that it necessarily violates the Back Pay Act. While the Respondent argues that a regulation interpreting the Back Pay Act, 5 C.F.R. § 550.804(e)(1), limits the back pay under the Back Pay Act to that allowed by law, rule, or regulation, the Back Pay Act law on which it is based, 5 U.S.C. § 5596(b)(4), is more specific (and does not support the Respondent's argument).

Stepping back for clarity, the Back Pay Act is a waiver of sovereign immunity that allows for back pay and interest to "[a]n employee of an agency who . . . 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 resulted in the withdrawal or reduction of all or part of the pay, allowances, or differential of the employee . . . " 5 U.S.C. § 5596(b)(1). A violation of a collective bargaining agreement is considered to be such an unjustified or unwarranted personnel action. *U.S. Dep't of Transp., FAA*, 63 FLRA 502, 503 (2009).

The Arbitrator in this case specifically found that the Agency violated Article 13, Section

13.01 of the CBA when it failed to promote the grievant to the Freight Rate Specialist [GS-9] position and that the grievant had a reduction of pay due to that failure. GC Ex. 2 at 10-11. As a result, the Arbitrator found that there was an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of pay for the grievant. *See U.S. Dep't of Transp., FAA*, 63 FLRA 502, 503 (2009). The applicable law, rule, regulation, or collective bargaining agreement that was the basis for the unjustified or unwarranted personnel action was Article 13, Section 13.01 of the CBA. Based on the violation of that provision of the CBA, the Arbitrator awarded back pay under the Back Pay Act from April 18, 2016 until September 2, 2019. GC Ex. 2 at 10. The Arbitrator did not base his award on violation of regulation, including the regulations noted above, 5 C.F.R. § 300.604(b)(1) and 5 C.F.R. § 300.604(b)(1).

Nevertheless, according to the Respondent's argument, 5 C.F.R. § 550.804(e)(1), a regulation explaining the Back Pay Act, states that "the pay, allowances, and differential paid as back pay under this subpart (including payments made under any grievance arbitration decision or any settlement agreement) may not exceed that authorized by any applicable law, rule, regulation or collective bargaining agreement, including any applicable statute of limitations." This language could be interpreted to limit the back pay allowed under the Back Pay Act to that allowed by the regulations cited by the Respondent involving a 120-day limit on temporary promotions and time-in-grade rules, 5 C.F.R. § 335.103(c)(3)(iii) and 5 C.F.R. § 300.604(b)(1), such that the back pay award exceeded the amount allowed by the Back Pay Act.

However, the actual language of the Back Pay Act upon which the regulation 5 C.F.R. § 550.804(e)(1) is based makes clear that it is not simply any law, rule, regulation, or collective bargaining agreement provision that limits the back pay amount under the Act. Instead, the Back Pay Act states that the back pay "shall not exceed that authorized by the applicable law, rule, regulations or collective bargaining agreement **under which the unjustified or unwarranted personnel action is found**, except that [it cannot exceed a period of] 6 years...." 5 U.S.C. § 5596(b)(4) (emphasis added). Therefore, it is clear that the limitation applies, not simply to any applicable law, rule, regulation or collective bargaining agreement provision, but instead the limitation applies only to the law, rule, regulation, or collective bargaining agreement provision **on which the unjustified or unwarranted personnel action was based**. *See NTEU, Chapter 231*, 67 FLRA 247, 250 (2014), *pet. for review denied sub nom. DHS, CBP, Scobey, Mont. v. FLRA*, No. 14-1052 (D.C. Cir. 2015). To the extent the regulation the Respondent cites, 5 C.F.R. § 550.804(e)(1), can be interpreted otherwise, that is not an interpretation consistent with the Back Pay Act.

This reading is consistent with the text, history and purpose of 5 U.S.C. § 5596(b)(4). As explained by the Authority, Congress amended the Back Pay Act in 1998 to include Section (b)(4) due to arbitrators and others awarding long periods of back pay beyond six years because the Back Pay Act did not previously have a limit. Therefore, it provided Section (b)(4) to establish an outer limit for back pay, where there was no other limit established by the law, rule, regulation or collective bargaining provision "'**under which the unjustified or unwarranted personnel action' was found.**" *NTEU, Chapter 231*, 67 FLRA at 250 (emphasis added) (citation omitted); *U.S. DHS*, 784 F. 3d at 823 (D.C. Cir. 2015).

Therefore, simply because a back pay award may be otherwise limited by a law, rule, regulation, it does not mean the back pay award exceeds that allowed by the Back Pay Act. A back pay award under the Back Pay Act only exceeds the amount allowed by the Back Pay Act when it either exceeds the amount allowed by the law, rule, regulation or collective bargaining agreement

provision on which the unjustified or unwarranted personnel action is based or six years.

As noted above, in the instant case, the unjustified or unwarranted personnel action was based on a violation of Article 13, Section 13.01 of the CBA, not the regulations cited by the Respondent. GC Ex. 2 at 10. Therefore, it is Article 13, Section 13.01 that the back pay award may not exceed (or six years). *See* 5 U.S.C. § 5596(b)(4). Article 13, Section 13.01 does not have a time limitation. GC Ex. 2 at 2-3. Therefore, the six-year statute of limitations in 5 U.S.C. § 5596(b)(4) applies and the award was not in excess of that limitation. As such, the back pay award did not exceed the amount allowed by the Back Pay Act.

As a result, even assuming that "[r]outine statutory and regulatory questions" about the Back Pay Act appropriately raise sovereign immunity questions, an assumption that *U.S. DHS*, 784 F. 3d at 823, does not support, this back pay award did not exceed the amount allowed by the Back Pay Act and therefore did not exceed the waiver of sovereign immunity granted under that statute. As such, there is no violation of sovereign immunity.

Therefore, the Respondent is found to have violated § 7116(a)(1) and (8) of the Statute when it failed and refused to comply with the final, binding and unambiguous Arbitrator's Award in violation of §§ 7121 and 7122 of the Statute. The Respondent is incorrect that it had appropriate justification for that failure and refusal, as explained above.

B. The Respondent is ordered to remedy its unlawful conduct.

As a remedy for the Respondent's unlawful conduct, the GC requests the typical order in such a case directing the Respondent to comply with the Award and post a notice to employees. In addition, the GC requests nontraditional remedies. The GC requests that the Respondent be held to a short deadline of 14 days following this decision for submitting evidence of compliance and thereafter be required to submit bi-weekly updates to the GC to describe its efforts to comply with the Order. GC MSJ at 15. The GC argues for the nontraditional remedies due to the Respondent's dilatory conduct. *Id.* at 15-16

Nontraditional remedies have been awarded and upheld where they are found "reasonably necessary to effect compliance with a final and binding arbitration award" especially "in light of the Respondent's dilatory conduct... in satisfying the Arbitrator's award..." *FAA Renton*, 55 FLRA at 300. The Respondent's conduct above establishes such dilatory conduct. Therefore, due to the Respondent's dilatory conduct, nontraditional remedies as well as traditional remedies will be ordered.

Therefore, as a traditional remedy, the Respondent will be ordered to comply with the final and binding Award of Arbitrator Petersen issued on October 7, 2021. The Respondent will also be ordered to post the Notice to All Employees, which shall be signed by Colonel Michael J. Power, 377th Air Base Wing and Installation Commander, Kirtland Air Force Base. As a nontraditional remedy, the Respondent will be ordered to submit bi-weekly updates to the GC to describe its efforts to comply with the Order, consistent with the GC's request, after an initial deadline of submitting evidence of compliance within 30 days of this Order, which is not consistent with the GC's request, but which provides the Respondent appropriate time after issuance of this Decision to comply.

I therefore recommend that the Authority grant the GC's Motion for Summary Judgment and deny the Respondent's Motion to Dismiss and issue the following Order:

VI. Order

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of the Air Force, Kirtland Air Force Base, New Mexico (the Respondent) shall:

1. Cease and desist from:

   (a) Failing and refusing to comply with the final and binding award of Arbitrator Donald J. Petersen, dated October 7, 2021, directing the Respondent to (1) temporarily promote Mr. Herweg into the position of Freight Rate Specialist (GS-9), from April 18, 2016 until September 2, 2019 to include noting on his OPS of this temporary promotion; and (2) pursuant to the Back Pay Act, pay Mr. Herweg all lost wages (including interest) that he did not receive because of the failure of the Agency to temporarily promote him as described above.

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

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

   (a) Exactly thirty (30) days following the issuance of this Order, and every fourteen (14) days thereafter until compliance has been fulfilled, submit written updates to the Denver Regional Office of the FLRA General Counsel describing Respondent's efforts to comply with the Order. These written updates shall be supported with evidence documenting Respondent's efforts.

   (b) Post the below Notice to All Employees in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. A copy of the Notice must also be electronically mailed to all bargaining unit employees. The Notice must be signed by Colonel Michael J. Power, 377th Air Base Wing and Installation Commander, Kirtland Air Force Base, New Mexico. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

   (c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Regional Office, 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.
October 4, 2023

LEISHA SELF

Digitally signed by LEISHA SELF
Date: 2023.10.04 13:28:55 -04'00'

LEISHA A. SELF
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 the Air Force, Kirtland Air Force Base, New Mexico 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 fail or refuse to comply with the final and binding award of Arbitrator Donald J. Peterson directing us to:

1. Temporarily promote Aaron Herweg into the position of Freight Rate Specialist (GS-9), from April 18, 2016 until September 2, 2019, to include noting on his OPS this temporary promotion; and

2. Pursuant to the Back Pay Act, pay Mr. Herweg all lost wages (including interest) that he did not receive because of the failure of the Agency to temporarily promote him as described above.

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

WE WILL take any and all steps necessary to fully comply with the FLRA Administrative Law Judge's Decision and Order.

WE WILL comply within 60 days of the date of the Decision and Order.

_____
(Respondent/Agency)

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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, by mail: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, or by telephone: (303) 225-0340.