U.S. Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, Maryland and AFGE, Local 1923

Federal Labor Relations Authority

0-AR-3246; 0-AR-3287; 56 FLRA No. 141; 56 FLRA 848

September 29, 2000

The Union filed a number of grievances over several issues. The parties entered into two settlement agreements over these grievances, which included a binding arbitration clause in each. Some grievances went to arbitration, under the provisions in the SA's, and the arbitrator issued five awards. "In Award I, the Agency stipulated that it had failed to comply with one of the settlement agreements, and the Arbitrator issued several remedies. In Award II, the Arbitration found that the Agency remained in noncompliance, and, among other things, he directed the Agency to post a notice to employees and to comply with its previous agreement to issue an apology to a Union steward. In Award III, the arbitrator found continued noncompliance by the Agency, and he offered additional remedies" including additional notice postings and an all-hands meeting. In Award IV, the Arbitrator found continued violations by the Agency and granted the Union three separate awards of attorney's fees for the three previous awards. The Agency timely excepted to the fourth award, challenging only the attorney's fees awards. The Arbitrator held another hearing, at which the Agency contested jurisdiction and withdrew from the hearing when the Union called the Agency's counsel to testify. The Arbitrator found he had jurisdiction. In Award V, the Arbitrator modified Award I, directed the Agency to post notices, conduct the all-hands meeting, pay attorney's fees to the Union, pay the costs of the arbitration and court reporter and issue a report to the Office of Personnel Management regarding the Agency's partnership efforts. The Agency excepted to Award V also.

In the Agency's exception to Award IV, it argued the award was contrary to the Back Pay Act because there was no award of backpay and no issues involving unjustified or unwarranted personnel actions at the Award IV hearing. As for Award V, the Agency argued the Arbitrator did not have jurisdiction because the exceptions to Award IV were still pending and "the Arbitrator's jurisdiction [was] limited to compliance, not 'enforcement.'" The Agency further argued the Arbitrator was biased, failed to conduct a fair hearing, the award did not draw its essence from the parties' agreements, and the Arbitrator exceeded his authority. The Union opposed the exceptions.

The Authority found the Arbitrator was not biased and did conduct a fair hearing in Award V, but did note "the record raises questions regarding the Arbitrator's continuing ability to assist the parties to resolve disputes." The Authority further found certain issues raised in Award V related to Award IV and since exceptions were pending to Award IV, the Arbitrator may not have had jurisdiction. The Authority remanded the case to the parties for resubmission to determine which issues in Award V directly relate to compliance with Award IV. The Authority also remanded the issue of attorney's fees for the Arbitrator to clarify the requirements for attorney's fees under the BPA. The Authority rejected the Agency's compliance/enforcement, exceeds authority, and essence arguments. The award was remanded to the parties to resubmit to the Arbitrator, absent settlement, unless either party objects to the current Arbitrator, then the Authority allowed the parties to choose a different arbitrator.

Before: Wasserman, Chair; Cabaniss, Member

Decision

I. Statement of the Cases

These matters are before the Authority on exceptions to two awards (hereinafter "Awards IV and V") in a series of five awards issued by Arbitrator Hugh D. Jascourt.1 The exceptions were filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed oppositions to the exceptions. Subsequently, in a meeting with Authority representatives, the parties clarified and stipulated to certain matters.

For the reasons that follow, we remand Awards IV and V to the parties. Absent settlement, the awards should be submitted to arbitration. If either party objects to submission to the Arbitrator who issued the awards, then the awards shall be submitted to another arbitrator for further proceedings. we deny the Agency's remaining exceptions.

II. Background and Arbitrator's Awards

A. Settlement Agreements and Awards I, II and III

The Union filed grievances over several issues, including the 4gency's alleged failure to provide an employee with an accurate position description. The parties entered into two settlement agreements, in which the Agency agreed to various remedies. The parties agreed that claims of noncompliance with the settlement agreements would be submitted to the Arbitrator for binding arbitration.

A series of five compliance awards followed. In Award I, the Agency stipulated that it had failed to comply with one of the settlement agreements, and the

Arbitrator issued several remedies. In Award II, the Arbitrator found that the Agency remained in noncompliance, and, among other things, he directed the Agency to post a notice to employees and to comply with its previous agreement to issue an apology to a Union steward. in Award III, the Arbitrator found continued noncompliance by the Agency, and he ordered additional remedies. The Arbitrator granted the Union's request for attorney fees and directed the Agency to conduct an all-hands meeting, at which the Agency's commanding officer would make a statement regarding the Agency's noncompliance.

B. Award IV (AR3246)

In Award IV, the Arbitrator found that the Agency had not complied with previous remedies regarding postings of notices, the all-hands meeting, and the apology letter. The Arbitrator directed the parties to take various actions. The Arbitrator granted the Union three separate awards of $8,082, totaling $24,246, in attorney and paralegal fees. See Stipulation (July 11, 2000).

The Agency timely filed exceptions to Award IV, challenging only the award of attorney fees.

C. Award V (AR3287)

Subsequent to the filing of exceptions to Award IV, the Arbitrator granted the union's request for additional compliance proceedings, which the Arbitrator opened to the public and the-press. During the proceedings, the union called the Agency's counsel as a witness to testify regarding what he observed at the posting sites. When the Agency's counsel objected, the Arbitrator ordered him to testify and, when the counsel refused, the Arbitrator stated that would draw an adverse inference from the refusal.

The Agency objected to the Arbitrator's jurisdiction. In response, the Arbitrator stated that he would render an immediate decision on jurisdiction only if the Agency agreed to participate in the proceedings in the event that he found that he had jurisdiction. The Agency refused and withdrew from the proceedings.

In the award, the Arbitrator found that he had jurisdiction. The Arbitrator also found that a promotion resulting from the position description grievance resolved in Award I should have been effected in January 1998, and he modified Award I to require the disputed promotion and backpay retroactive to that time. The Arbitrator concluded that the Agency continued to fail to comply with previous remedies regarding postings, the all-hands meeting, and investigations regarding alleged wrongdoing by the steward's supervisor.

As remedies, the Arbitrator directed the Agency to: post notices at locations agreed upon by the union; videotape postings; investigate and report interference with postings; purchase certain bulletin boards for locations where interference

had occurred; conduct all-hands meetings under specified conditions; and pay attorney fees and costs of the Arbitrator and court reporter. The Arbitrator also provided the Agency with options for investigations of employees, and he directed the Agency to address the matters involved in the awards in a report to the Office of Management and Budget (OMB) regarding partnership efforts.

III. Positions of the Parties

A. Agency's Exceptions

1. Award IV

The Agency argues that the award of attorney fees in Award IV is contrary to the Back Pay Act because: (1) the issues before the Arbitrator did not involve unjustified or unwarranted personnel actions, (2) there was no award of pay, allowances, or differentials, and (3) the Arbitrator failed to assess whether the fees were warranted in the interest of justice or whether the amount of fees was reasonable.2

2. Award V

The Agency asserts that the Arbitrator did not have jurisdiction to issue Award V, because: (1) the Arbitrator's jurisdiction is limited to compliance, not "enforcement"; (2) the Agency's exceptions to Award IV stayed compliance proceedings; and (3) the Arbitrator's statement in Award IV that he retained jurisdiction "[b]y agreement of the parties" indicates that he could not exercise jurisdiction absent a joint request from the parties. Exceptions to Award V at 19.

The Agency also asserts that the Arbitrator failed to conduct a fair hearing and/or was biased because the Arbitrator: (1) directed Agency counsel to testify and drew an adverse inference from a refusal to testify; (2) made certain statements indicating bias; (3) demanded that the Agency waive its right to withdraw from the proceedings; (4) fashioned remedies that involve a financial interest for himself; and (5) compromised his impartiality by opening the proceedings to the public and press.

According to the Agency, the award fails to draw its essence from the parties' agreement on two grounds. First, the Agency contends that the parties' agreement requires the parties to equally share arbitral fees and costs. Second, the Agency argues that the parties' agreement reserves management's rights, and that the Arbitrator's direction that the Agency investigate and discipline employees is contrary to that provision, and to management's rights under the Statute.

Also according to the Agency, the Arbitrator exceeded his authority by resolving an issue---improving the parties, "labor management relations climate"---that was

not before him, and by modifying Award I. Id. at 34. Similarly, with regard to the OMB report, the Agency claims that "the issue of correcting comprehensive labor relations was never submitted" to the Arbitrator. Id. at 35 (internal quotations omitted).

Finally, the Agency asserts that the award of attorney fees is contrary to law because, among other things, the Arbitrator did not connect the fees to a withdrawal or reduction of pay, allowances, or differentials and because the Arbitrator reached only "cursory" conclusions regarding the other requirements for an award of attorney fees. Id. at 41.

B. Union's Opposition

1. Award IV

The Union argues that the Agency's exceptions to Award IV should be dismissed because the Agency agreed to the remedies in that award. On the merits, the Union contends that the Arbitrator "1aid the foundation for a valid attorney fee award in his previous awards"---to which the Agency did not file exceptions---and that "the award in this case regarding compliance was part and parcel of the continuing issue regarding back-pay and interest that [the Arbitrator] awarded previously." Opposition to Award IV at 6, 7.

2. Award V

The Union argues that the Authority should strike references to, and deny any exceptions that rely on, a "Declaration of Mari Yonkers," cited by the Agency as Exhibit B. Opposition to Award V at 11. The Union asserts that the Exhibit 8 provided to it is not such a declaration.

The Union claims that the Arbitrator had jurisdiction in Award V because in each prior award, the parties agreed to confer, or the Arbitrator reserved, jurisdiction over compliance issues. The Union also claims that the Arbitrator was not biased, did not fail to conduct a fair hearing, and did not exceed his authority. With regard to the Agency's essence arguments, the Union asserts that the order that the Agency pay the arbitral costs "was proper and a past practice," and that the Arbitrator had authority to direct the Agency to conduct investigations. Id. at 37.

Finally, the Union asserts that the Arbitrator properly awarded attorney fees.

IV. Analysis and Conclusions

A. The Agency Did Not Waive its Right to File Exceptions to Award IV

A waiver of a party's statutory right to file exceptions to an arbitrator's award under section 7122(a) of the Statute must be clear and unmistakable. See Social Security Administration and American Federation of Government Employees, AFL-CIO, 31 FLRA 1277, 1279 (1988).

The Union states that the Agency voluntarily agreed to the remedies issued in Award IV. The Arbitrator also states, in Award V, that the patties agreed to the remedies issued in Award IV. See Award V at 19. The Union and Arbitrator rely on an alleged, off-the-record conversation during the proceedings resulting in Award IV. However, the Agency expressly disputes the Union's and Arbitrator's statements. See Exceptions to Award V at 28. Further, there is no reference in Award IV to such an agreement and no other evidence establishing it. In these circumstances, the record does not establish that the Agency clearly and unmistakably waived its right to file exceptions to Award IV, and we deny the Union's request to dismiss the exceptions on that ground.

B. The Arbitrator Was Not Biased and Did Not Fail to Conduct a Fair Hearing in Award V

As the Agency combines its bias and fair hearing arguments, we consider the arguments together.

To demonstrate that an award is deficient because of bias, a party must establish that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. See U.S. Department of Veterans Affairs Medical Center, North Chicago, Illinois and American Federation of Government Employees, Local 2107, 52 FLRA 387, 398 (1996). To establish that an award is deficient on the ground that an arbitrator failed to conduct a fair hearing, a party must demonstrate that the arbitrator refused to hear or consider pertinent or material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceedings as a whole. See American Federation of Government Employees. Local 1668 and U.S. Department of the Air Force. Elmendorf Air Force Base, Anchorage, Alaska, 50 FLRA 124, 126 (1995). It is well established that an arbitrator has considerable latitude in conducting a hearing. See U.S. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California and Federal Employees Metal Trades Council, Local 127, 53 FLRA 390, 396 (1997).

First, the Agency bases its exceptions on the Arbitrator's direction that the Agency counsel testify regarding certain matters. However, although the Agency counsel's reluctance to testify is understandable, the Agency provides no authority establishing that the counsel had a right to refuse to testify about these matters, and has not demonstrated that, by directing such testimony, the Arbitrator failed to conduct a fair hearing or evidenced bias. In this connection, the Agency cites two rules of professional responsibility. The first, which prohibits

an attorney from representing a client where it is necessary for the attorney to be a witness in a trial involving that client, would not apply here because, by its terms, the rule prohibits representation, not testimony. The second, which relates to confidentiality of information, also would not apply because the testimony sought from the attorney related to the attorney's observations of public sites---not confidential information.

Second, the Agency bases its exceptions on statements allegedly made by the Arbitrator. In this regard, the Agency claims that, during off-the-record discussions in proceedings that led to Award V, the Arbitrator made certain statements that indicate bias. The Agency has not established, however, that these statements were made. In this regard, the alleged statements are not reflected in the record and, as the Union points out, the document relied on by the Agency does not include the alleged statements.3See Attachment 8 to Exceptions to Award V. Similarly, although the Agency points to statements allegedly made in an unrelated award involving the parties, the Agency did not provide the Authority with a copy of that award in these proceedings. As such, these arguments are not substantiated.

The Agency also relies on the Arbitrator's statements in Award V that its exceptions to Award IV were "disingenuous" and that the Agency objected to jurisdiction because "it sees a benefit to obtaining a decision-maker who is unaware of what has not been disclosed on paper." Award V at 19, 22. We note, in this connection, that the Authority has denied fair hearing exceptions based on arbitrators, remarks indicating concern with a party's conduct. See Department of Health and Human Services, Social security Administration and American Federation of Government Employees, AFL-CIO, 26 FLRA 6, 7-8 (1987). The Authority has also denied bias exceptions based on arbitrators' statements that are critical of a party. See U.S. Department of Defense, Defense Mapping Agency, Hydrographic/ Topographic Center, Washington, D.C. and American Federation of Government Employees, Local 3407, 47 FLRA 1187, 1203-05 (1993). Applying this precedent here, we conclude that the disputed statements do not establish that the award is deficient. Although the statements indicate the Arbitrator's concern with, and are critical of, the conduct of Agency representatives, reviewing them in context, we conclude that they do not demonstrate that the Arbitrator was biased, or failed to conduct a fair hearing.

Third, the Agency bases its exceptions on the claim that the Arbitrator demanded that the Agency waive its "right" to withdraw from the proceedings. Exceptions to Award V at 24. However, the Authority has held that, where a party chooses not to attend a hearing, an arbitrator's decision to proceed ex parte does not provide a basis for finding that the arbitrator denied the non-participating party a fair hearing. See Equal Employment Opportunity Commission and American Federation of Government Employees, National Council of EEOC Locals No. 216, 48 FLRA 822, 831-32 (1993) (EEOC), petition for rehearing denied sub nom. E.E.O.C. v. FLRA, No. 94-1168 (D.C. Cir., Nov. 14, 1995) (unpublished).

See also Warner Robins Air Logistics Center, Department of the Air Force, Warner Robins, Georgia and American Federation of Government Employees, Local No. 987, 24 FLRA 968, 969-70 (1986) ("awards resulting from ex parte hearings have been enforced by Federal courts based upon the rationale that since the losing party had a chance to be heard and refused to participate it should not now complain that the award is invalid because it chose to stay away."). No basis to apply a different rule in resolving bias exceptions is asserted. Applying this precedent, the Arbitrator's demand that the Agency participate in the proceedings does not, standing alone, provide a basis for finding that the Arbitrator's was biased or failed to provide a fair hearing.

The Agency's fourth basis for its exceptions---that the Arbitrator fashioned remedies involving a personal financial interest---is based on the remedy ordered by the Arbitrator in Award IV, rather than Award V and, as such, does not provide a basis for finding Award V deficient. We note, in this connection, that the Agency's exceptions to Award IV do not challenge those remedies.

Finally, the Agency bases its exceptions on the facts that the Arbitrator opened the proceedings to the public and the press and allowed himself to be photographed with Union representatives. However, these facts do not demonstrate that the Agency's rights were prejudiced, that the Arbitrator .refused to hear pertinent evidence, or that the hearing was conducted in a manner prejudicial to the Agency. In particular, a review of the disputed photograph does not establish that the award is deficient. See Attachment 14 to Exceptions to Award V.

Based on the foregoing, we deny the Agency's exceptions. In doing so, however, we note that, as discussed below in the Order, the record raises questions regarding the Arbitrator's continuing ability to assist the parties to resolve disputes.

C. The Record Is Not Sufficient To Determine Whether the Arbitrator Had Jurisdiction to Adjudicate Certain Issues in Award V

The Agency asserts that the Arbitrator did not have jurisdiction to issue Award V, because the Arbitrator's jurisdiction is limited to compliance and does not include enforcement. However, the Agency does not explain or support its assertion that there is a relevant distinction between the two terms or that, even if there is, the Arbitrator was engaging in enforcement rather than compliance. Accordingly, we reject the argument.

The Agency also asserts that the Arbitrator lacked jurisdiction to issue Award V because exceptions to Award IV stayed further compliance proceedings. The Authority has held, in this connection, that a party is not required under the Statute to comply with an award until that award becomes "final and binding" within the meaning of section 7122(b) of the Statute. U.S. Department of

Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 55 FLRA 293, 296 (1999) (Chair Segal concurring on other grounds), petition for review filed sub nom. Department of Transportation, Federal Aviation Admin., Northwest Mountain Region, Renton, Washington v. FLRA, No. 99-1165 (D.C. Cir. Apr. 29, 1999). An award becomes final and binding when there are no timely exceptions filed or when timely-filed exceptions are denied by the Authority. See id. In this regard, an award is automatically stayed when exceptions are filed. See United States Department of Education and American Federation of Government Employees, Council 252, Local 2607, 5 0 FLRA 34, 34 n.1 (1994) (citing 51 Fed. Reg. 45,754 (Dec. 22, 1986)).

There is no dispute that the Agency timely filed exceptions to Award IV, and that those exceptions were pending before the Authority when the Arbitrator conducted the compliance proceedings resulting in Award V. Thus, Award IV was not final at the time the Arbitrator conducted those compliance proceedings, and the Agency was not required to comply with it under the Statute. In this connection, no basis is provided for concluding that an award is stayed only as to the portion to which exceptions are filed. Accordingly, the Arbitrator was not permitted to resolve, in Award V, compliance issues regarding Award IV.

On the other hand, there is no dispute that Awards I, II, and III are now, and at all relevant times have been, final. There is also no dispute that, in those awards, the Arbitrator retained jurisdiction to resolve compliance issues. In this connection, an arbitrator may retain jurisdiction for the purpose of "overseeing the implementation of remedies[,]" even when the parties have not jointly requested that the arbitrator do so.4U.S. Department of Veterans Administration, Medical Center. Leavenworth, Kansas and American Federation of Government Employees, Local 85, 38 FLRA 232, 238-39 (1990) (VAMC. Leavenworth). Thus, the Arbitrator had jurisdiction to resolve, in Award V, compliance issues regarding Awards I, II, and III.

There is one aspect of Award V---concerning the disputed promotion---that clearly relates to Award I and not to Award IV. See Award V at 20 (Arbitrator noted that this matter derived from Award I and was not a product of Award IV). See also Stipulation (July 11, 2000) (promotion matter was raised only in awards I, II, and V). However, the extent to which the remaining matters addressed in Award V result from compliance with Award IV is unclear. The Arbitrator acknowledged, in this regard, that the matters of the posting and the all-hands meetings were subjects of Award IV. However, the Arbitrator also stated that these matters "go [] to the heart" of prior matters and are "merely a continuation of the failure-to comply with the provision of Proceeding III." Award V at 20. Similarly, while the parties stipulated that issues regarding postings, the all-hands meetings, and the discipline of management officials were addressed in Award IV, they also stipulated that these matters were addressed in prior proceedings. See Stipulation (July 11, 2000).

In these circumstances, we are unable to determine which aspects of Award V were properly within the Arbitrator's jurisdiction. Accordingly, we remand this matter to the parties for further proceedings, consistent with the Order.

D. The Arbitrator Did Not Exceed His Authority in Award V

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. See U.S. Department of Defense, Army and Air Force Exchange Service and American Federation of Government Employees, (Worldwide Consolidated Bargaining Unit), 51 FLRA 1371, 1378 (1996).

As discussed above, arbitrators may appropriately retain jurisdiction over their awards. See VAMC, Leavenworth, 38 FLRA at 238-39. In Award I, the Arbitrator directed actions that resulted in the disputed promotion, and he retained jurisdiction over any disputes concerning the matter. In Award V, he found, on the basis of new evidence, that but for the Agency's inaction, the disputed promotion would have occurred in January 1998. Based on this new evidence, the Arbitrator modified Award I. As the Arbitrator specifically retained jurisdiction over the matter in Award I, we conclude that, in modifying the award, the Arbitrator did not exceed his authority. Accordingly, we deny the exception.

E. The Awards of Attorney Fees Are Remanded

The Agency argues that the awards of attorney fees in Awards IV and V are contrary to the Back Pay Act, 5 U.S.C. S 5596. The Authority reviews the questions of law raised by the award and the Agency's exceptions de novo. See National Treasury Employees Union, Chapter 24 and U.S. Department of the Treasury, Internal Revenue Service, 50 FLRA 330, 332 (1995) (citing U.S. Customs Service v. FLRA, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with applicable standards of law, based on underlying factual findings. See National Federation of Federal Employees, Local 1437 and U.S. Department of the Army. Army Research, Development and Engineering Center, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the underlying factual findings. See id. In cases where the record does not permit the Authority to determine the proper resolution of the matter, the Authority will remand the award for further proceedings to assure that the resolution of a request for attorney fees is consistent with law. See U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine Association of Agriculture Employees, 53 FLRA 1688, 1695 (1998).

A threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. See U.S. Department of Defense, Defense Distribution Region East, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004, 51 FLRA 155, 158 (1995) (DOD, New Cumberland). The Act further requires that an award of fees must be: (1) in conjunction with an award of backpay to the grievant; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. 5 7701(g)(1).5See id.

The Arbitrator's award of attorney fees in Award IV references the Agency's failures to properly post notices to employees, conduct all-hands meetings, and deliver an apology letter. There is no indication whether these matters involve pay, allowances, or differentials under the Back Pay Act, and the award does not contain findings regarding the other requirements for an award of attorney fees. In addition, the record is insufficient for the Authority to determine whether the requirements have been met.

We note, in this regard, that the Arbitrator did not address, in Award IV, whether his award of attorney fees was connected to an award of backpay. However, the Union contends that the attorney fees and remedies in that award relate to previous awards of backpay. In this connection, the Authority has held that awards of attorney fees may be based on awards of backpay issued in previous arbitral awards. See U.S. Department of Defense, Dependents Schools and Federal Education Association, 54 FLRA 514, 519 (1998).

Although the record is not sufficiently clear for the Authority to determine whether the attorney fees awarded in Award IV are based on previous backpay awards, there is some evidence supporting the Union's contention. In this regard, it is clear that the posting remedy in Award IV is a continuation of postings ordered in earlier awards. It is also clear that the Arbitrator's first direction to the Agency to post notices was a remedy for the Agency's noncompliance with previous awards, some of which included backpay. See Award II at 3-4, 8-9. In addition, the all-hands meeting ordered in Award IV is clearly related to previous awards ordering such meetings. The Arbitrator's first direction to the Agency to conduct an all-hands meeting was a remedy for the Agency's noncompliance with his previous remedies, including postings, which were based in part on awards of backpay. See Award III at 13-15. Further, the record is ambiguous as to whether the apology letter ordered in Award IV is connected to an award of backpay. In particular, the March 29, 1999 settlement agreement, in which the Agency agreed to issue the apology letter; states that a supervisor interfered with an employee's protected activity, but does not indicate whether that interference involved a denial of pay, allowances, or differentials. See Agency Exhibit 2 in Award V (March 29, 1999 Settlement Agreement). Finally, the Arbitrator stated,

in Award V, that there was a "continuum" between the award of fees in Award III and the award of fees in Award IV. Award V at 20.

In these circumstances, we find that there is a question as to whether the attorney fees award in Award IV is based on awards of backpay issued in the Arbitrator's previous awards.

Similarly, the award of attorney fees in Award V, which is based in part on the postings and all-hands meetings, fails to indicate whether these matters involved pay, allowances, or differentials. Further, although the fees in Award V are also based on an award of backpay in conjunction with the disputed promotion, the award does not specify the extent to which the attorney fees were based on this matter. As with Award IV, the record regarding Award V is insufficient for the Authority to determine whether the requirements for an award of attorney fees have been met.

In these circumstances, we remand the awards of attorney fees to the parties, consistent with the following order.

V. Order

Awards IV and V are remanded to the parties for further proceedings consistent with this decision. The Agency's exceptions that the Arbitrator was biased, failed to conduct a fair hearing, and exceeded his authority are denied.

Section 7122(a)(2) of the Statute provides that the Authority, on finding that an award is deficient, "may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules or regulations." While the customary practice in. remanding awards contemplates that, absent settlement, the awards will be resubmitted to the same arbitrator who initially adjudicated those matters, the Authority has, in unusual cases, required that, absent settlement, the dispute be submitted to an arbitrator other than the arbitrator who initially made the award. See e.g. American Federation of Government Employees and Social Security Administration, 29 FLRA 1568, 1580 (1987) (separate opinion of Members Calhoun and Frazier) (parties ordered, absent settlement, to submit dispute to "neutral" arbitrator, because dispute "one of longstanding and evident rancor" and because of self-interest of original arbitrator); cf. U.S. Department of the Air Force, Seymour Johnson Air Force Base, North Carolina and National Association of Government Employees, Local R5-188, 56 FLRA 249, 254 (2000) (award remanded to different arbitrator where, "[i]n essence, the Arbitrator has disqualified himself from consideration of attorney fees on the ground that he is not able to consider the matter neutrally"); Panama Canal Commission and International Organization of Masters, Mates, and Pilots Marine Division ILA, AFL-CIO, Panama Canal Pilots Branch, 34 FLRA 740, 743 (1990) (award remanded to "arbitrator of [the

parties] choice," noting that "[t]here is no statute or regulation which requires that an arbitration award be resubmitted to its author").

The instant case is an unusual case that warrants such a remedial order. In particular, the role of the Arbitrator in this case was to enforce compliance with two bilateral settlement agreements made by the parties. The Arbitrator has now issued five separate compliance awards involving issues that are escalating in number and tone. Moreover, the nature of the Arbitrator's statements in Award V, and the Agency's interpretations of them, may raise the question of his continuing ability to assist the parties to resolve their disputes and improve their labor-management relationship. As a result, if the parties are unable to settle this matter on remand,6 and either party objects to resubmission of this matter to the Arbitrator, then the parties are directed to select a different arbitrator.

1 These cases have been consolidated for decision because they involve the same parties, the same Arbitrator, and related issues. See U.S. Department of Defense, Army and Air Force Exchange Service. Dallas, Texas and American Federation of Government Employees, 53 FLRA 20, 20 n.1 (1997).

2 As the Union claims entitlement to attorney fees only under the Back Pay Act, we do not address the Agency's claims that the fees are not authorized under other statutes.

3 As such, we do not address further the Union's claim that the document should be struck from the record.

4 Without a retention of jurisdiction, an arbitrator becomes functus officio and, with exceptions not relevant here, may not reopen a final award without the parties' consent. See National Federation of Federal Employees, Local 11 and U.S. Department of the Air Force, Fairchild Air Force Base, Washington, 53 FLRA 1747, 1749-50 (1998). We note that the Arbitrator stated in Award IV that "[b]y agreement of the parties, the Arbitrator shall retain jurisdiction of the matters herein." Exceptions to Award V at 19 (quoting Award IV at 7). The parties dispute the meaning of this statement. However, even if the statement means that the Arbitrator could exercise retained jurisdiction without the parties' consent, as the Union argues, he could not do so as to compliance with Award IV until that award became final.

5 Section 7701(g)(1), which applies to all cases except those involving allegations of employment discrimination, applies in this case. See DOD, New Cumberland, 51 FLRA at 158 (discussing requirements under section 7701(g)). See also U.S. Department of Defense, Department of Defense Dependents Schools and Federal Education Association, 54 FLRA 773, 790 (1998) (discussing standards for determining whether an award of attorney fees is warranted in the interest of justice, as required by section 7701(g)).

6 We encourage the parties to make every effort to resolve this dispute bilaterally.