68 FLRA No. 87

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1680
(Union)

0-AR-4179
(63 FLRA 620 (2009))
(66 FLRA 414 (2011))

DECISION

April 30, 2015

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

I. Statement of the Case

The history of this case is extensive, and Section II of this decision sets it out in more detail. As relevant here, in one award (Award I),[1] Arbitrator Kenneth A. Perea found that the Agency violated the Fair Labor Standards Act (FLSA)[2] and the Federal Employees Pay Act (FEPA)[3] by failing to pay correctional officers (officers) overtime pay for certain pre-shift and post-shift activities. The Arbitrator directed the Agency to

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[1] Exceptions, Attach. B, 1st Final Award (Award I).
[2] 29 U.S.C. §§ 201-219.
[3] 5 U.S.C. §§ 5541-5549.

pay affected officers compensation "until the date of" Award I.[4] He also "remanded [the matter] to the parties for their calculation and agreement regarding the remedy," and "retain[ed] jurisdiction to resolve any disputes regarding the remedy awarded."[5]

In a second award (Award II),[6] the Arbitrator found that he had jurisdiction to resolve issues regarding the Agency's alleged FLSA and FEPA violations that continued after Award I. And, in three more awards (Awards III,[7] IV,[8] and V[9]), he resolved those issues, as well as the details of the remedies originally directed in Award I.

The question currently before us does not involve the Arbitrator's findings regarding the pre-Award-I period, or the *merits* of his findings regarding the post-Award-I period. Rather, the question is whether the Arbitrator exceeded his authority, or whether Awards II and portions of Awards III through V are contrary to law, because the Arbitrator was "functus officio" – without authority to *resolve* – issues regarding the post-Award-I period. We find that the answer is no, because – even assuming that the doctrine of functus officio otherwise would apply here – the Arbitrator's resolution of the issues regarding the post-Award-I period falls within an exception to that doctrine.

II. Background, Arbitrator's Awards, and Previous Authority Decisions

This case began when the Union filed a grievance on May 31, 2005, alleging that the Agency violated the FLSA and FEPA by failing to pay officers overtime pay for certain pre-shift and post-shift activities. With regard to the "[d]ate(s) of violation(s)," the grievance stated: "For all FLSA violations, three . . . years prior to the date of this grievance. For [FEPA] violations, six . . . years prior to the date of this grievance."[10] With regard to remedies, the grievance requested: (1) "[f]or FLSA violations, [backpay] and damages at the [officers'] overtime rate, compensatory time off at the [officers'] overtime rate of pay, [reclassification] of [officers] as [nonexempt] under the FLSA, and liquidated damages"; (2) "[f]or [FEPA] violations, [backpay] and other damages"; and (3) "[f]or FLSA and FEPA violations, costs and attorney's fees."[11]

The grievance went to arbitration, where the parties authorized the Arbitrator to frame the issues. In Award I, dated November 30, 2006, the Arbitrator framed the issues, in pertinent part, as: (1) "did the Agency fail to lawfully compensate . . . officers . . . for pre-shift and post-shift overtime . . . pursuant to the [FLSA] and/or [FEPA]?"; and (2) if so, "what is the appropriate remedy?[12]

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[4] Award I at 20.
[5] *Id.*
[6] Exceptions, Attach. A, 1st Interim Award (Award II).
[7] Exceptions, Attach. A, 2nd Interim Award (Award III).
[8] Exceptions, Attach. A, 3rd Interim Award (Award IV).
[9] Exceptions, Attach. B, 2nd Final Award (Award V).
[10] Opp'n, Ex. F (Grievance) at 2.
[11] *Id.*
[12] Award I at 2.

The Arbitrator found that the Agency violated the FLSA and FEPA by failing to pay officers overtime pay for certain pre-shift and post-shift activities. The Arbitrator stated that "the precise amount of time consumed in the performance of" compensable pre-shift and post-shift activities "varies among . . . officers."[13] But, "[b]ased upon the totality of the record evidence, . . . the Arbitrator conclude[d] that an average amount of time expended per day per . . . officer [was] equal to [thirty] minutes in excess of their regular eight-hour shift[s]."[14]

As to remedy, the Arbitrator awarded "officers who worked . . . during applicable time periods . . . one-half hour backpay at their respective overtime rates of pay plus interest thereon for all full shifts [that] they completed[,] commencing three years prior to initiation of the . . . grievance on May 31, 2005, until the date of this [a]ward."[15] The Arbitrator also found that the Union was entitled to reasonable attorneys' fees. The Arbitrator "remanded [the matter] to the parties for their calculation and agreement regarding the remedy awarded," and "retain[ed] jurisdiction to resolve any disputes regarding the remedy awarded."[16]

The Agency then filed, with the Authority, exceptions to Award I, and the Union filed an opposition to the Agency's exceptions. The Authority resolved those exceptions in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Terminal Island, California* (*Terminal Island I*).[17] In *Terminal Island I*, the Authority found that Award I was contrary to law because the Arbitrator had erroneously: (1) failed to differentiate among officers who performed compensable pre-shift and post-shift activities and officers who did not; and (2) awarded each officer thirty minutes of overtime compensation, without taking into account the varying amounts of time that different officers spent in compensable activities.[18] As the record did not provide sufficient information for the Authority to determine which officers performed compensable activities and the amount of time those officers were engaged in such activities, the Authority remanded the award "to the parties for resubmission to the Arbitrator, absent settlement, for a determination consistent with [the Authority's] decision."[19]

On remand, the parties did not settle the matter, and the Arbitrator "reconvened the proceedings."[20] During those proceedings, the Union argued that the Arbitrator had jurisdiction to remedy alleged FLSA and FEPA violations that continued to occur after Award I issued, up until on or about June 21, 2009 – when the Agency had issued new post orders that directed officers to no longer engage in certain compensable activities. By contrast, the Agency argued that the Arbitrator's jurisdiction was "limited to the issue

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[13] *Id.* at 18.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 20.
[17] 63 FLRA 620 (2009).
[18] *Id.* at 624.
[19] *Id.* at 625.
[20] Award II at 3.

of remedy pursuant to [Award I, and that] he was functus officio and without authority to address the merits of the alleged FLSA and FEPA violations occurring" after Award I.[21]

In Award II, the Arbitrator resolved the parties' dispute regarding his jurisdiction. The Arbitrator determined that "the issue of alleged FLSA and FEPA violations occurring during the period December 1, 2006 through June 21, 2009 arises pursuant to the same grievance and [collective-bargaining-agreement] provisions [that] the Arbitrator was mutually appointed by the parties to adjudicate."[22] Additionally, the Arbitrator "noted [that] the alleged FLSA and FEPA violations during the foregoing period involve the same work location . . . and . . . [post orders that] the Arbitrator was mutually selected and agreed to resolve."[23] The Arbitrator "concluded [that] the sole distinguishing characteristic between those matters previously addressed in [Award I] and the issues [that] the Union now contends are included within the Arbitrator's jurisdiction is the time period in question, to wit, December 1, 2006 through June 21, 2009."[24]

The Arbitrator noted an Agency argument that his retention of jurisdiction in Award I was limited to the period through November 30, 2006 – the date of Award I. The Arbitrator also "noted, however, [that Award I] could only address and remedy alleged FLSA and FEPA violations [that] had occurred" as of that date.[25] The Arbitrator stated that, in issuing Award I, he "could not presume to know what future actions would occur between the parties," so that award "did not therefore consider or address prospective FLSA and FEPA violations."[26] The Arbitrator further stated:

> The absence of a remedy in [Award I] for alleged future violations occurring during the Authority's review of the matter[in *Terminal Island I*] . . . should not, as a practical matter, limit the Arbitrator's jurisdiction where such claims for relief arise out [of] the same grievance, pursuant to the identical [a]greement, and involve the same parties, work location[,] and . . . [post orders]. . . . [T]he grievance at issue seeks to remedy *all* FLSA and FEPA violations resulting from the Agency's [post orders] at [the facility at issue]. Since the November 30, 2006 [a]ward[, Award I,] did not and could not address the time period from December 1, 2006 until June 21, 2009 for the reasons expressed above, [Award I] did not determine a matter submitted for adjudication by the parties to the Arbitrator. The Arbitrator's jurisdiction regarding alleged FLSA and FEPA violations during the period December 1, 2006 through June 21, 2009, therefore, falls within the judicially created exception to the functus officio rule [that] permits an arbitrator to decide an issue [that] has been submitted for resolution but [that] remains open for adjudication.[27]

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[21] *Id.*
[22] *Id.* at 4.
[23] *Id.*
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 5-6.

To support his finding that the situation fell within an exception to the functus officio doctrine, the Arbitrator cited *Colonial Penn Insurance Co. v. Omaha Indemnity Co.* (*Colonial Penn*).[28]

The Arbitrator further stated that resolving issues relating to the post-Award-I period was "consistent with the arbitral goals of efficiency and economy of resources in the resolution of labor-management disputes."[29] But he noted that, "[s]hould . . . [he] conclude[,] following presentation of all evidence[,] that the Union [was] in fact seeking adjudication of different issues than alleged in the grievance," he would "decline to address any matters outside his proper jurisdiction."[30]

The Agency then filed, with the Authority, exceptions to Award II, challenging the Arbitrator's jurisdiction to resolve issues regarding the post-Award-I period. The Union filed an opposition to the Agency's exceptions.

While the Agency's exceptions to Award II were pending before the Authority, the Arbitrator issued Award III. In Award III, the Arbitrator found that the Agency failed to lawfully compensate officers for pre-shift and post-shift overtime from May 31, 2002 through November 30, 2006; directed the Agency to pay officers overtime compensation for that time period, plus interest; and specified different amounts of compensable time for different shifts and different units within the facility at issue. In addition, he found that the Union was "entitled to reasonable attorneys' fees[,] subject to proof."[31] And he "remanded to the parties for final calculation and agreement upon the dollar amount to be awarded each . . . [o]fficer."[32] Further, he "retain[ed] jurisdiction to resolve any disputes regarding the remedy awarded[,] . . . as well as any potential remedy for the period from December 1, 2006, until on or about June 21, 2009."[33]

On the same day that the Arbitrator issued Award III, the Authority – in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Terminal Island, California* (*Terminal Island II*)[34] – addressed the Agency's exceptions to Award II. Before the Authority, the Agency acknowledged that its exceptions were "interlocutory," because the Arbitrator had not fully resolved all of the issues before him, but argued that Authority review was warranted because the exceptions raised a "plausible jurisdictional defect."[35] The Authority stated that, in order to demonstrate that interlocutory review is appropriate, an excepting party must establish not only that there is a plausible jurisdictional defect, but also that interlocutory review will "advance the ultimate disposition of the case" – in other words, that "resolving the exceptions would end the litigation."[36] The Authority found that there was "no dispute" that the parties still needed

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[28] 943 F.2d 327 (3d Cir. 1991).
[29] Award II at 6.
[30] *Id.*
[31] Award III at 22.
[32] *Id.*
[33] *Id.* at 23.
[34] 66 FLRA 414 (2011).
[35] *Id.* at 415.
[36] *Id.*

to resolve "the issues raised by the Authority in" *Terminal Island I*, including "determining which . . . officers actually performed compensable activities, and the amount of time [that] they spent performing those activities."[37] Thus, the Authority said that, "even assuming that a plausible jurisdictional defect exist[ed], the Agency ha[d] not shown that interlocutory review [would] end the litigation, advancing the ultimate disposition of the case."[38] So the Authority found that interlocutory review was not warranted, and dismissed the Agency's exceptions, "without prejudice" to the Agency's right to refile the exceptions at a later, appropriate time.[39]

Subsequently, the Arbitrator issued Award IV. The Arbitrator noted that the parties had been "[u]nable to achieve resolution of the remedy awarded by" him.[40] Among other things, he established a schedule for post-hearing briefs, and directed the parties to address various issues in those briefs, including, as relevant here: (1) "[t]he correct calculation of [backpay] owed to [officers], including . . . [o]vertime compensation for each full shift completed during the May 31, 2002, through November 30, 2006 period, inclusive, plus interest thereon";[41] (2) "[w]hether the Agency failed to lawfully compensate [officers] . . . for pre-shift and post-shift overtime activities . . . for the period December 1, 2006, until June 21, 2009"; (3) if the Agency did fail to lawfully compensate officers for that period, "[t]he correct calculations of [backpay] to be awarded" officers for that period;[42] and (4) "[t]he specified amount of any reasonable [attorney's] fees [that] should be awarded pursuant to proof provided."[43]

Then, in Award V, the Arbitrator determined that "practices and procedures concerning pre-shift and post-shift work activities continued from December 1, 2006 until June 21, 2009" – the date on which the Agency changed the post orders.[44] He further stated that "[i]n view of the conclusion the Agency's policy and practice remained consistent from May 31, 2002 to November 30, 2006, inclusive, and was substantially consistent therewith from December 1, 2006 to June 21, 2009, . . . it is concluded the Agency failed to compensate . . . [o]fficers for compensable pre-shift and post-shift overtime work activities during the latter period in the identical amounts of time as specified in Award III."[45] Additionally, he found that "the Agency . . . failed to demonstrate its actions were taken in good faith with reasonable grounds for believing [that] its act or omission was not in violation of FLSA requirements, particularly in light of the issuance of Award I."[46] So he awarded liquidated damages, as well as attorney's fees.

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Award IV at 4.
[41] *Id.* at 7.
[42] *Id.*
[43] *Id.* at 8.
[44] Award V at 7.
[45] *Id.* at 9.
[46] *Id.* at 10.

The Agency again filed exceptions with the Authority, and the Union filed an opposition to the Agency's exceptions. The Agency's exceptions do not challenge the Arbitrator's findings regarding the pre-Award-I period, or the *merits* of his findings regarding the post-Award-I period. Rather, as discussed in greater detail below, the exceptions challenge the Arbitrator authority to *resolve* – in Award II and portions of Awards III through V – issues regarding the post-Award-I period.

III. Analysis and Conclusions: The Arbitrator was not functus officio as to – and thus had authority to resolve, in Award II and portions of Awards III through V – the issue of whether the Agency committed violations from December 1, 2006 through June 21, 2009.

The Agency argues that the Arbitrator exceeded his authority, and that the award is contrary to law, because the Arbitrator was "functus officio" as to – and, thus, without authority to resolve – the issue of whether the Agency committed FLSA violations from December 1, 2006 through June 21, 2009.[47] According to the Agency, the Union never filed a grievance over that issue,[48] and that issue "was not submitted to [him] when the case was brought before him in 2005."[49] In addition, the Agency asserts that, in Award I, the Arbitrator awarded backpay only "until the date of" Award I, and then "retained jurisdiction over [Award I] only for the purposes of resolving disputes over the remedy."[50] The Agency also argues that, in Award I, the Arbitrator fully resolved all of the issues submitted, and "[a]ny attempt to add additional liability, and find additional violations of the FLSA, goes to the merits of the award and would not conform to the Arbitrator's original award[,] as required by"[51] the Authority's decision in *SSA*.[52] Further, the Agency claims that the Arbitrator's findings of additional violations conflicts with "Article 32(a) and (h) of the parties' agreement[,] which prohibits the [A]rbitrator from modifying the grievance, the alleged violation, or the remedy requested in the written grievance without the mutual consent of the parties."[53]

The Union argues that the Arbitrator was not functus officio.[54] In this regard, the Union contends that the grievance sought "to remedy *all* violations of the [FLSA] resulting from the Agency's failures to compensate correctional officers for pre-shift and post-shift overtime"[55] – including all violations during the pendency of the proceedings.[56] The Union also contends that one of the issues that the Arbitrator framed in Award I was "what is the appropriate remedy" for an Agency failure to compensate correctional officers for "pre-shift and post-shift overtime,"[57] that the Arbitrator retained jurisdiction

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[47] Exceptions at 5.
[48] *Id.* at 7.
[49] *Id.* at 10-11.
[50] *Id.* at 5.
[51] *Id.* at 12.
[52] 63 FLRA 274 (2009).
[53] Exceptions at 8 n.5.
[54] Opp'n at 17.
[55] *Id.* at 9.
[56] *Id.* at 12.
[57] *Id.* at 17.

to resolve "*any* disputes regarding the remedy awarded,"[58] and that "the effective dates of the remedy . . . have remained at issue since" Award I.[59]

Under the doctrine of functus officio, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority.[60] The doctrine of functus officio prevents arbitrators from reconsidering a final award.[61] Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding.[62]

However, federal courts and the Authority have recognized exceptions to the doctrine of functus officio.[63] As relevant here, one exception applies where an arbitrator completes an award to resolve a submitted issue that the arbitrator's initial award failed to resolve (the completion exception).[64]

In this case, the grievance stated that it was alleging violations three or six years "prior to the date of [the] grievance."[65] But the remedial period set forth in the grievance contained no end date.[66] And the issues that the Arbitrator framed in Award I – "did the Agency fail to lawfully compensate . . . officers . . . for pre-shift and post-shift overtime . . . pursuant to the [FLSA] and/or [FEPA]?"; and (2) if so, "what is the appropriate remedy?" – did not contain an end date for either the violations that he intended to resolve or the remedies that he intended to issue.[67]

The only support for the notion that the Arbitrator intended to limit the remedial period was his statement, in Award I, that he was awarding officers backpay and interest "for all full shifts [that] they completed commencing three years prior to initiation of the . . . grievance on May 31, 2005, *until the date of this [a]ward.*"[68] However, the Arbitrator then remanded the calculation of remedy to the parties, and expressly "retain[ed] jurisdiction to resolve any disputes regarding the remedy awarded."[69] Further, as the Arbitrator later explained in Award II, he interpreted the grievance as

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[58] *Id.* at 15.
[59] *Id.* at 2.
[60] *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*).
[61] *Id.*
[62] *Id.*
[63] *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, Local 631 v. Silver State Disposal Serv. Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997) (*Silver State*); *Marshals Serv.*, 67 FLRA at 22 (citations omitted).
[64] *Silver State*, 109 F.3d at 1411("the arbitrator's clarification was permissible because it completed the award. The arbitrator explained that she had intended to award back pay, but had failed to address that issue."); *Marshals Serv.*, 67 FLRA at 22 (citations omitted).
[65] Grievance at 2.
[66] *Id.*
[67] Award I at 2.
[68] *Id.* at 18 (emphasis added).
[69] *Id.* at 20.

"seeking to remedy *all* FLSA and FEPA violations resulting from" the Agency's post orders at the facility at issue, and had not previously addressed the post-Award-I period only because, when he issued Award I, he "could not presume to know what future actions would occur between the parties."[70] Accordingly, he found that the completion exception to functus officio applied.[71]

The Agency's functus officio arguments, and its reliance on Article 32(a) and (h) of the parties' agreement, are premised on the notion that the issues before the Arbitrator did not include the post-Award-I period.[72] But the Arbitrator found to the contrary,[73] and the Authority and the federal courts "accord an . . . arbitrator's formulation of the issue to be decided . . . the same substantial deference [that is] accorded an arbitrator's interpretation and application of a collective[-]bargaining agreement."[74] The Agency provides no basis for concluding that the Authority should not defer to the Arbitrator's interpretation of the issue before him as including the Agency's continuing violations of the exact same nature that were adjudicated in Award I. As such, there is no basis for concluding that the Arbitrator erred in finding that – in the awards that followed Award I – he was resolving issues that were submitted to him before, but unresolved in, Award I. And – even assuming that the doctrine of functus officio otherwise would apply here – the Arbitrator's finding supports the Arbitrator's reliance on the completion exception to that doctrine.[75]

With regard to the Agency's citation to *SSA*,[76] in that case, the initial arbitration award required the agency to give certain employees *priority considerations* for positions, but the arbitrator later directed the agency to *select* those employees by noncompetitive promotion.[77] Thus, *SSA* involved a situation where the arbitrator's second award directed something that was *inconsistent with* the first award. That is not the case here, so *SSA* does not support the Agency's position.

The Agency also argues[78] that, in finding that the completion exception applies, the Arbitrator misinterpreted *Colonial Penn*.[79] Specifically, the Agency asserts that the completion exception was "not at issue and therefore [was] not the basis of the [c]ourt's reasoning" in that decision.[80] By contrast, the Union argues that "[a]n analysis of *Colonial Penn* is superfluous to a determination of whether functus officio applies here,"

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[70] Award II at 5.
[71] *Id.* at 6.
[72] Exceptions at 5-16.
[73] Award II at 5-6.
[74] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002) (then-Member Pope dissenting in part on other grounds); *accord Sheet Metal Workers Int'l Ass'n, Local Union No. 359 v. Madison Indus., Inc. of Ariz.*, 84 F.3d 1186, 1190 (9th Cir. 1996) ("The arbitrator's interpretation of the scope of issues submitted . . . is entitled to the same deference as" the arbitrator's interpretation of a collective-bargaining agreement).
[75] *See, e.g., Marshals Serv.*, 67 FLRA at 22.
[76] 63 FLRA 274.
[77] *Id.* at 278.
[78] Exceptions at 13.
[79] 943 F.2d 327.
[80] Exceptions at 13.

because the Authority has adopted the completion exception, and that exception applies in this case.[81]

It is immaterial whether the Arbitrator misinterpreted *Colonial Penn*. As discussed above, the Authority and the courts have recognized the completion exception,[82] and there is no basis for finding that the Arbitrator erred in relying on that exception. Any alleged misinterpretation of *Colonial Penn* does not change that fact. Therefore, the Agency's argument concerning *Colonial Penn* provides no basis for finding the Arbitrator's exercise of jurisdiction deficient.

The Agency further contends that, "[a]bsent a stipulated issue," the Arbitrator's "jurisdiction was limited to resolving the issues remanded to him by the [Authority] in"[83] *Terminal Island I*.[84] By contrast, the Union contends that, when the Authority remanded to the parties in *Terminal Island I*, "[n]othing transpired to divest the Arbitrator of his authority to issue an award that encompassed violations of the same kind that continued to occur during the pendency of the appeal."[85]

As stated previously, in *Terminal Island I*, the Authority found that, in Award I, the Arbitrator had erroneously: (1) failed to differentiate among officers who performed compensable pre-shift and post-shift activities and officers who did not; and (2) awarded each officer thirty minutes of overtime compensation, without taking into account the varying amounts of time that different officers spent in compensable activities.[86] As the record did not provide sufficient information for the Authority to determine which officers performed compensable activities and the amount of time those officers were engaged in such activities, the Authority remanded the award "to the parties for resubmission to the Arbitrator, absent settlement, for a determination consistent with [the Authority's] decision."[87] Nothing in *Terminal Island I* purported to limit the Arbitrator's authority to complete Award I by resolving issues that had been raised before, but not completely resolved in, that award.

Finally, the Agency argues that finding that the Arbitrator properly continued to assert jurisdiction "would be a slippery slope that could easily result in a never-ending arbitration process, the exact opposite result of the finality that the arbitration process is supposed to provide."[88] According to the Agency, if the Union wanted to adjudicate additional violations, "it was obligated under . . . the parties' agreement to file a [new] grievance over the matter."[89] If the Union had done so, the Agency claims, then the Agency "could have remedied any such violations," without having "to go through the

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[81] Opp'n at 18-19.
[82] *Silver State*, 109 F.3d at 1411; *Marshals Serv.*, 67 FLRA at 22.
[83] Exceptions at 6.
[84] 63 FLRA 620.
[85] Opp'n at 8-9.
[86] 63 FLRA at 624.
[87] *Id.* at 625.
[88] Exceptions at 15.
[89] *Id.* at 7-8.

costly arbitration process."[90] In this regard, the Agency contends that, "[b]y improperly allowing expansion of the grievance, [the Arbitrator] has required the Agency [to] incur . . . significant costs" – including attorney's fees – "when it is possible [that] they did not need to be incurred."[91]

In response to the Agency's "slippery[-]slope" argument, the Union contends that, "[h]ad the Agency ceased perpetuating the same violations during the pendency of its appeal, this matter would not have been before the [Authority]" – and that, "[o]nce the Agency eventually changed its unlawful practices on June 21, 2009, the purported 'slippery slope' stopped."[92] Further, the Union argues that "[t]he Agency's assertion that the Arbitrator's actions resulted in unjustifiable expense to the Agency is disingenuous."[93] In this regard, the Union argues that, when the Authority remanded the matter in *Terminal Island I*, it directed the parties to resubmit the matter to the Arbitrator, "*absent settlement*."[94] According to the Union, the Agency "has made little effort to resolve *any* portion of this dispute."[95]

The Agency's arguments provide no basis for finding that the Arbitrator lacked jurisdiction to resolve issues regarding the post-Award-I period, or that the Union was required to file a new, separate grievance concerning that period. As one court has stated,

> requiring the Union to invoke and exhaust the . . . grievance machinery once again to resolve "the remnants of a dispute [that] has already once traveled that route" would seriously undermine the federal interest in facilitating the "speedy, flexible[,] and inexpensive resolution of labor disputes." . . . The purpose of arbitration, and the underlying reason for the federal laws facilitating it, is to resolve disputes fairly and efficiently, not to create new ones. . . . The Union in this case has already once exhausted the . . . grievance/arbitration process on the question of remedies owed to [the officers], and [the Agency cites] no legitimate policy justification for forcing it to do so again. The reinvocation of the grievance machinery in this case would . . . be shamefully wasteful of resources.[96]

So, "[o]n the basis of the formidable federal policy favoring arbitration and the efficient resolution of disputes,"[97] the Agency's arguments provide no basis for finding that the Union was required to file an entirely new grievance, rather than submitting the issues of continuing violations, and remedies for those violations, to the Arbitrator. We note that the Agency does not challenge the merits of the Arbitrator's finding that the Agency

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[90] *Id.* at 8.
[91] *Id.* at 8 n.6.
[92] Opp'n at 20.
[93] *Id.* at 13.
[94] *Id.* at 14.
[95] *Id.*
[96] *Pace Union, Local 4-1 v. BP Pipelines (N. Am.)*, 191 F.Supp.2d 852, 860 (S.D.Tex. 2002) (citations omitted).
[97] *Id.*

continued to commit violations in the post-Award-I period, or his determinations regarding what remedies were appropriate for those violations.

For the foregoing reasons, we find that the Agency has not demonstrated that the Arbitrator was functus officio to resolve issues regarding the post-Award-I period.

The Agency also argues that the Authority should set aside all of the monetary remedies for the post-Award-I period, including attorney fees incurred in connection with litigating issues concerning that period.[98] But this argument is premised on the notion that the Arbitrator lacked authority to resolve issues regarding that period. As we have found to the contrary, we reject the Agency's argument.

IV. Decision

We deny the Agency's exceptions.

[98] Exceptions at 16-18.

Member Pizzella, dissenting:

In the 1980 classic comedy *Caddyshack*, Ty Webb (played by Chevy Chase) concludes that "[t]here's a force in the universe that makes things happen; all you have to do is get in touch with it. Stop thinking . . . let things happen."[1]

On May 31, 2005, AFGE, Local 1680 (Local 1680) filed a grievance alleging that the Federal Correctional Institution at Terminal Island, California (the prison) violated the Fair Labor Standards Act (FLSA)[2] and the Federal Employees Pay Act (FEPA)[3] by not paying correctional officers (officers) for certain pre-shift and post-shift activities.[4] The parties hired Arbitrator Kenneth A. Perea to answer two questions – whether the prison violated the FLSA for the three years,[5] or the FEPA for the six years, preceding May 31, 2005 and what remedy would be "appropriate" if a violation was found.[6]

In what turned out to be the first of five awards, Arbitrator Perea determined that the prison violated the FLSA[7] even though how much compensable pre- and post-shift overtime was worked, or worked at all, "varie[d] among [the] officers."[8] As a remedy, he awarded backpay to those officers who could prove that they actually worked compensable overtime from May 31, 2002 to May 31, 2005.[9]

After receiving the favorable award, Local 1680 (apparently convinced that Ty Webb had a point) decided to "get in touch with" and ask the "force . . . that ma[de] things happen" for them,[10] and asked Arbitrator Perea to extend his ruling to any violations that *might occur* after his November 30, 2006 award.[11] But there were two problems. First, Local 1680 never filed a grievance over the alleged yet-to-occur violations. Second, the prison never agreed to submit that issue to the Arbitrator. Nonetheless, Arbitrator Perea – apparently relying on some mystical authority – extended his award and remedy from November 30, 2006 through June 21, 2009.[12]

The majority believes that the Arbitrator acted within his authority when he unilaterally extended his own jurisdiction in this manner.

I do not agree with my colleagues. Their decision flies in the face of the statute of limitations that is imposed on FLSA claims, and the Arbitrator did not possess the authority to extend the scope of his own jurisdiction. In short, the Arbitrator acted functus officio.

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[1] *Caddyshack* (Warner Bros. Pictures 1980) (*Caddyshack*).
[2] 29 U.S.C. §§ 201-219.
[3] 5 U.S.C. §§ 5541-5549.
[4] Award I at 2.
[5] *See* 29 U.S.C. § 255(a).
[6] Award I at 2.
[7] *Id.* at 20.
[8] *Id.* I at 18.
[9] *Id.* at 20.
[10] *Caddyshack.*
[11] Award II at 4, 7.
[12] *Id.*

The FLSA permits an employee to recover backpay for the two-year period that *precedes* the filing of a claim.[13] The FLSA also permits that period to be extended to the three years that *precede* the claim in those instances where the impacted employee demonstrates that the violation was "willful."[14] Therefore, to the extent Arbitrator Perea found a willful violation, he had the authority to award backpay from May 2002 until May 2005.[15]

But, as my colleagues correctly note, the doctrine of functus officio prevents an arbitrator from reconsidering a final award.[16] They are also correct that the courts and the Authority have recognized a few narrow exceptions to the functus-officio doctrine. One such exception – the completion exception[17] – is relevant here but does not apply to the circumstances of this case.

The completion exception provides an arbitrator with a certain degree of latitude to complete an award that is "*patently* incomplete."[18] In other words, the exception permits an arbitrator to resolve unanswered questions that pertain to the awarded remedy, that may be required to "defin[e]" the "terms" of the remedy,[19] or that "correct a mistake which is apparent on the face of his award."[20] But the exception does not permit an arbitrator to "alter[] . . . the arbitral award"[21] itself and unilaterally extend his jurisdiction to new matters, new allegations, and different grievants.

Here, the Arbitrator properly awarded backpay as a remedy for the violations that occurred from May 31, 2002 through May 31, 2005 (the date of the grievance). But when Arbitrator Perea later extended his award to cover any new violations that might have occurred from November 2006 through June 21, 2009, he was not "simply flesh[ing] out the remedy"[22] for the May 31, 2005 grievance. To the contrary, he was acting functus officio, because the violations that occurred, or may have occurred, from November 2006 through June 2009 had nothing whatsoever to do with the grievance that was filed on May 31, 2005 or to who was impacted during the 2002 through 2005 timeframe.

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[13] 29 U.S.C. § 255(a).
[14] *Id.*
[15] Award I at 20.
[16] Majority at 8 (citing *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*)).
[17] *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, Local 631 v. Silver State Disposal Serv. Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997) (*Silver State*); *Marshals Serv.*, 67 FLRA at 22.
[18] *Local P-9, United Food & Commercial Workers Int'l Union, AFL-CIO v. George A. Hormel & Co.*, 776 F.2d 1393, 1395 (8th Cir. 1985) (citing *Harvill v. Roadway Express, Inc.*, 640 F.2d 167, 169-70 (8th Cir. 1981)).
[19] *Silver State*, 109 F.3d at 1411 (quoting *Courier-Citizen Co. v. Bos. Electrotypers Union No. 11, Int'l Printing & Graphic Commc'ns Union*, 702 F.2d 273, 279 (1st Cir. 1983) (*Courier-Citizen*)).
[20] *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3d Cir. 1997) (citing *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 329-30 (3d Cir. 1991)).
[21] *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995).
[22] *E. Seaboard Constr. Co., Inc. v. Gray Constr. Inc.*, 553 F.3d 1, 4 (1st Cir. 2008).

Most issues can be broken down into an almost infinite number of sub-issues and related questions – some which occurred in the past and some which may occur in the future. According to the majority, a party's ability to extend an arbitrator's jurisdiction (after receiving a favorable award) is limited only by its imagination and the help of a "force . . . that makes things happen" for them.[23] Such a rule can only frustrate the "amicable settlement[] of disputes"[24] and long-standing policy which favors the finality of arbitration awards.[25]

Therefore, I dissent.

Thank you.

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[23] *Caddyshack.*
[24] 5 U.S.C. § 7101(a)(1)(C).
[25] *See id.* §§ 7121(b)(3)(C), 7122(a).

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1680
(Union)

0-AR-4179
(63 FLRA 620 (2009))
(66 FLRA 414 (2011))

STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

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