

**IN THE MATTER OF THE ARBITRATION BETWEEN**

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HONEYWELL INTERNATIONAL, INC	)	
	)	SUPPLEMENTAL DECISION
“EMPLOYER”	)	
	)	FMCS NO. 060504-55833-7
	)	
And	)	
	)	
	)	RICHARD R. ANDERSON
TEAMSTERS LOCAL 1145	)	ARBITRATOR
	)	
“UNION”	)	DECEMBER 3, 2007
	)	

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**APPEARANCES**

**EMPLOYER**

Brian L. McDermott, Attorney  
Ed Merriam, Director of Labor Relations

**UNION**

Martin J. Costello, Attorney  
Brad Slawson Sr., President Teamsters Local 120 & Union Trustee  
Monty Clemmer, Grievant & Former Union Secretary-Treasurer

## JURISDICTION

On August 25, 2007 this Arbitrator issued an Arbitration Decision, hereinafter the Decision, in the above matter sustaining the grievance filed by the Union on behalf of the Grievant Monty Clemmer. In the Award section of the Decision, I directed the Employer to do the following:

*It is hereby ordered that the grievance in the above entitled matter be and hereby is sustained for the reasons set forth in this Decision.*

*It is further ordered that the discharge of Monty Clemmer be rescinded and any reference to his discharge be expunged from his personnel file, consistent with my Decision herein.*

*It is further ordered that Monty Clemmer be reinstated to his former position; and be made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the Employer's action, less any interim earnings.*

*The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.*

In a letter dated September 17, 2007 the Grievant requested that this Arbitrator extend my jurisdiction in the above matter beyond the forty-five (45) days originally set forth in my Award since the parties could not agree on the implementation of my Award.

By letter dated September 26, 2007, I apprised the parties of the Grievant's request.

The letter stated:

*Mr. Clemmer in a letter dated September 17, 2007 (attached) requested that I retain jurisdiction in the above matter beyond the 45-day time period specified in my Decision. Mr. Clemmer cites the Employer's refusal to reinstate him and its offer to settle the matter for less than ordered by the undersigned. He also references that he was notified the Employer intends to appeal my Decision. In view of Mr. Clemmer's request, I would like to have your position on this matter.*

The Union responded by letter dated September 28, 2007. Its response is as follows:

*On August 25, 2007, you issued an Opinion & Award in the above-referenced matter, overturning Grievant's termination, and awarding him back pay and other contract benefits. You retained jurisdiction for 45 days from the parties' receipt of the Award to resolve any disputes over your Award.*

*The parties have been unable to reach a resolution regarding back pay, benefits, and other issues; therefore, the Union hereby respectfully invokes your retained jurisdiction. The Union requests that the Arbitrator convene a conference call among you, Mr. McDermott, and me, to decide on the appropriate way to present these issues.*

The Employer responded by letter dated October 4, 2007. Its response is as follows:

*We are in receipt of your September 26, 2007 letter attaching Mr. Clemmer's September 17, 2007 letter and also are in receipt of the Union's letter dated September 28, 2007. The parties have been involved in numerous discussions concerning your August 25, 2007 Opinion and Award ("Award") and its application. The Company is available for a telephone conference as requested by the Union in its September 28 letter. Please let us know what time you would be available for the conference.*

*In the Award, you ordered that Mr. Clemmer be reinstated and made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the Employer's action, less any interim earnings. By way of background, on April 8, 2005, Mr. Clemmer applied to participate in the 2005-2006 Severance Program for Minneapolis Hourly Employees (Members of Local 1145) (Attachment A). On May 27, 2005, Mr. Clemmer executed a release for the retirement package offered to him (and numerous other employees) (Attachment B, which was admitted into evidence at the hearing in this matter). After his employment termination, Mr. Clemmer, by letter dated September 8, 2005, reaffirmed his intent and request to retire effective December 16, 2005 (Attachment C). In that letter, Mr. Clemmer stated:*

*Enclosed please find a copy of a legal and binding document for a severance agreement that I, Monty Clemmer, signed on May 27, 2005, that Honeywell International accepted. In lieu of the document I am requesting a settlement of all my outstanding grievances and request that I remain on a temporary leave of absence until December 16, 2005, at which time I would be eligible for this entire agreement identified as the "Coon Rapids transfer of work settlement agreement" dated February 3, 2005.*

*On January 22, 2006, the Union filed Grievance No. 06-039 claiming the Company failed to honor the Coon Rapids Transfer of Work Settlement Agreement and acceptance letter of Mr. Clemmer dated May 27, 2005 (Attachment D). Based on Mr. Clemmer's conduct and representations, including but not limited to those made in Mr. Clemmer's September 8, 2005 letter, Mr.*

*Clemmer's May 27, 2005 acceptance letter, and the January 22, 2006 grievance identified above, Mr. Clemmer is not entitled to any backpay under the Award beyond December 16, 2005. Accordingly, but without waiving any of its rights, claims and/or defenses relating to the Award and/or the January 22, 2006 grievance, the Company has more than complied with the Award by offering to;*

- a. reinstate Mr. Clemmer for the time period of September 7, 2005 to December 16, 2005;*
- b. expunge from Mr. Clemmer's personnel file any reference to Mr. Clemmer's discharge; and*
- c. pay Mr. Clemmer the gross sum of Sixty Thousand Eight Hundred Fifty-Nine Dollars and Twenty-Eight Cents (\$60,859.28), less applicable withholdings and taxes. The above sum represented payment of back wages and vacation to Mr. Clemmer from September 7, 2005 to December 16, 2005 in the amount of Twenty-Eight Thousand Four Hundred Sixty-Five Dollars and Eight Cents (\$28,465.08) and the applicable severance payment of Thirty-Two Thousand Three Hundred Ninety-Four Dollars and Twenty Cents (\$32,394.20).*

*The above items do not subtract for any interim earnings. They more than make Mr. Clemmer whole as required by the Award, and place Mr. Clemmer in the same or a better position than he would have been if he had not been terminated on September 7, 2005. We look forward to hearing from you concerning the conference call requested by the Union.*

Thereafter, a conference call was held on October 12, 2007 at which time the parties restated their positions. During the conference call this Arbitrator determined that issue with respect to the implementation of my Award would be best resolved during record testimony at which time witness testimony and appropriate exhibits could be adduced.

A hearing was then conducted before this Arbitrator on November 9, 2007 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on November 9, 2007. Post-Hearing Briefs were timely received from the Employer on

November 21, and from the Union on November 26, 2007.<sup>1</sup> The record was then closed and the matter was taken under advisement.

### **THE ISSUE**

According to the Employer, there are two issues. First, "Does this Arbitrator have authority to issue a clarification regarding his intended award?"; and second, "What is the remedy intended by the award under the circumstances of this case?" The Union describes the issue as, "Was the Arbitrator's August 25, 2005 Award final, such that it may not be revisited except to assist in implementation?" This Arbitrator has determined that the issue is, "Does the Arbitrator have jurisdiction to clarify his Award?; and, if so, what is the appropriate implementation of the Award".

### **RELEVANT FACTS**

In 2005, the Employer was projecting to eliminate a number of positions from its Coon Rapids facility. On February 3, 2005, the Employer and the Union negotiated an agreement, which became known as the Coon Rapids Transfer of Work Settlement Agreement also known as the Achieve Core Excellence (ACE) Agreement, herein after the Settlement Agreement.<sup>2</sup> The purpose of the Settlement Agreement was to offer generous severance packages to bargaining unit employees resulting from a transfer of work and reduction of positions from the Coon Rapids facility.

The Grievant, as Secretary-Treasurer of the Union at the time, was the chief negotiator and a signatory to the Settlement Agreement on behalf of the Union. In this

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<sup>1</sup> The simultaneous mailing date was November 23, 2007.

<sup>2</sup> Employer Exhibit No. 2. The Agreement is also known as the 2005-06 Severance Program for Minneapolis Hourly Employees Who Are Members of Local 1145.

Agreement, the Employer agreed to provide severance packages to 103 employees based upon its projection that 97 jobs would be moved and 6 jobs would be eliminated from the Coon Rapids facility.

The Settlement Agreement provided for a retirement severance package. If a bargaining unit employee received a severance package from the Employer as part of the Settlement Agreement Program, herein after Program, and if the individual was not eligible for an early retirement benefit under the Employer's pension plan, but was within 36 months of attaining retirement, the employee would then be entitled to an unpaid bridge leave to the earliest date on which the employee qualified for early retirement. Also as a part of the Program, the Employer initially identified an anticipated employee termination date. Then, at least 60 days prior to the actual termination date, the Employer would identify an actual termination date. If an employee wanted to set an actual termination date that was earlier than the anticipated termination date, the employee could advise the Employer, and the Employer would then honor it. The undisputed hearing testimony demonstrated that the Employer honored an employee's request to retire early on no fewer than 15 occasions.

Initially, the Employer offered the severance package to employees with a seniority date of 1977 or earlier. When not enough people expressed interest to fill all 103 spots, the Employer then offered the severance package to employees with 1978 seniority dates, which included the Grievant. Eventually, the Employer had to offer the severance package to all employees with a seniority date of 1979 since the 1977 or 1978 did not generate interest from 103 employees.

When the employees with a seniority date of 1978 were notified that the severance package was being extended to them until April 20, 2005, the Grievant, with a seniority date of September 25, 1978, elected to participate in the Program by signing the application request required by the Agreement on April 8, 2005.<sup>3</sup> The Employer received his application on April 11, 2005.<sup>4</sup> [The Grievant testified that he was solicited by then Human Resource Manager Michael Sweet to apply in the event something happened to him so his wife would be protected. The Grievant also testified that rather than sending the application to FAA Paula Kraemer as the application directed, he gave it directly to Sweet who would hold it if it needed to be processed.] The Grievant was still the Union's Secretary-Treasurer and Business Agent at the time of his application and the Employer's collusion investigation cited in my Decision had not yet begun.

Prior to enrolling in the severance program, the Grievant received a significant amount of information regarding the Program.<sup>5</sup> In addition, he had extensive knowledge and understanding of the Program as he was involved in the negotiation of the Agreement. On May 27, 2007, the Grievant signed the Release of Claims Form under the Program expressing his continued interest in the program, which Union President and Business Agent Richard Wrzos signed as a witness.<sup>6</sup> The Document inter alia states:

*Acknowledgments and Certifications*

*The Employee acknowledges and certifies that the Employee:*

*(a) has read and understands all the terms of this General Release of all*

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<sup>3</sup> APPLICATION TO PARTICIPATE IN 2005-2006 SEVERANCE PROGRAM FOR MINNEAPOLIS HOURLY EMPLOYEES (MEMBERS OF LOCAL 1145). Employer Exhibit No. 3.

<sup>4</sup> Id.

<sup>5</sup> Employer Exhibit No. 1.

<sup>6</sup> Employer Exhibit No. 6.

*Claims and does not rely on any representation or statement written or oral not set forth in this General Release of Claims*

- (b) is signing this General Release of Claims-knowingly and voluntarily;*
- (c) has been advised to consult with an attorney before signing this General Release of Claims;*
- (d) has the right to consider the terms of this General Release of Claims within 45 days and if the Employee takes fewer than 45 days to review this General Release of Claims, the Employee hereby waives any and all rights to the balance of the 45 day review period;*
- (e) has the right to revoke this General Release of Claims within fifteen days after signing it. If the Employee revokes this General Release of Claims during this fifteen-day period, it becomes null and void in its entirety and the Employee will not receive the lump sum severance payment;*
- (f) has been informed by Attachments A B and C as to the eligibility factors for this lump sum severance payment, the job titles and ages of all individuals eligible for the lump sum severance payment and the ages of all individuals in the same job classification or organizational unit not eligible for the lump sum severance payment. The Employee has also been informed that if he or she wishes additional information regarding job titles and ages, the Employee may request same of Michael Sweet (753) 957-3051*
- (g) will resign the then Current General Release of Claims after the termination of employment date.*

***THIS IS A LEGALLY ENFORCEABLE DOCUMENT***

*I, the Employee confirm that I have received Attachments A, B and C and understand, that if I wish or require any additional information regarding job titles and ages, I may request this information of Michael Sweet, Honeywell Labor Relations.*

As stated in my Decision the Grievant was removed from Union office on August 8, 2005 and terminated by the Employer on September 7, 2005. On September 8, 2005, the Grievant renewed his request to participate in the Employer's Program in a letter to Union Trustee Brad Slawson.<sup>7</sup> The letter, which had his May 27, 2005 signed Release of Claims Form attached, was also forwarded to the Employer. It stated<sup>8</sup>

*Enclosed please find a copy of a legal and binding document for a severance agreement that I Monty Clemmer, signed on May 27 2005, that Honeywell International accepted. In lieu of this document, I am requesting a settlement of all my outstanding grievances and request that I remain on temporary leave of absence until December 16, 2005, at which time I would be eligible for this entire agreement identified as the "Coon Rapids transfer of work settlement agreement" dated February 3, 2005.*

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<sup>7</sup> Employer Exhibit No. 8.

<sup>8</sup> Exact date unknown.

The Grievant filed a grievance on January 22, 2006, specifically directed at his severance package.<sup>9</sup> In that grievance, he again asserted that he was entitled to participate in the Program based upon his signing the Release of Claims Form on May 27, 2005, and demanded that the terms of the Settlement Agreement be applied. The grievance stated:

*The Company is in violation of the Coon Rapids Transfer of Work Settlement Agreement dated Feb, 3, 2005 regarding severance packages. Also, not honoring the acceptance letter dated May 27, 2005, which was accepted by Labor Relations Michael Sweet, for Monty Clemmer severance package. Relief sought: Honor letter of Agreement.*

Merriam testified that the Program provided a three-year bridge for pension purposes. Therefore, for the Settlement Agreement to provide a significant early retirement benefit, an employee needed to be at least 52 years of age at the time of his/her early retirement in order to be eligible for pension benefits at age 55. On the date that the employee actually retired, the employee also would sign a second release agreement. Merriam further testified that the Grievant would not be 52 years old until December 15, 2005; however, he would be allowed to be "bridged" (on an unpaid leave of absence), as had other employees, until December 16, 2005 in order to qualify for the severance package under the Program. He would also continue to accrue seniority for pension benefit as a part of the three-year bridge for pension purposes.

Merriam also testified that he and Slawson had multiple communications regarding the appropriate means of making the Grievant whole following the issuance of my Decision. The Employer took the position that the Grievant wanted to take the severance package that had been offered to him and that he would have retired on

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<sup>9</sup> Employer Exhibit No. 9.

December 16, 2005. The Employer had several basis for taking this position. One was Slawson's repeated statements (at least five times) to Merriam before the Decision issued, that all the Grievant wanted was his early retirement. Another was the Grievant's September 8, 2005 letter expressly requesting that the Employer honor the Settlement Agreement and allow him to remain on a temporary leave of absence until December 16, 2005, at which time he would retire under the terms of the Settlement Agreement. In addition, the Grievant filed a grievance for the Employer's failure to apply the Settlement Agreement to him.<sup>10</sup>

Finally Merriam testified that the Employer could not honor the Grievant's request for early retirement under the Settlement Agreement since it would be inconsistent with the Employer's position in the Arbitration that it had terminated the Grievant for lying on September 7, 2005. According to Merriam, the Employer nevertheless reserved one of the 103 severance packages for the Grievant in the event the Employer subsequently did not prevail in the Arbitration.

During the course of the hearing the Grievant testified that any back pay award should include the damages resulting from the forced closure of his 401(k) account. The Grievant testified that he was forced to withdraw the money in his 401(k) account because of financial reasons within a week or two after his termination. Because of the early withdrawal, he incurred a 10% penalty plus he had to pay income tax on the

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<sup>10</sup> The grievance was not pursued once the matter of his termination went to arbitration.

withdrawn amount. Further, if he had not withdrawn the money, it would be worth substantially more at the present time.<sup>11</sup>

Finally, during the course of the hearing, the Union raised a *functus officio* argument that this Arbitrator does not have any authority to revisit the Award after the Decision issued and/or resolve the retirement/severance package issue.

### **POSITION OF THE EMPLOYER**

It is the Employer's position that this Arbitrator has the authority to issue a clarification of his Award. This Arbitrator, as is customary in labor arbitrations, specifically retained jurisdiction to resolve disputes over the implementation of his Award. There is no prohibition against such jurisdiction retention or the issuance of the requested clarification.<sup>12</sup> In a similar situation an arbitrator specifically retained jurisdiction to resolve "possible disputes that may arise under the general terms of this award", which reasonably would include a claim that the back pay portion of the award was incorrectly calculated or otherwise in error.<sup>13</sup> In addition, Elkouri & Elkouri states, "*It is common for arbitrators to retain jurisdiction so that their awards are properly carried out and disagreement about the award can be resolved.*"<sup>14</sup>

Furthermore, this Arbitrator has been granted authority to resolve the pending remedy dispute by agreement of the parties. By correspondence dated September 28, 2007, Counsel for the Union informed the Arbitrator that the parties were unable to

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<sup>11</sup> According to the Grievant the Employer's 401(k) plan consisted of stock. When he withdrew the money the Employer's stock was trading at approximately \$25 per share. Now the stock is over \$52 per share.

<sup>12</sup> *Brotherhood of Teamsters v. Silver States Disposal*, 109 F.3d 1409 [154 LRRM 2865] (9th Cir. 1997).

<sup>13</sup> *Municipality of Anchorage*, 122 LA 252 (Landau, 2006):

<sup>14</sup> *How Arbitration Works*, p. 333, Fn. 195 (6th Ed. 2003).

agree on the proper remedy and specifically “invoked” the retention of this jurisdiction.<sup>15</sup> Thereafter, the Union willingly participated in the scheduling of a hearing on the issue, participated at the hearing, and asked for specific relief, including an award for the Grievant's alleged losses associated from his closed 401(k) account. The Union cannot now argue that the Arbitrator has no jurisdiction to enter an appropriate ruling. The Employer further argues that it is complying with the remedy pursuant to the terms of the Award with its offer of back pay to the Grievant. The amount of back pay (\$60,859.28) consists of back wages of \$20,792.96<sup>16</sup> and vacation pay of \$7,672.12 between the period from when Grievant was returned to work on September 8, 2005 through December 15, 2005. In addition, the back pay remedy consists of \$32,394.20, which represents the lump-sum payment for taking the Program severance package on December 16, 2005. In fact, the Employer states it is giving the Grievant more than he was entitled to. Since the Grievant would have been on an unpaid leave of absence, he would not have been entitled to any wages from the Employer during that time period. Further, he would not have been entitled to any vacation pay because he had not performed any work during the preceding year.

The Award required that the Grievant be reinstated and “made whole”. The "make whole" remedy requires that the Grievant be placed in the same position that he would have been in had he not been terminated. The Employer's proposed remedy does this. The Grievant is not entitled to more than he would have otherwise received had he not been improperly terminated him. Anything more would be a "wind fall".

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<sup>15</sup> Union Exhibit No.9.

<sup>16</sup> The amount was compiled based upon the amount of regular hours and overtime hours worked based on the number of hours worked by a comparable person in the same position.

The Employer further argues that the Grievant applied for and signed a release under the Settlement Agreement in April and May 2005, prior to the commencement of the Employer's collusion investigation. On the day after he was terminated (September 8, 2005), he asked to be placed on unpaid leave until December 15, 2005 so that he could take the severance package on December 16, 2005, which was the first day that he would have been eligible to retire and receive the pension bridge had he not been terminated. By placing him back in that position, the Grievant should be reinstated to unpaid leave effective September 7, 2005 through December 15, 2005 and have his severance package effective on December 16, 2005, as he requested. This remedy would comply with the Grievant's intent as expressed in his application to participate in the Settlement Agreement signed on April 8, 2005 and his agreement to participate in the Program dated May 29, 2005. By applying for the severance package under the Program, the Grievant made an irrevocable commitment to separate from the Employer and receive the benefits of the Settlement Agreement.

Finally, the Employer argues that the Grievant is not entitled to damages arising from the closure of His 401(k) plan. The Grievant is seeking a "consequential damage" which is only recoverable if he can meet his burden to prove the specific loss was reasonably foreseeable by the parties at the time they signed the CBA. The Grievant cannot meet this burden. The alleged 401(k) damages are indirect consequential damages in which the termination was not a clear proximate cause of the loss, but a result of the choices made by the Grievant in response to the termination. It was not mutually intended that such losses would be compensable in the event of a breach of the Agreement at the time the parties entered into the Agreement. Other arbitrators

have ruled similarly. For example, an arbitrator ruled that the employee in question was wrongfully discharged and rendered an award requiring the employer to reinstate the employee with full seniority and back pay according to a “make whole” remedy.<sup>17</sup> The union argued that the losses resulting from the sale of the grievant’s 401(k) stock should be included in calculating gross back pay. The employee cashed out his 401(k) to pay for his car and boat payments, mortgage payments, credit cards and other expenses. He also incurred a 10% withdrawal penalty and increased taxes. The arbitrator held that the claimed damages are not the consequences an employer should expect to result from a wrongful discharge and are not included in gross back pay.

An arbitrator also rejected 401(k) related damages where he ruled that the employee was wrongfully discharged and required the employer to reinstate the employee and provide back pay pursuant to the “make whole” remedy.<sup>18</sup> The employee argued he was entitled to reimbursement for the expenses of taxes and penalties incurred in connection with a 401(k) loan involuntarily converted to a distribution when the employee was unable to pay it off after being terminated. The arbitrator held that the damages were unrecoverable consequential damages, as the loan’s existence and the employee’s inability to pay it off are the result of choices he made.

While the Grievant claims that he was forced to cash in his 401(k) on September 20, 2005, the fact is that he asked on September 8, 2005 to remain on an unpaid leave of absence through December 15, 2005. He cannot now claim that his cashing in his 401(k) account was a foreseeable consequence under these circumstances, nor can he

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<sup>17</sup> *Newport Steel Corp. and United Steelworkers of American*, 100 LA 1007 (Gibson, 1993).

<sup>18</sup> *Homer Electric Association*, 119 LA 525 (Lumbley 2003).

claim that his termination resulted in the alleged need to cash in his 401(k). If he had not been suspended from paid Union office, he would have had an income at that time. Moreover, if he truly was in dire financial straits with nowhere else to turn, he would not have requested an unpaid leave of absence from September to December 2005.

### **POSITION OF THE UNION**

It is the Union's position that the Arbitrator has no jurisdiction to revisit his award except to assist in its implementation. The issue whether the Grievant retired was never submitted, decided, or reserved; accordingly, the Arbitrator has no jurisdiction over the retirement issue. The Issue stipulated to in the initial Arbitration Hearing was whether the Employer had just cause to terminate the Grievant and, if not, what was the appropriate remedy? This issue dictated the scope of the Arbitration. The Arbitrator was asked and decided matters within his jurisdiction, and matters only within his jurisdiction, nothing more, and nothing less . The Arbitrator only reserved jurisdiction to implement the remedy. The Employer never submitted the question of whether the Grievant retired at the hearing. The Employer's position was that he was fired and that he was entitled to no relief, period. Now the Employer has taken the position that the Grievant retired, and it wants the Arbitrator to change the reinstatement ordered in the original Award to retirement, two completely different remedies. Therefore, the retirement issue raised in these supplemental proceedings is inappropriate since no such issue was raised, argued, or heard in the initial Arbitration.

The retirement issue was discussed in the initial Arbitration hearing, but the discussion of the issue cannot be interpreted as the equivalent of the Employer raising the issue. On rebuttal, the Employer offered an exhibit that purported to be the

Grievant's acceptance of a retirement package. The exhibit was not offered as part of the Employer's case, but was offered for the sole purpose of showing that the Grievant was an employee, subject to the Employer's rules and regulations, and not that the Grievant had retired. Merriam admitted during cross-examination in this hearing that the exhibit was offered only to rebut the Union's position that the Grievant was not an employee. Thus, any suggestion that the retirement issue was duly raised in the initial Arbitration hearing can easily be dismissed.

It is also clear that the retirement issue was also not addressed in the Arbitrator's Decision or in the resultant Award. Therefore, the Arbitrator does not have jurisdiction now to decide such an issue. The task before the Arbitrator now is implementation, nothing else.

The Employer could have attacked the Award, albeit probably unsuccessfully, under the Minnesota Arbitration Act had the Employer believed it to be incomplete or requiring correction or clarification.<sup>19</sup> It could have moved to correct or modify the Award, pursuant to the Act, which states in pertinent part:<sup>20</sup>

***Subd1. Application of party.*** *On application of a party, the arbitrator may modify or correct the award:*

- (1) upon the grounds stated in section 572.20, subdivision 1*
- (2) for the purpose of clarifying the award; or*
- (3) where the award is based on an error of law.*

***Subd. 2. Submission by court.*** *If an application to the court is pending under section 572.18, 572.19, or 572.20, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in section 572.20, subdivision 1, or for the purpose of clarifying the award.*

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<sup>19</sup> Minn. Stat. § 572.

<sup>20</sup> Minn. Stat. § 572.16

**Subd. 3. Procedure.** *For purposes of subdivision 1 or 2, the application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that the opposing party must serve objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of sections 572.18, 572.19 and 572.20.*

As the statute explicitly states, a party seeking to invoke these procedures must do so within 20 days. The Employer did not do so and it cannot be heard now to complain that modification or correction is in order. Even if “clarification” or even “modification” were in order at one time, with which the Union does not agree, the Arbitrator’s jurisdiction to make such a change is gone forever. In sum, the Award was correctly drawn in its scope, even if the Employer complains about its substance. The Arbitrator was not asked to address a retirement question, and he properly did not do so.

It is also the Union's position that under the doctrine of *functus officio* the Arbitrator cannot re-decide this case. The Arbitrator's Award was final and binding on the parties, such that he has no jurisdiction to modify or revisit the Award. Having retained jurisdiction to assist the parties with implementation, however, the Arbitrator has jurisdiction to hear the Union’s timely, narrow request for assistance with implementation of the Award.

It is a general rule in common law arbitration that when arbitrators have executed their award and declared their decision they are *functus officio* and have no power or authority to proceed further.<sup>21</sup> The doctrine “prevents arbitrators from revisiting a final award after the final award has been issued”.<sup>22</sup> Having fulfilled his or her function, discharged the office, or accomplished the purpose for which he or she was appointed,

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<sup>21</sup> Mercury Oil Refining Co. v. Oil Workers Int’l Union, 187 F.2d 980, 983 (10<sup>th</sup> Cir. 1951)

<sup>22</sup> Legion Ins. Co. v. VCW, Inc., 198 F.3d 718, 719 (8<sup>th</sup> Cir. 1999)

an arbitrator has no further force or authority.<sup>23</sup> A modification was also not authorized in an arbitration award where there was no retention of jurisdiction allowing modification of the original award, and the employer did not move for modification of the award within 20 days as required by the Florida Arbitration Act.<sup>24</sup>

A “minor adjustment to the award” does not defeat the finality of an arbitrator’s award, however, such that a clarification of a final award is permissible without offending the *functus officio* doctrine.<sup>25</sup> “The preponderance of arbitral thinking [is] that an arbitrator may correct clerical mistakes, inaccuracies of mathematical computation or similar errors of a technical nature not directly affecting the substance of a decision.”<sup>26</sup> An arbitrator has jurisdiction over a supplemental hearing when he or she has retained jurisdiction for “implementation” or “administration” or the like.<sup>27</sup> Thus, when the arbitrator reserves jurisdiction for a particular narrow purpose, such as determining the amount of back pay owing, the parties may go before the arbitrator on the same matter, as long as their inquiry is limited to that narrow matter.<sup>28</sup> Such a retention of jurisdiction does not render the award incomplete.

The United States Supreme Court was faced with an award that neglected to calculate back pay.<sup>29</sup> It held that the award should not be set aside as incomplete, and ordered a return to the parties for arbitration back pay determination. And often arbitrators have spelled out reservation of jurisdiction should the parties be unable to

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<sup>23</sup> Sterling China Co. v. Glass Workers Local 24, 357 F.3d 546, 553 (6<sup>th</sup> Cir. 2004) (citing BLACK’S LAW DICTIONARY 673 (6<sup>th</sup> ed. 1990)).

<sup>24</sup> WJA Realty, Inc. and Int’l Jai-alai Players Ass’n, UAW Local 8868, 104 LA 1157, 1163 (Haemmel 1995).

<sup>25</sup> Legion Ins., 198 F.3d at 720.

<sup>26</sup> B & I Lumber and United Food Workers Int’l Union, Local 367, 81 LA 282, 283 (Lumley 1983).

<sup>27</sup> Lakeside Jubilee Foods and United Food Workers Local 1116, 95 LA 807, 813 (Berquist 1990).

<sup>28</sup> WJA Realty, 104 LA at 1163.

<sup>29</sup> United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

agree upon back pay. In such a circumstance, however, “the arbitrator is limited in his review to the specific matter remanded for clarification and may not rehear and re-determine those matters not in question.”<sup>30</sup>

This case is similar to what the arbitration board faced where the employer essentially sought “to have its liability under the original award limited by a finding that the work. . . in these cases was not work capable of being performed by bargaining unit employees,” contrary to the original award.<sup>31</sup> The arbitration board concluded that the capability issue was resolved in the original award. Whether the evidence the employer presented at the compliance hearing would have been sufficient to convince the arbitration board initially that the work was not in fact capable of being performed by unit employees was “not an appropriate matter for consideration here.” The board found it improper in the context of a compliance hearing to use newly presented evidence to reconsider the original award’s findings and conclusions.

In another similar case, the arbitrator refused to consider evidence at a supplemental hearing, going to a certain final and binding issue resolved in the original award, where the evidence was not presented in the original hearing.<sup>32</sup> The arbitrator stated, “The [employer’s] decision not to present such evidence may be unfortunate but the Arbitrator truly is functus officio in respect to this issue. He cannot reopen the record so as to modify the Award.” At the same time, however, it was within the arbitrator’s authority to clarify the intent of the award, given that he had retained jurisdiction to rule with regard to implementation only.

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<sup>30</sup> Accord Paperhandlers Union No. 1 v. U.S. Trucking Corp., 96 LRRM 2535, 2539 (S.D.N.Y. 1977).

<sup>31</sup> USS Div. of USX Corn. and United Steelworkers of America Local 1557, 98 LA 211, 213 (Neyland 1991).

<sup>32</sup> Sears Logistics Services and International Brotherhood of Teamsters Local 107, 97 LA 421 (Garrett 1991),

The jurisdictional line is exactly the line that the Employer now asks the Arbitrator to cross. Having rendered a final Award, the Arbitrator does not have jurisdiction to hear anything other than implementation issues. And, as discussed above, the parties have not asked the Arbitrator to implement anything regarding retirement, as retirement was not addressed in the Award and rightly so.

In sum, under the doctrine of *functus officio* an arbitrator cannot re-decide a case. Here, the Arbitrator has only reserved jurisdiction to implement the remedy. The Employer never submitted to the Arbitrator at the hearing the question of whether the Grievant retired. Indeed, the Employer's position was that he was fired and that he was entitled to no relief, period. Now the Employer has taken the position that he retired, and it wants the Arbitrator to change the reinstatement ordered in the original Award to retirement, two completely different remedies. The issue whether the Grievant retired was never submitted, decided, or reserved; accordingly, the Arbitrator has no jurisdiction over the retirement issue.

The Employer's final position is that even if there were authority to revisit the Award, the argument that the Grievant retired must be rejected. If there was a retirement agreement between the Employer and the Grievant, the Employer breached it by firing him and not implementing the retirement according to its terms.

In the period between the initial Arbitration and the issuance of the original Award, the Grievant approached the Employer more than once to request retirement. The Employer rejected his request maintaining that he had been fired. Now, the Employer's position is that he has indeed retired. There is nothing in the retirement papers that requires that an employee be in good standing at the time of retirement. When the

Grievant never received the benefits of the severance retirement package, he suffered financial losses that changed his retirement position.

After he was fired on September 7, 2005, he sought unemployment compensation to make ends meet. When that was not immediately available, he cashed in his 401(k) plan. The Grievant testified that due to the result of his termination and denial of unemployment for over a month, he was forced to cash in his 401(k) in order for his family to maintain on one income. Additionally, he was required by the IRS to pay an early withdrawal penalty.” As it turned out, he cashed in his benefits at a disadvantageous time. At that time the Employer's stock in which he was invested 100% was worth considerably less than it is now.

The Grievant cannot afford to retire now. The Arbitrator should find that the Grievant did not in fact retire but was terminated, so he is entitled to the full benefits of the Award if he finds the authority to address the retirement issue.

### **OPINION**

The Union argues that this Arbitrator is precluded under the doctrine of *functus officio* to re-decide this case involving the issue of the Grievant's retirement. The retirement issue was not decided in the Award and since the Award was final and binding on the parties, the Arbitrator has no jurisdiction to modify or revisit the Award. Under the doctrine of *functus officio* arbitrators are considered to have completed their work upon the issuance of final and binding decisions and are *functus officio*, or powerless to re-examine the merit of the adjudicated issues. Thus, an arbitrator's jurisdiction normally ends when a final and binding award issues.

There are, however, exceptions to this doctrine. The generally recognized exceptions to the doctrine are as follows. An arbitrator can (1) correct a mistake which is apparent on the face of his award; (2) decide an issue which has been submitted but which has not been completely adjudicated by the original award; or (3) clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation.<sup>33</sup>

The third exception, applicable whether or not enforcement is sought under the Federal Arbitration Act<sup>34</sup>, allows an arbitrator to clarify an award that is ambiguous on its face or is determined to be ambiguous when the parties attempt enforcement.<sup>35</sup> Therein, the court observed that "*courts usually remand to the original arbitrator for clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation*".<sup>36</sup> The courts have also identified a number of additional exceptions including reservation of jurisdiction to ensure compliance with the award,<sup>37</sup> when there is the occurrence of a post-award contingency.<sup>38</sup>

It is indisputable that this Arbitrator retained jurisdiction to resolve any issue(s) involving the implementation of the Award. As the Award clearly states, "*The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation*".

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<sup>33</sup> Brown v. Witco Corp., 340 F.3d 209, 219 (5th Cir. 2003).

<sup>34</sup> 9 U.S.C.

<sup>35</sup> See e.g., M & C Corp., v. Bahr & Co., 326 F. 3d 772 at 783 (6<sup>th</sup> Cir. 2003)

<sup>36</sup> Citing Green v. Ameritech Corp., 200 F. 3d at 977 (6<sup>th</sup> Cir. 2000).

<sup>37</sup> See also Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local 24, 357 F.3d 546, 554 (6<sup>th</sup> Cir. 2004); Engis Corp. v. Engis Ltd., 800 F. Supp. 627, 632 (N.D. Ill. 1992).

<sup>38</sup> Int'l Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Services, Inc., 109 F.3d 1409, 1411 (9<sup>th</sup> Cir. 1997).

It is also clear that the parties requested that I revisit the remedy portion of my Award, which is another exception to the doctrine of *functus officio*. The Grievant, in a letter dated September 17, 2007, first raised an implementation issue when he requested this Arbitrator to extend jurisdiction beyond the forty-five (45) days originally set forth in my Award since the parties could not agree on the implementation of the Award. After my September 24, 2007 inquiry of the parties as to their position on the subject matter, the Union by letter dated September 26, 2007 invoked my jurisdiction stating, "*The parties have been unable to reach a resolution regarding back pay, benefits, and other issues; therefore, the Union hereby respectfully invokes your retained jurisdiction*". The Employer followed suit in a letter dated October 4, 2007 wherein it disclosed its position on the implementation of the Award.

The Union's "make whole" remedy entails reinstatement of the Grievant retroactive to September 7, 2005 with back pay from that date until he is finally reinstated. Additionally, the Union is requesting that the Grievant be reimbursed for his forced early withdrawal from his 401(k) plan. Whereas, the Employer agreed to expunge the Grievant's termination from its records and reinstate the Grievant retroactive to September 7, 2005 per my Award.<sup>39</sup> It also agreed to make the Grievant "*whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the Employer's action, less any interim earnings*". The Employer, however, disagreed with the Grievant and Union on the back pay period and the amount of back pay due the Grievant.

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<sup>39</sup> This is not in contention.

Thus, The parties cannot agree on the "make whole" remedy. The Union argues that "make whole" remedy consists of back pay commencing on September 7, 2005 and ending when the Grievant is reinstated. The Employer argues that a "make whole" remedy consists of the Grievant's reinstatement effective September 7, 2005, when he would be placed on a leave of absence pursuant to his September 8, 2005 request until December 15, 2005, at which time he would be eligible for the Settlement Program. Pursuant to that Program, he would receive severance pay and a three-year bridge to retirement. The Grievant would also receive back pay for wages and benefits from September 7, 2005 until December 16, 2005, the date the severance package would become available pursuant to the Program.

It is clear that the parties are at odds over the implementation of my Award and seek a resolution of the "make whole" remedy issue confronting them. Herein lies the authority for this Arbitrator to invoke jurisdiction in this matter, retention that also constitutes an exception to the doctrine of *functus officio*.

There is an additional basis to assert jurisdiction on the issue of the Grievant's retirement. As correctly pointed out by the Union, the Employer presented evidence in the initial Arbitration Hearing on the retirement issue, but only to the extent to support its position that the Grievant was an employee at the time he lied during an Employer investigation, which served as the basis for his termination. During the course of the hearing, the Employer introduced exhibits entailing the Grievant's April 8, 2005 request for the Settlement Program application, his signed May 27, 2005 application, his September 8, 2005 request for retirement and his January 22, 2006 grievance over the Employer's failure to grant him the benefit of the Settlement Program. In hindsight, I

should have considered these factors in addressing a "make whole" remedy even though more evidence was obviously needed to completely resolve the issue.<sup>40</sup> By not addressing the issue, it was left up to the parties to resolve; however, I reserved jurisdiction to resolve any problems associated with implementation.

An additional basis for addressing the retirement issue in implementing a "make whole" remedy is the fact that the retirement issue is inextricably intertwined with any back pay compilation. Back pay cannot be calculated until the retirement issue is addressed, which in and of itself constitutes an exception to the doctrine of *functus officio*.

After a review of all of the evidence, I conclude that the Employer's offer to make the Grievant "whole" is consistent with the Grievant's effort to retire. The Grievant by his own actions fully intended to take advantage of the Settlement Agreement and its severance package. He applied for the Program materials and application material on April 8, 2005, thereby indicating his desire to participate in the Program. He reiterated this desire by formally applying for the Program on May 27, 2005 when he signed the Release of Claims Form. Although he could have revoked his intent within 15 days, he chose not to. After he was terminated and the termination grievance was filed, rather than await the disposition of his grievance, he renewed his request to participate in the Program; and in fact, established the effective date of his retirement. In doing so he acted at his peril. Finally, he renewed his request for retirement in his January 2006

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<sup>40</sup> This is precisely the reason why I directed that a hearing be held to adduce more evidence in order to resolve the issue, rather than have the parties submit briefs on the issue, as the Employer suggested in our October 12, 2007 conference call.

grievance, as did the Union in numerous conversations with the Employer prior to the initial Arbitration, again acting at his peril.

The Employer rightly was precluded from initially honoring the Grievant's retirement request since this would be inconsistent with its position that the Grievant was terminated for just cause; rendering him ineligible for the Program. It nevertheless reserved one of the 103 severance packages for the Grievant in the event he prevailed in the grievance/arbitration process.

Based upon the foregoing all of the evidence adduced discloses that the Grievant fully intended to retire and take advantage of the severance package effective December 16, 2005. I am, therefore, adopting the Employer's "make whole" remedy.

### **SUPPLEMENTAL AWARD**

It is hereby ordered that the grievance in the above entitled matter be and hereby is sustained for the reasons set forth in my August 25, 2007 Decision.

It is further ordered that the discharge of Monty Clemmer be rescinded and any reference to his discharge be expunged from his personnel file, consistent with my August 25, 2007 Decision.

It is further ordered that Monty Clemmer be reinstated to his former position, and be made whole by paying Monty Clemmer the gross sum of Sixty Thousand Eight Hundred Fifty-Nine Dollars and Twenty-Eight Cents (\$60,859.28), less applicable withholdings and taxes. The above sum represents payment of back wages and vacation to Mr. Clemmer from September 7, 2005 to December 16, 2005 in the amount of Twenty-Eight Thousand Four Hundred Sixty-Five Dollars and Eight Cents (\$28,465.08) and the severance package be applied retroactively to December 16, 2005 with an applicable

severance payment of Thirty-Two Thousand Three Hundred Ninety-Four Dollars and Twenty Cents (\$32,394.20).<sup>41</sup>

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Supplemental Award to resolve any matters relative to implementation.

**Dated: December 3, 2007**

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**Richard R. Anderson, Arbitrator**

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<sup>41</sup> Any standard benefits including disability or other insurance given to other employees receiving the severance package will be offered to the Grievant.