

## CHAPTER 6

### THE CODE AND POSTAWARD ARBITRAL DISCRETION

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Some issues that come before this Academy, like old soldiers, never die, nor do they fade away. The original *Code of Ethics for Arbitrators* was jointly prepared and published by the Academy and the American Arbitration Association (AAA) in 1951. It provided in Part II, Section 5.a, that an award “should reserve no future duties to the arbitrator except by agreement of the parties.” It has been suggested to me by one of our experienced members that the origin of this sentence was perhaps an earlier, undated AAA booklet on arbitration procedures that specified: “The power of the arbitrator ends with the making of the award.”<sup>1</sup>

Public criticism of this arbitral version of the doctrine of *functus officio* first began, as far as I am able to ascertain, at our 17th Annual Meeting in 1964. Our late colleague, Peter Seitz, argued there that when the record is incomplete, justice and fairness require that no final decision be made until all the facts are known. Noting that permanent umpires with continuing jurisdiction have few problems in this area, Seitz contended that even ad hoc arbitrators should not hesitate to retain jurisdiction if additional facts or even experience with an operation are needed.<sup>2</sup> The primary vehicle by which he accomplished this objective was an interim award, which he then followed by a final award when all the facts became known. Opposition to this position was voiced in that same session by a management advo-

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<sup>1</sup>Labor Arbitration: Techniques and Procedures (New York: American Arbitration Ass'n, ca. 1947), 21.

<sup>2</sup>*Problems of the Finality of Awards, or Functus Officio and All That*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964).

cate, the late Jesse Freidin, who somewhat intemperately objected that if the parties think a decision can be reached, it is not up to us to decide otherwise. Our duty is simply to rule against the party who fails to meet its factual burden of proof.

Eight years later at our 25th Annual Meeting, the issue was again taken up by another member, Lou Crane. His position was that while an arbitrator might be justified in unilaterally retaining jurisdiction in back pay cases where there is no evidence in the record about interim earnings, in all other cases he considered retention of jurisdiction without the parties' specific permission to be an abuse of arbitral discretion.<sup>3</sup>

During that same year, 1972, the Academy, the AAA, and the Federal Mediation and Conciliation Service (FMCS) established a joint committee to revise and update the 1951 Code. The committee met frequently during 1972 and 1973, preparing eight different drafts of a new Code. Each of these continued to retain the specification that without the parties' agreement an arbitrator's award should "reserve no further duties." The eighth draft was distributed for discussion at our Members Meeting in 1974. The transcript of that session is 150 pages long. A full one-sixth of it, 25 pages, is devoted to discussion of the single sentence regarding "no further duties." Five members spoke in favor of retaining the sentence while nine favored its deletion. The flavor of the discussion may be recalled by quoting two distinguished members no longer with us. Philip Marshall spoke for retaining the sentence, saying, "This is an important canon of ethics that should be continued," if we were to "avoid unethical grasping" for future business. Bob Howlett strongly disagreed, saying, "an arbitrator is derelict in his duty in a discharge or seniority case if he fails to reserve jurisdiction to settle back pay or relative placement issues." Many of our members who spoke that day or later wrote to the committee admitted that even if they had not sought the parties' permission, they quite often retained some jurisdiction in one or another type of case. I thought that Bill Eaton best summarized the whole discussion in true arbitral style when he concluded, "It seems to me we have created a past practice which supersedes the language of the old Code."<sup>4</sup>

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<sup>3</sup>*The Use and Abuse of Arbitral Power*, in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973).

<sup>4</sup>The quotations in this paragraph are from the transcript of the Members Meeting, Tuesday, April 23, 1974.

Apparently the committee agreed. The ninth draft no longer contained the controversial "no further duties" sentence. Instead, the new Code of Professional Responsibility which the Academy, the AAA, and the FMCS then approved, in Section 6.D.1 states only, "No clarification or interpretation of an award is permissible without the consent of the parties."<sup>5</sup> As experts in construing bargaining history and contract language, what are we to make of this evolution in the Code? That it is discretionary whether we retain jurisdiction or even ask the parties, provided it is not for the purpose of clarifying or interpreting an award?

### The Law and the Practice

My haphazard survey of colleagues' practices and our published awards leads me to believe that perhaps half of us read the "no clarification . . . without the consent of the parties" to mean that we may not retain jurisdiction unless we ask the parties' permission before we do so. But the timing of such a request troubles some. To ask at the beginning of the hearing is to make a request at a time when it can hardly be refused. The Code does not permit us to force the parties to make an irrevocable commitment about publication before they see our award. Why then should we be permitted to force their commitment on retention of jurisdiction before they see it? But to ask them if we may retain jurisdiction at the end of the hearing is even worse. Late in a hearing day a management advocate once responded to my question about retaining jurisdiction, "So you've decided against me before I've written my brief?" A late request is wrong because it may lead both advocates and grievants to conclude that we have reached an answer at a time when we are still genuinely in doubt.

To avoid these kinds of problems, some of us exercise our discretion by neither asking for nor retaining jurisdiction. This road, however, can lead to problems when the parties fail either to give us complete information at the hearing or later to agree on the implementation of the remedy we ordered. They may then wind up in court. It is true that in every such case that I have

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<sup>5</sup>*Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, National Academy of Arbitrators, American Arbitration Association, Federal Mediation and Conciliation Service, 1974.

seen, absent some malfeasance on the arbitrator's part, the court had no hesitation in returning the award to the original arbitrator for completion or clarification.<sup>6</sup> In *Enterprise Wheel* the Fourth Circuit rejected the argument that *functus officio* prevented the resubmission of back-pay determinations to the original arbitrator. It said this doctrine "should not be applied today in the settlement of employer-employee disputes."<sup>7</sup> When *Enterprise Wheel* reached the Supreme Court in the *Steelworkers Trilogy*, specifically with regard to the back-pay issue, the Court said, "We agree with the Court of Appeals . . . that the amounts due the employees may be definitely determined in arbitration. . . ."<sup>8</sup>

Returning to current practice, others of us, because we feel the parties should not have to go to court to get our awards completed or clarified, without asking the parties' consent appear simply to retain jurisdiction. Following *Enterprise Wheel*, courts have often held that arbitrators did not exceed their authority when they retained jurisdiction over aspects of a dispute.<sup>9</sup> The Second Circuit recently remanded to Arbitrator Ted Kheel a case in which he retained jurisdiction 10 years ago, asking that he now clarify his views on an issue that the court conceded he "apparently did not foresee."<sup>10</sup> Courts also have often insisted that arbitrators continue to have jurisdiction despite the arbitrators' conclusion that they were *functus officio*.<sup>11</sup> Whatever the uses of *functus officio* at law, courts have little patience or use for it in arbitration.

The common law rule that arbitrators have no authority to modify or correct an award because of *functus officio* has also been modified by statute. The Uniform Arbitration Act (and many states have adopted it or some variant) permits us, upon timely application from only one party, to correct miscalculations of figures; evident mistakes in our descriptions of persons,

<sup>6</sup>E.g., *Hanford Atomic Metal Trades Council v. General Electric*, 353 F.2d 302 (9th Cir. 1965); *Electrical Workers (IBEW) Local 494 v. Brewery Proprietors*, 289 F.Supp. 865, 69 LRRM 2292 (E.D. Wis. 1968); *Safeway Stores v. Teamsters Local 70*, 83 Cal.App. 430, 147 Cal. Rptr. 835, 99 LRRM 2928 (1978).

<sup>7</sup>*Enterprise Wheel & Car Corp. v. Steelworkers*, 269 F.2d 327, 332, 44 LRRM 2349 (4th Cir. 1959).

<sup>8</sup>363 U.S. 593, 599, 46 LRRM 2423 (1960).

<sup>9</sup>E.g., *Teamsters Local 509 v. Richmond Chase Corp.*, 191 Cal.App. 2d (1961); *Department of Public Safety (Alaska) v. Public Safety Employees Ass'n*, 732 P.2d 1090, 125 LRRM 2116 (Alaska 1987).

<sup>10</sup>*New York Bus Tours v. Kheel*, 864 F.2d 9, 130 LRRM 2277 (2d Cir. 1988).

<sup>11</sup>E.g., cases cited in note 6, *supra*.

things, or property; or imperfections of form. But such corrections may not affect the merits of our decision.<sup>12</sup> This statutory authority can still create problems for us, however.

Suppose that you were presented a case in which the employer had rejected the bids of over 20 senior bargaining unit members for three higher-paying bus operator positions in favor of three part-time operators without seniority. The union alleges that this violates the contractual seniority rights of the grievants and asks as a remedy that you decide which of them should have been given the three vacancies. You decide that the union is contractually correct and award the jobs to Smith, Jones, and Brown, together with back pay to each. After you mail out the award, the union politely writes you that the record showed two Browns had bid and you, apparently mistakenly, had awarded the job to Junior rather than Senior Brown. It asks that you correct your error. After checking the record you discover in dismay that the union is correct. You have erroneously described the individual whom you meant to have the job. But the employer writes to object, stating that it has carried out your award. Should you correct your mistake? Even if it changes the bottom line of your award? An analogous issue is now before the Committee on Professional Responsibility and may lead to a Code supplement.

As I noted earlier, after making an affirmative award many of us routinely retain jurisdiction to resolve back pay, seniority placement, or other types of problems. These may be problems we do not foresee but know from experience may arise, or problems that our record does not allow us adequately to address at the time we make our original award. However we characterize such an incomplete award, we return it to the parties, hoping that they can settle any problems that arise, but retaining jurisdiction to resolve them if the parties do not. To return to where I began, despite the criticism his view had received, Peter Seitz continued to make use of interim awards throughout his long and distinguished career.<sup>13</sup> Several of us to whom Russell Smith was mentor in Michigan follow his example and routinely retain jurisdiction to resolve the problems that may arise after our awards if the parties cannot. The Michigan Employment Relations Commission in my time recommended strongly to arbitrators we appointed that they should retain

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<sup>12</sup>Uniform Arbitration Act, Sections 9, 13.

<sup>13</sup>Seitz, *Substitution of Disciplinary Suspension for Discharge*, 35 Arb. J. 27 (1980).

limited jurisdiction over affirmative awards after the Michigan courts criticized us for not suggesting that they do so.<sup>14</sup>

According to one regional study<sup>15</sup> and my own casual look through volumes of published awards, retention of jurisdiction with or without the parties' consent seems to take place in 10 to 20 percent of all affirmative awards.<sup>16</sup> Among the noteworthy types of jurisdictional retention I have read are: "until the date when the remedy is implemented," "while the parties attempt to negotiate a remedy," "in the event the parties seek clarification," and "in the event the parties fail to agree on the administration of the remedy awarded." Several of these retention phrases seem to skirt rather narrowly the Code's ban in Section 6.D.1 on clarification without a joint request. Perhaps in the retentions I quoted a joint request for clarification is implied by the use of the plural "parties." But retention of jurisdiction is often found without use of "both," "parties," or a "joint" request. I then wonder how the arbitrator intends to handle what must surely come sooner or later—a request for clarification from a single party, objected to by the other. The arbitrator must then accede to the request or refuse, and the parties may end in court in either case. This may explain why the Code forbids us from complying with a unilateral request for clarification.

Most surprisingly, I have found reference to two awards in which the arbitrator retained jurisdiction despite an objection to his doing so by one of the parties.<sup>17</sup> I also know of two cases in which the arbitrator *refused* to retain jurisdiction though both parties requested that he do so; one of them is mine.<sup>18</sup> Such refusal is based on the consideration or fear that what the parties really desire is to have the arbitrator participate in the enforcement of the award. An example of this is a recently published award in which the arbitrator retained jurisdiction to decide

<sup>14</sup>*E.g.*, *Opinion Explaining Decision, West Bloomfield Board of Education* (unpublished) (Alexander, 1975).

<sup>15</sup>*Retaining Jurisdiction*, Study Time (New York: American Arbitration Ass'n, July 1980).

<sup>16</sup>*E.g.*, *Overly Co.*, 68 LA 1343 (E. Jones, Jr., 1977); *Providence Medical Center*, 77-1 ARB ¶8191 (Conant, 1977); *Riverdale Plating Co.*, 71 LA 43 (D. Peterson, 1978); *Consolidated Aluminum*, 78-1 ARB ¶1918 (Bailey, 1978); *Holland Plastics*, 74 LA 69 (Belcher, 1980); *Western Airlines*, 74 LA 923 (Richman, 1980); *Bay Area Rapid Transit*, 18 Lab. Arb. in Gov't No. 4090 (Koven, 1988); *City of Ottawa, Ill.*, 18 Lab. Arb. in Gov't No. 4093 (E. Alexander, 1988); *Sweet Life Foods*, 359 Lab. Arb. Awards 10 (Bornstein, 1989); *Butler Paper Co.*, 359 Lab. Arb. Awards 11 (Weiss, 1989).

<sup>17</sup>*Supra* note 15.

<sup>18</sup>*Uarco, Inc.*, 43 LA 1060 (Koven, 1964); *Wilmington Transp. Co.*, (unpublished) (Rehmus, 1988).

“any issue raised by either party over compliance with this award.”<sup>19</sup> Section 6.E.1 of the Code states that retention for this purpose is beyond the arbitrator’s responsibility.

The danger when an arbitrator ignores Section 6.E.1 and retains jurisdiction for compliance or enforcement purposes is exemplified by an arbitrator whom I shall refer to by the eponymous name Smith. The Social Security Administration and AFGE were faced with 1000 or more grievances under their national agreement, all dealing with aspects of the conduct of union training or business at federal expense and while in federal pay status. The parties and Smith agreed that all of these grievances involved only 29 basic issues, on each of which Smith rendered an opinion and award. He went further, however, and agreed to retain jurisdiction to apply and enforce his award in the many hundreds of individual grievances that remained. It appears that he did so on some mistaken theory that the law of his state encouraged or required him to do so. Enforcement proved an impossible task. Four years and over \$43,000 in time charges later Smith was not finished. He continued to render new oral and sometimes *ex parte* enforcement decisions, some of which even modified or went well beyond the issues in his original award.

At long last the Federal Labor Relations Authority (FLRA) looked closely at an agency motion to remove Smith and ordered that new arbitrators be selected to clean out this Augean stable.<sup>20</sup> In a herculean 80-page opinion Ira Jaffe began the job, but Sol Yarowsky, David Kaplan, and Donald Goodman have all had to render additional awards in the continuing effort to set this matter aright. At this point the situation can best serve as a monument to the wisdom of the authors of our present Code, who warned us against any attempt to enforce or participate in the enforcement of our awards.

### The Federal Sector

This incident brings me to the federal sector. It will come as no surprise to those of you who arbitrate there to hear that the federal view of arbitral *functus officio* is chaotic. The FLRA routinely hears appeals from one or both parties in about 20 per-

<sup>19</sup>*Dow Jones & Co.*, 360 Lab. Arb. Awards 1 (Eisenberg, 1989).

<sup>20</sup>*Social Security Admin. and AFGE*, 33 FLRA No. 87 (1988).

cent of arbitration awards in the federal sector.<sup>21</sup> It has recently decided that *functus officio* is alive and well in cases coming before it. In 1987 Academy member Jerry Ross found that “where the record is incomplete due to the failure of the parties to cite applicable law . . . I find that my jurisdiction under the [Civil Service Reform Act] encompasses correction of the Award to bring it into conformance with FLRA precedent.”<sup>22</sup> The Authority disagreed, upholding the Defense Department’s objection, and ruled that once an award is rendered arbitrators lack jurisdiction to reopen the matter, even when neither agency nor union has properly informed them of applicable law. The FLRA cited traditional case precedents on *functus officio* and comfortably noted, “The failure of the parties to identify applicable law may make an arbitrator’s task more difficult, but it does not confer jurisdiction on an arbitrator to change an award in an attempt to make the award consistent with the Statute.”<sup>23</sup>

The Office of Personnel Management (OPM) is charged with enforcing the civil service laws and has the statutory right to review and, if necessary, obtain judicial review of the acts of both the Merit Systems Protection Board and the FLRA.<sup>24</sup> Three months after the FLRA decision affirming *functus officio* that I just described, the OPM came to the exact opposite view.

Another of our members, Arthur Berkeley, reinstated an employee whom NASA had removed from service. Neither NASA nor the union appealed his decision to the FLRA. Nevertheless, OPM, which receives copies of all federal arbitration awards, asked Berkeley to reconsider his award. He refused to do so on the basis that he was *functus officio* and thus without authority to reconsider the merits of his award without a joint request from the parties, which the union refused to give. At OPM’s request the Justice Department then petitioned the Court of Appeals for the Federal Circuit to order Berkeley to reconsider and reverse his error in interpreting the Civil Service Reform Act (CSRA). The Justice brief contended, “when [*functus officio*] is invoked to deny a request by the Director of OPM for review of an arbitral award, it is in direct conflict with

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<sup>21</sup>Frazier, *Arbitration in the Federal Sector*, 41 Arb. J. 70 (1986).

<sup>22</sup>Quoted in *Overseas Fed’n of Teachers (AFT) and Department of Defense Dependents Schools, Mediterranean Region*, 32 FLRA 410 (1988).

<sup>23</sup>*Id.*

<sup>24</sup>5 U.S.C. 1103.



federal law. . . .”<sup>25</sup> The brief continued, “the doctrine of *functus officio* simply must give way to the requirement in section 7703(d) [of CSRA] that arbitrators address the merits of OPM reconsideration requests.”<sup>26</sup>

To compound the confusion, while this difference of opinion is awaiting resolution by the court, the FLRA came down with a second opinion in which it said that, of course, *functus officio* doesn’t *always* apply to federal awards. Arbitrator Kinoul Long declined to consider a request for attorney’s fees that was made after his award was rendered leaving him, he decided, without jurisdiction. This time the Authority said that nothing in the Back Pay Act or OPM regulations required that remedial requests for attorney fees must be made before the record closed. Hence this arbitrator’s decision that he was *functus officio* was wrong and he was required to consider and act upon the postaward request for an additional remedy.<sup>27</sup>

Federal sector grievance arbitration reminds me of a line from *Through the Looking-Glass*. With regard to *functus officio* it’s just as Humpty-Dumpty said, “When *I* use a word, it means just what *I* choose it to mean—neither more nor less.”

### Concluding Recommendations

My conclusion from the foregoing is that we arbitrators remain divided to this day about when, if ever; how; and for what purposes we may retain jurisdiction after making an award. Many, perhaps a majority, of us read the Code to mean that we may retain jurisdiction only with the consent of both parties. Many among this group appear seldom to request that they be given such consent. This is understandable, for *functus officio* has its virtues. It protects us from long telephone calls and the indignant protests of those who, having presented and lost ill-thought-out cases, might otherwise importune us for reconsideration. Blessedly, the award puts the dispute to bed and lets sleeping dogs and arbitrators lie. Those who render only final awards seem never to doubt that they have answered all questions asked of them in words over which reasonable men and women would never differ.

<sup>25</sup>Petitioner’s Brief, *Horner v. Corrado*, Appeal No. \_\_\_\_ at 6 (Sept. 21, 1988).

<sup>26</sup>*Id.* at 16. At this writing, the decision in this case is pending.

<sup>27</sup>*Philadelphia Naval Shipyard and Philadelphia Metal Trades Council*, 32 FLRA 417 (1988).

But what of those whose collective bargaining experience has taught that such clarity is God-given and all too rarely man-made? Many of this group have never fully understood or agreed with the Academy's inhibition on retention. They (and I include myself among them) believe that we are not really *functus officio* until our job is finished. We realize that it makes good sense to let the parties try first to resolve issues that they really know more about than we do. We welcome savvy advocates who ask at the hearing that we retain jurisdiction when the circumstances suggest that it may be appropriate. But what if they don't and, for whatever reason, we haven't asked? In such cases, when we finally decide that an affirmative award is appropriate, are we powerless? At the time of award a request to retain jurisdiction may be refused by a newly disappointed loser. Yet the winner's remedy may be jeopardized if the parties can't agree on each aspect of it and the same bad loser, a stickler for *functus officio*, refuses to let us complete our award and finish the job. Must the parties then litigate, perhaps re-arbitrate? We think not, so we retain jurisdiction.

The danger that such reservation may lead to a violation of the language or intent of Section 6 of the Code (or worse, may appear to be a boarding-house reach for further business) can in my opinion be avoided, even in the absence of prior agreement, if we take three simple precautions. First, I believe that any retention of jurisdiction should be only until a date specific and that not long ahead. This has two virtues. It tells the parties and anyone else who cares that we are not reaching, particularly if, as I do, we retain jurisdiction for no more than 60 or 90 days. Short retentions force the parties to get together and finish the job if they can. A refusal to meet can be handled by the winner's timely request to the arbitrator for further specification or hearing. In any event, no good is served by letting these things drag on.

The second precaution I commend to those who retain jurisdiction is that they do so for as specific a purpose as possible. Precise words, such as "In the event the parties fail to agree, jurisdiction is retained to determine the grievant's placement in the B Street warehouse seniority list," are certainly preferable if specificity is at all possible. Language such as "until the administration of this award is completed" is a black hole from which no light escapes.

Third, and perhaps controversial to some, I think we should accept no further remuneration following a preliminary or

incomplete award. Unless the parties ask for additional hearing days to present their positions on unresolved issues, I have never changed for a supplementary or final award. My *functus* may not be *officio*, but my financial interest in the matter is over. The few hours it may take me to participate in a conference telephone call, or read letters of argument and then prepare a short final award, are minimal and noncompensable. And properly so. If one or both parties genuinely do not understand what I intended, or if I fail to think through all possible ramifications of my award, I failed to do my initial job properly.

Those of us who do not regularly ask both parties' consent but nonetheless sometimes conclude we must retain jurisdiction should, I think, accept such cautionary limitations. If we do so, I believe we fulfill the parties' expectations of us. At the same time we will avoid exceeding the reasonable limits of the slight postaward discretion granted us by the Code.

### Discussion—

DENNIS R. NOLAN\*

The time-honored doctrine of *functus officio* has several faces: It is a rule of law, of prudence, of loyalty, and of ethics. Charles Rehmus has tackled the last of these. His paper is at once thorough, tolerant, reasoned, and fair. More surprisingly for a scholarly paper, he writes concisely and with an unusually fluid prose style. As well as casting light on a relatively obscure topic, Rehmus adds much to our knowledge by explaining how and why the drafters of the second code dropped the provision that an award "should reserve no future duties to the arbitrator except by agreement of the parties."<sup>1</sup> That change was of great practical importance because it permitted retention of jurisdiction, provided that the arbitrator complied with other ethical obligations.<sup>2</sup> In short, and apart from any disagreements one

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<sup>1</sup>*Code of Ethics for Arbitrators*, Sec. II.5.a (1951).

<sup>2</sup>The most pertinent of the other requirements of the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (1974) are Secs. 6.C ("The award should be definite, certain, and as concise as possible"), 6.D.1 ("No clarification or interpretation of an award is permissible without the consent of both parties"), 6.E.1 ("The arbitrator's responsibility does not extend to the enforcement of an award"), and 6.E.2 ("An arbitrator should not voluntarily participate in legal enforcement proceedings").

might have about the *substance* of Rehmus' paper, it is a pleasure to read and a model for all of us to follow.

Rehmus addresses a question that has bedeviled arbitrators for several decades: whether and under what conditions an arbitrator may ethically retain jurisdiction once he has rendered a decision on the merits of a grievance.<sup>3</sup> While granting the legitimate points of those opposed to retention of jurisdiction, Rehmus concludes that arbitrators may (and perhaps should) do so, but only for a short period, for a specific purpose, and for free. With one exception and one reservation, I strongly agree with his analysis and conclusions.

To resolve the most difficult ethical questions of *functus officio*, one must go back to the purposes of the ethical rule. *Functus officio* has three objectives: first, to avoid undermining the principle of finality; second, to avoid delay; and third, to avoid the appearance of arbitral overreach—the impression of what Rehmus, in a typically pithy phrase, terms “a boarding-house reach for further business.” As long as the arbitrator accomplishes these objectives, retention of jurisdiction does not violate any ethical canon.

My one disagreement with Rehmus' paper concerns his third recommendation, that arbitrators work for free on any supplemental opinions not requiring additional hearing days. This recommendation attempts to satisfy the third of the rule's objectives, the appearance of arbitral overreach. If Rehmus is proposing some sort of *de minimis* rule, for example that we should not charge for a few minutes spent clearing up a simple point of confusion, no one would disagree. If he intends more than that, many if not most of us would surely differ with him. Some supplemental work involves a large amount of time. When that is

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<sup>3</sup>The most prolific discussant of this question was the late Peter Seitz, whose seminal 1964 paper Rehmus cites. See also his other major piece on the subject, *Substitution of Disciplinary Suspension for Discharge (A Proposed "Guide to the Perplexed" in Arbitration)*, 35 Arb. J. (No. 2) 27 (1980). Seitz also wrote a brief letter on the subject to Study Time (New York: American Arbitration Ass'n, January 1981), 3–4.

Among the best of the other writings are Busch, *Does the Arbitrator's Function Survive His Award?*, 16 Arb. J. 31 (1961); Dilts, *Award Clarification: An Ethical Dilemma?*, 33 Lab. L.J. 366 (1982); Elkouri & Elkouri, *How Arbitration Works*, 4th ed. (Washington: BNA Books, 1985), 283–285; Fairweather, *Practice and Procedure in Labor Arbitration*, 2d ed. (Washington: BNA Books, 1983), 579–583; Jones, *Arbitration and the Dilemma of Possible Error*, 11 Lab. L.J. 1023 (1960); Scheiber, *The Doctrine of Functus Officio With Particular Relation to Labor Arbitration*, 23 Lab. L.J. 638 (1972); and Werner & Holtzman, *Clarification of Arbitration Awards*, 3 Lab. Law. 183 (1987). The AAA Study Time published three short articles on retention of jurisdiction by arbitrators: *Retaining Jurisdiction* (July 1980), 1; *More on Retaining Jurisdiction* (October 1980), 1; and *Final Comments on Retaining Jurisdiction* (January 1980), 3.

the case, arbitrators should be paid for their time even as other workers are.

Similarly, if Rehmus is proposing a rule of humility, that we should not charge the parties for correcting our own errors, no one would disagree with him. Rehmus hints that supplemental work may be required only because of the arbitrator's lack of clarity. If so, the humble arbitrator would likely decline to charge the parties. If he intends more than to caution us to be humble, however, his argument is unpersuasive. Most supplemental work is likely to concern things like the calculation of back pay—work necessitated by the parties' decision not to introduce evidence on that question until the arbitrator has determined that some back pay may be due. In that situation there is no reason for the arbitrator to work for free. To the contrary, if the arbitrator did so, the parties would be likely to get what they paid for.

Ethically, then, arbitrators may retain jurisdiction as long as they craft the retention provision to avoid relitigation of the merits (thus satisfying the first of the rule's objectives), to limit the duration of jurisdiction (thus satisfying the second of the rule's objectives), and to exclude any possible assertion of jurisdiction over new issues or new cases (thus satisfying the third of the rule's objectives).<sup>4</sup> Indeed, in many cases retention will best serve the parties' own interests by providing a speedier and cheaper means of resolving disputes over the award than going to court or filing a new grievance before a new arbitrator. If the retention itself is ethical, payment for the supplemental work is equally so.

The one reservation I have with Rehmus' paper concerns its scope—or rather its lack of scope. As I said, he deals with only one narrow part of the interface between *functus officio* and arbitral ethics, the retention of jurisdiction. This may well be the simplest part, too, because (at least arguably) retention to resolve remedial disputes is not a "clarification or interpretation" proscribed by Section 6.D.1 of the new Code. A full analysis of the ethical dimensions of *functus officio* will have to await another occasion, but I can mention briefly four ethical issues Rehmus

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<sup>4</sup>In this connection, I commend Rehmus for his criticism of the most flagrant piece of arbitral overreaching I have encountered, the infamous series of awards by Arbitrator Smith in his *Social Security Administration* cases.

did not address, and suggest how an arbitrator might deal with them.

First, there is the matter of the arbitrator's issuance or completion of a partial award. Much of the criticism of Peter Seitz's recommendation that arbitrators issue "interim awards" misses the point, because the doctrine of *functus officio* does not even come into play until the arbitrator issues something purporting to be a "final" award. Given the occasional alternatives of issuing a final award on an incomplete record or of making no award at all until some subsidiary issues are resolved, issuance of an interim award is not only ethical but also wise. Once an arbitrator has rendered an interim award, nothing in Section 6.D.1 prohibits its completion.<sup>5</sup>

Second, there is the problem of correcting obvious errors, for instance, typographical errors involving dates or computational errors involving back pay. Some might find that any change in the written award violates *functus officio*, but it is more accurate to view these corrections as mechanical ones intended to make sure that the writing corresponds with the arbitrator's intention: they do not *change* the award, but merely assure its accurate expression. Moreover, Section 9 of the Uniform Arbitration Act expressly permits the arbitrator to make these sorts of corrections,<sup>6</sup> so an arbitrator in a case governed by the Uniform Act may interpret the agreement as incorporating that authority.

Third, there is the matter of remand by a court or administrative agency. As Rehmus mentions, courts and the Federal Labor Relations Authority are increasingly likely to bounce awards back to arbitrators for clarification rather than undertake the job themselves.<sup>7</sup> If the court or Authority does so in the smoothest

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<sup>5</sup>Partial awards may run into Sec. 6.C.1's direction that the award be "definite, certain, and concise as possible," but the two weasel words at the end of that quote leave the arbitrator a lot of room.

<sup>6</sup>Section 9 reads as follows:

Section 9. (Change of Award by Arbitrators.) On application of a party or, if an application to the court is pending under Sections 11, 12 or 13, 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 paragraphs (1) and (3) of subdivision (a) of Section 13. . . .

The referenced paragraphs of Section 13(a) are these:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

<sup>7</sup>There is ample statutory authority for such remands, including Sec. 9 of the Uniform Arbitration Act, Sec. 10 of the United States Arbitration Act, 9 U.S.C. Sec. 10 (1982), and Sec. 301 of the Labor-Management Relations Act, 29 U.S.C. Sec. 185 (1982).

possible way, by ordering *the parties* to resubmit the case to the arbitrator, there is no ethical problem because the arbitrator then has the consent of both parties, although the “consent” of one of the two might exist only because of the court’s order.<sup>8</sup>

If the court or Authority purports to remand the case directly to the arbitrator, there is indeed an ethical problem. Most arbitrators would have little difficulty in resolving that problem, however, even assuming they perceived it. They might assume that the contract implicitly incorporated the relevant law, or that the statute superseded the contract, or that by returning to the arbitrator the objecting party waived its claim of *functus officio*. Should the objecting party renew its claim, though, the arbitrator should consider very carefully whether he or she may ethically proceed. Unless the arbitrator was a party to the litigation, the court has no power over him or her, and the court order thus would not trump the Code’s prohibition.

Finally, and most disturbingly, there is the problem of a request from a single party for clarification beyond the correction of evident errors. Absent some supervening authority, the arbitrator cannot ethically grant this request. This is what I term the “hard core” of *functus officio*. To act on such a request would violate Section 6.D.1 of the Code as blatantly as one could imagine.

But what if there is some arguable supervening authority? For example, Section 9 of the Uniform Arbitration Act provides: “On application of *a party* . . . the arbitrators may modify or correct the award . . . for the purpose of clarifying the award” (emphasis added). Before acting on that authority, the arbitrator should be very sure the statute applies to the case. South Carolina’s version of the Uniform Arbitration Act, for example, expressly excludes “arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply. . . .”<sup>9</sup>

If arbitrators find that the statute does apply, they may conclude that a contract negotiated against that legal background

<sup>8</sup>This may have been the situation in the most egregious case cited by Rehmus, *New York Bus Tours v. Kheel*, 864 F.2d 9, 130 LRRM 2277 (2d Cir. 1988). Although the arbitrator was a named defendant, he did not appear in the appeal. The real dispute was between the two parties, and the court’s order directing the district court to “remand to the arbitrator” might be an infelicitous way of expressing its direction to the parties themselves.

<sup>9</sup>S.C. Code Sec. 15-48-10(b)(2) (1988 Cumulative Supplement).

impliedly incorporates the statute, but that is a lawyer's argument, not an arbitrator's. It treads very close to the borderline of conduct permitted by the Code. The prudent arbitrator, trying to avoid brinkmanship, might reasonably decline to exercise jurisdiction without joint consent, even if the law would permit a clarification. The statute may make lawful an arbitrator's clarification on the request of a single party, without necessarily making it ethical.

Perhaps my reservation is too demanding. One could easily present a paper on any of these issues, and authors are free to choose their own battleground. Within his chosen field, Rehmus has superbly illuminated the problem and has given us solid and sensible guidance on how to resolve it. For that his hearers and later readers owe him thanks.

FRANCIS X. QUINN\*

There can be no argument that an arbitrator who retains jurisdiction solely to make more money is unethical. While Charles Rehmus' parenetic analysis of postaward arbitral discretion makes use of past codes to accuse, condemn, and urge repentance, he is precisely on target when he condemns "grasping for cases." The record indicates that more and more arbitrators show their bad manners and bad ethics in "extending their boarding-house reach."

The Code of Professional Conduct for Arbitrators of Labor-Management Disputes can be used to praise, advise, implore, and encourage.<sup>1</sup> However, such parenesis will succeed only if genuine consensus exists about what is right and wrong, about what is ethical and what is not.

The Code of Professional Conduct for Arbitrators presents a fundamental problem. The Code seems interesting and relevant when it abandons the ephemeral realm of theory and abstract speculation and gets down to practical questions, such as those raised by Rehmus. However, if we treat the questions of postaward discretion as something entirely new, novel, or new-fangled, we may lose the best way of finding the answers.

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<sup>1</sup>*Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service, 1974.



Rehmus reported the public criticism of versions of *functus officio*. Peter Seitz, of happy memory, summed it up well when he said, "When the record is incomplete, justice and fairness require no final decision be made until all the facts are known."<sup>2</sup>

The founding fathers of this Academy regularly affirmed that, although each case must be viewed together with all its unique circumstances and from the view or intention of the presiding arbitrator, there are principles of ethics; there are norms of behavior; there are responsibilities to the profession, to the parties, and to the administrative agencies. Listen to the minutes of our very first meeting in 1947, when there were only two committees: one for membership, and the other called the "Ethics Committee."

In truth the arbitration process is capable of infinite variety and no code of ethics or standards should be drawn so narrowly as to inhibit the possibility of varying the process to fit the present needs and desires of the parties and of the public. . . .

In summary, we are agreed on certain basic canons of ethics for arbitrators embodying concepts of decency, integrity, and fair play.<sup>3</sup>

Decency, integrity, and fairness became the recurring theme in 1952 and 1953, and in the eight drafts of the Code that led to our present qualifications of honesty, integrity, impartiality, and general competence.

In 42 years there have been 20 opinions issued by the Ethics Committee, now known as the Committee on Professional Responsibility and Grievances. You are familiar with the topics: no advertising, full disclosure, rules concerning the publication of awards, the use of interns, decency, integrity, and honesty.<sup>4</sup> The science of ethics also speaks to us.

As one reads the Code, one has to remember the distinctions made in Ethics Course 101. There is a difference between law and ethics, between the law and the Code of Professional Responsibility. One hopes they are in accord. Ethics and the Code demand more than the law. And if perchance they are not

<sup>2</sup>*Problems of the Finality of Awards or Functus Officio and All That in Labor Arbitration*, in *Labor Arbitration: Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964).

<sup>3</sup>McKelvey, *Ethics Then and Now: A Comparison of Ethical Practices*, in *Arbitration 1985: Law and Practice*, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985).

<sup>4</sup>*Opinions 1-19*, National Academy of Arbitrators Committee on Professional Responsibility and Grievances, 1989.

in accord, Ethics 201 reminds us of the rights and duties of conscience.

Ethics is interested in doing the good, seeking justice and equity. If you studied Aristotle carefully, you know that he wrote a treatise on arbitration and ethics. In that treatise he affirmed the principle of *epieikeia*, or equity. Ethicists ever since have been quoting Aristotle, affirming that we are rational animals, and *epieikeia*, or equity, is the principle that looks to the meaning of the law giver, or code author.

Equity makes allowance for human weakness, looking not to the law but to the meaning of the law giver, not to the act but to the intention, not to the part but to the whole, not to what a person is at the moment, but to what he is as a rule. Equity remembers benefits received rather than benefits conferred; it is patient under justice, it is readier to appeal to reason than force, to arbitration than to law. For the arbitrator looks to what is equitable, whereas the judge sees only the law; indeed arbitration was devised for no other words than to secure the triumph of equity.<sup>5</sup>

Ethics 301 affirms the fundamental reasonableness of *epieikeia*; namely, no code of professional conduct can foresee all circumstances. The drafters of the Code in their eight versions presumed to address ordinary contingencies. *Epieikeia* attempts to interpret the mind and will of those who drafted the Code. Indeed, Rehmus is on strong ground when he announces that, “no clarification or interpretation of an award is permissible without the consent of both parties.” That’s what Part 6.D.1 says. *Epieikeia* affirms that if a situation arises wherein the observance of that canon would be hurtful, it should not be observed. For example, can or should an arbitrator correct evident clerical mistakes or computational errors in an award upon request by one party or on the arbitrator’s own initiative? You know what Part 6.D.1 of the Code says: “No clarification of an award is permissible without the consent of the parties.”

Suppose an arbitrator awards back pay to some employees as remedy for failure to assign them to particular overtime work and rejects the claim of certain other named employees. After the award issues, the union informs the arbitrator that the award mistakenly identifies one of the employees entitled to back pay and that the amount of back pay awarded to another employee

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<sup>5</sup>Aristotle, *Nicomachean Ethics*, in *The Works of Aristotle*, ed. W.D. Ross (Oxford, Clarendon Press, 1962), Book VI, Ch. 3.

was incorrect due to an arithmetic miscalculation by the arbitrator. In both instances the cited errors are evident from the undisputed facts. The union asks for a corrected award. The company says the award is final and binding, and does not consent to the arbitrator's issuing a corrected award.

In these circumstances, correction of the identity of one of the employees entitled to back pay and of the arithmetic error in calculation, does not constitute a clarification or interpretation within the meaning of Part 6.D.1. Where obvious clerical or computational mistakes have been made, they should be subject to correction. Rectifying the arbitrator's carelessness in identifying grievants, making arithmetic calculations, or proofreading, are not clarifications or interpretations. To permit such obvious errors to be binding on the parties would impose unfair burdens and would be detrimental to the arbitration process and deleterious to honesty, integrity, fairness, and impartiality. Of course, the arbitrator should ensure each party the right to be heard before any such correction is made.<sup>6</sup>

*Functus officio* does not bar correction of clerical mistakes or obvious computational errors. Rehmus reminds us that the Academy has an inhibition on retention, but that we are not really *functus officio* until our job is finished. His conditions of short retention, not more than 90 days with specific purpose spelled out, are admirable. His suggestion to accept no further remuneration is admirable, but service pro bono is hardly necessary. Sometimes a financial burden is conducive to getting the parties to finish the job. He is true to the Academy tradition in warning us about the ethical cautionary limitations embodied in the Code.

When the final draft of the Code of Professional Conduct was adopted, the Academy was fortunate to have authors well experienced in arbitration practice and in ethical precepts. Names like William Simkin and Ralph Seward were and are synonymous with honesty, integrity, and good judgment. Past chairmen of the Ethics Committee, Richard Mittenthal, Alexander Porter, Howard Cole, William Fallon and Arthur Stark, demonstrate the continuing premium the Academy places on fairness, equity, and prudence.<sup>7</sup> With the Academy's burgeon-

<sup>6</sup>*Opinion No. 20*. National Academy of Arbitrators Committee on Professional Responsibility and Grievances, 1989.

<sup>7</sup>*Dissemination and Enforcement of the Code of Ethics*, in *Arbitration 1988: Emerging Issues for the 1990s*, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989).

ing membership, now nearly 700 members, and the *Directory of U.S. Labor Arbitrators* reflecting nearly four times that number, we need more reflection on the Code and arbitral discretion with the same depth and light that Rehmus has given.

May I remind you that Aristotle concluded his long discussion of the arbitrator and ethics by equating ethics with the inside of the nest. Our Code reminds us of the principles with which our ethical nest is built. It is catastrophic if we dirty our own nest.<sup>8</sup>

We are impartialists whose profession demands integrity, impartiality, and general competence. Happily, in the good judgment you exercise in procedural matters and in substantive decisions, you usually meet those qualifications. Don't maintain jurisdiction unless it is necessary. You're the best judge of that.

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<sup>8</sup>Kagel, *Legalism—and Some Comments on Illegalisms—in Arbitration*, in *Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting*, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985).