

Functus Officio

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One area of the law that has recently received some noteworthy attention is the arbitration doctrine of *functus officio*. The doctrine of *functus officio* provides that an arbitrator's duties are generally discharged upon the rendering of a final award at which point the arbitral authority is terminated. See *Green v. Ameritech Corp.*, 200 F.3d 967 (2000); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 326 F.3d 772 (2003). Under the doctrine, in most cases an arbitrator's appointment continues until the case has been heard, a final award has been made and the award has been disclosed to both parties:

“At this time the task is performed, the duties of the Arbitrator under the Arbitration Agreement are discharged, and the arbitral authority is at an end. See *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3rd Cir. 1967). The policy which lies behind this [doctrine] is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to reexamine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.” *Id.*

Once the arbitrator has made a final award and disclosed it to both parties, his power and authority as an arbitrator is completed as he has fulfilled his function, discharged the office and accomplished the purpose for which he was contractually appointed. See *Black's Law Dictionary*, 673 (6th Edition 1990), as cited in *MacNeil Speidel & Stipanowich*, § 37.6.1.1 at 37:25.

There are, however, several recognized exceptions to the doctrine:

“The rule of [*functus officio*] was based on the notion that after an arbitrator has rendered an award, his contractual powers have

lapsed and he is *functus officio*. This rule, however, has its limits. A remand is proper, both at common law and under the federal law of labor arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.” *Green, supra* at p 978.

Other courts have more clearly delineated the exception as follows:

“An arbitrator can correct a mistake which is apparent on the face of his award; or, where the award does not adjudicate an issue which has been submitted. Then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.” *La Vale Plaza, supra* at 573.

For examples of remands with permissible scope, see *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, 943 F.2d 327 (3rd Cir. 1991); *Courier-Citizens Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273 (1st Cir. 1983).

A corollary to the doctrine is the well-established rule that the District Court should not attempt to clarify an ambiguous arbitration award, but should remand it to the Arbitration Panel for clarification; however, a court should avoid remanding a decision to the arbitrator because of the interest in prompt and final arbitration. *Publicis Communication v. True North Communication Inc.*, 206 F.3d 725, 730 (7th Cir. 2000).

The rules of the American Arbitration Association similarly codify the concept of *functus officio*. American Arbitration R-50. Modification of Award provides:

“Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered

to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.”

A recent discussion of the *functus officio* doctrine can be found in the decision of the United States District Court for the Eastern District of Michigan in the matter of *Sodexo Management, Inc. v. The Detroit Public Schools*, ___F 3d ___, 2016 WL 4205925; (15-cv-10610) . Judge Mark Goldsmith addressed the doctrine in reference to *Sodexo*’s claim that an Order of the Arbitrator rescinding a prior award of attorney fees could be reviewed by the court. Judge Goldsmith noted that Commercial Rule of Arbitration 50 permits an arbitrator to “correct any clerical, typographical, or computational errors in the award,” however, he or she “is not empowered to redetermine the merits of any claim already decided.” “[T]he *functus officio* doctrine . . . holds that an arbitrator’s duties are generally discharged upon the rendering of a final award, when the arbitral authority is terminated.” Citing *M & C Corp., supra* at 782.

A subtle part of the doctrine is in the event of an exception to the doctrine--in which a matter may be returned to arbitration for clarification-- whether the question to be clarified should go back to the original arbitrator or should be assigned to a new arbitrator.

As to whom the award should be remanded, “courts usually remand to the original arbitrator for clarification of an ambiguous award when the award fails to address the contingency that later arises or when the award is susceptible to more than one interpretation.” *Green, supra*, 300 F.3d at 977. See also *United Paperworkers International Union, AFL-CIO, CLC v White Pigeon Paper Co.*, 815 F. Supp. 1061, 1065 (W.D. Mich. 1993). (“An issue properly

submitted to arbitration and decided by an arbitrator cannot be re-litigated in federal court. However, an issue may be remanded to the arbitrator if the arbitrator failed to decide an issue.”)

A remand to a new arbitrator is not appropriate absent showings of bias or prejudice in the original arbitrator. *HMC Management Corp. v. Carpenters District Council of New Orleans and Vicinity*, 750 F.2d 1302, 1305 (5th Cir. 1985). (“Because there does not appear to be such compromise of the arbitrator’s appearance of impartiality in this case, and the original arbitration consisted of 4 days of hearings, the case may best be remanded to the original arbitrator.”) See also *In Re AH Robins Co., Inc.*, 230 B.R. 82, 85 (E.D. Va. 1999). (“The decisions remanding an arbitration claim to a new arbitrator contain a common thread; the arbitrator in question acted, or failed to act, in a manner from which one might infer bias against one of the parties, corruption, fraud or other misconduct.”) See also *United States v. Am. Soc. of Composers, Authors and Publishers*, 714 F. Supp. 697, 698 (S.D.N.Y. 1989).

For more information concerning the doctrine of *functus officio* or in relation to expertise in alternative dispute resolution matters, please visit the web site for Professional Resolution Experts of Michigan, PREM_i at www.premiadr.com which includes contact information for the PREM_i professionals.