65 FLRA No. 67

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4556

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DECISION

December 15, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator James A. McClimon filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that, because the parties had incorporated the Back Pay Act (BPA), 5 U.S.C. § 5596, into their agreement, the Agency was required to pay the grievant interest on backpay that it had paid to the grievant. For the reasons set forth below, we grant the Agency's contrary to law exception and set aside the Arbitrator's award.

II. Background and Arbitrator's Award

The grievant began employment with the Agency in 2003. Four years later, the grievant discovered that the Agency had set her pay incorrectly. Award at 6. The grievant asked the Agency to adjust her pay and give her backpay with interest. *Id.* Under the Agency's Personnel Management System (PMS), Agency employees are permitted to receive backpay for unjustified or unwarranted personnel actions; however, they cannot obtain interest. *Id.* at 4. The Agency, accordingly, adjusted the grievant's pay and gave her backpay, but it denied her request for interest. *Id.* at 6-7.

The Union filed a grievance arguing that the Agency violated the BPA and the parties' agreement by refusing to pay the grievant interest.[1] The parties stipulated to the following issue:

> Did the [Agency] violate the [BPA], 5 U.S.C. [§] 5596 and Article 37[2] of the contract when it refused to pay [the grievant] interest when the [Agency] corrected their mistake in setting her salary, if so what is the appropriate remedy?

Id. at 2.

The Arbitrator concluded that the Agency violated the parties' agreement. The Arbitrator found that Article 102, Section 1 establishes that the agreement serves as a "valid exception" to any Agency rule that conflicts with it.[3] *Id.* at 9 (quoting Article 102, Section 1). He further found that Article 102, Section 4 of the agreement incorporates the BPA into the agreement.[4] *Id.* Therefore, although the Agency's PMS prohibits interest on backpay, the Arbitrator concluded that the Agency nevertheless owed the grievant interest on her backpay because it had a contractual obligation to follow the BPA. *Id.*

1. Before the Arbitrator, the parties' disputed whether their 2003 or 2006 collective bargaining agreement controlled the resolution of this matter. The Arbitrator concluded that, because both agreements contained identical provisions, it was irrelevant which agreement controlled. Award at 6. Neither party challenges this finding; accordingly we will not address it further except to note that, for purposes of this decision, we will reference both agreements as if they were one document.

2. Article 37, Section 1 of the agreement provides: "In accordance with 5 USC Chapter 71, the Parties recognize the power of an appropriate authority to render a remedy in accordance with the provisions of 5 USC [§] 5596." Award at 3.

3. Article 102, Section 1 of the parties' agreement provides: "Any provision of this Agreement [Contract] shall be determined a valid exception to, and shall supersede any existing or future Agency rules, regulations, directives, order, policies and/or practices which conflict with the Agreement [Contract]." Award at 3.

4. Article 102, Section 4 of the parties' agreement provides: "Any provision of the United States Code (USC) or Code of the Federal Regulations (CFR) which is expressly incorporated by reference in this Agreement [Contract] is binding on the Parties." Award at 3.

at 9-10. The Arbitrator, accordingly, sustained the grievance and ordered the Agency to pay interest to the grievant. *Id.* at 11.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law because the Arbitrator erroneously concluded that the BPA applies to the Agency through the parties' agreement. According to the Agency, Congress excluded the Agency from most of the provisions of Title 5 when it enacted the Department of Transportation Appropriations Act of 1996, Pub.L. No. 104-50, § 347, 109 Stat. 436, 460 (1995), codified at 49 U.S.C. § 40122 (DOT Act), including the BPA. Exceptions at 3. The Agency also states it has yet to incorporate the BPA into its PMS, even though Congress gave the Agency permission to adopt any portion of Title 5 when it authorized the Agency to develop its PMS. *Id.* Moreover, the Agency contends that legislation is currently pending before Congress that would make the BPA applicable to the Agency; according to the Agency, such legislation would be unnecessary if the BPA already applied to the Agency. *Id.* The Agency contends that the foregoing conclusively establishes that Congress excluded the Agency from the BPA, and that the incorporation of the BPA into the parties' agreement is insufficient to overcome this exclusion. *Id.* at 3-4.

Additionally, the Agency contends that, even if the BPA applies to the Agency, the award is nevertheless contrary to law because it does not satisfy several requirements of the BPA and PMS, Ch. II, § 9. *Id.* at 4-7.

B. Union's Opposition

The Union disputes on several grounds the Agency's contention that the BPA does not apply to the Agency. First, according to the Union, Congress amended the DOT Act to make the Statute applicable to the Agency; as such, the Agency is required to abide by agreements negotiated pursuant to its terms. Opp'n at 5. The Union contends that Article 37 of the parties' agreement passed Agency head review, and is, accordingly, a valid agreement negotiated under the Statute. Therefore, the Union alleges that the Agency is bound by Article 37. Opp'n at 4-5 (citing 5 U.S.C. § 7114(c)). Second, the Union argues that, under Authority precedent, parties may incorporate statutory language in an agreement so long as that language matches the language used by an agency under its own personnel system, i.e., agency rules. Opp'n at 5 (citing *NAGE, Local R1-203*, 55 FLRA 1081 (1999)). According to the Union, the Authority has further held that such contractual language trumps agency rules. Opp'n at 5 (citing *U.S. Dep't of Transp., FAA*, 61 FLRA 750 (2006)). The Union contends that the language of Article 37: (1) incorporates the BPA; and (2) mirrors the language contained in the Agency's PMS regarding backpay. Therefore, according to the Union, Article 37 controls over the Agency's PMS. *Id.* at 5, 10. Finally, the Union alleges that the Agency's arguments should be ignored because they are inconsistent with other arguments it has made in the past regarding whether the BPA applies to the Agency. *Id.* at 6-7 (citations omitted).

The Union contends that the Agency's remaining contrary to law arguments are barred by § 2429.5 of the Authority's Regulations because the Agency never presented them to the Arbitrator. *Id.* at 11, 16. Alternatively, the Union contends that these arguments are incorrect. *Id.* at 11-16, 16-21.

IV. The award is contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The BPA does not apply to the Agency.

The Agency argues that the Arbitrator's award of interest was improper because Congress has excluded the Agency from the coverage of the BPA. Exceptions at 3. The Agency further contends that the parties' agreement cannot serve as a basis to make the BPA applicable to the Agency. We construe the foregoing as a claim that the doctrine of sovereign immunity bars the award of interest.

1. The BPA does not apply to the Agency as a matter of law.

The United States, as sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (*DOT*) (citing *U.S. v. Testan*, 424 U.S. 392, 399 (1976)). Thus, there is no right to money damages in a suit against the United States without a waiver of sovereign immunity. *DOT*, 52 FLRA at 49. In order to waive sovereign immunity, Congress must unequivocally express its intention to do so. *Id.* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The Government's consent to a particular remedy also must be unambiguous. *DOT*, 52 FLRA at 49 (citing *Dep't of Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995). "As such, an award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy." *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (*Minot*) (then-Member Pope dissenting in part on another matter) (citing *U.S. Dep't of HHS, FDA*, 60 FLRA 250, 252 (2004)). "In this regard, a collective bargaining agreement may require monetary payments to employees only where there is an underlying statutory authority for the payment." *Minot*, 61 FLRA at 370 (citation omitted). Absent a waiver of sovereign immunity, an arbitrator's monetary remedy is contrary to law. *See DOT*, 52 FLRA at 49.

Congress enacted the DOT Act, which authorized the Agency to develop its PMS. *See FAA*, 55 FLRA 1271, 1274-75 (2000) (Member Cabaniss concurring). The DOT Act also provided, in pertinent part, that Title 5 of the United States Code, with certain exceptions, did not apply to the PMS. 49 U.S.C. § 40122(g)(2); *see also FAA*, 55 FLRA at 1274. The BPA was not one of the exceptions specified.

When the Agency created its PMS, it established rules that allow Agency employees to obtain backpay in certain situations. *See* Award at 4 (citing PMS, Ch. II, § 9). However, the PMS does not permit interest for backpay paid by the Agency. *See id.* Additionally, the Agency chose not to incorporate the BPA into its PMS.

Congress subsequently amended § 347 of the DOT Act to extend additional portions of Title 5 to the PMS. *See* Pub. L. No. 104-122, 110 Stat. 876, codified at 49 U.S.C. § 40122(g)(2). Once again, Congress did not extend the BPA to the Agency; however, Congress did extend "chapter 71, relating to labor-management relations" to the Agency. 49 U.S.C. § 40122(g)(2)(C); *FAA*, 55 FLRA at 1274. Thus, the Agency is required to abide by the terms of the Statute.

Although Congress has extended the *Statute*, to the Agency, it has *not* extended the *BPA itself* to the Agency. *See* 49 U.S.C. § 40122(g)(2)(A)-(H) (listing only provisions of Title 5 that do apply to Agency). Therefore, apart from remedies of backpay awarded pursuant to the Statute, the Agency is exempt from the BPA. *See id.*; *cf. Brown v. Sec'y of the Army*, 918 F.2d 214, 216 (D.C. Cir. 1990) (concluding that BPA applied to matters arising under Title VII of the Civil Rights Act of 1964 because "text" of BPA provides "no hint of an exclusion of, or exemption for, federal sector Title VII adjudications[]"). As such, the BPA does not apply to the Agency when the Agency *itself* awards backpay to employees. The Agency awarded the grievant backpay under its PMS, not under the BPA.

Moreover, § 7122(b) of the Statute states that arbitrators may award grievants backpay "as provided in" the BPA. However, as stated above, the BPA does not apply to the Agency. Furthermore, the Arbitrator did not award any backpay under the BPA. Thus, there was no award of backpay "as provided in" the BPA in this case. As such, even assuming that § 7122(b) constitutes a requisite waiver of sovereign immunity for the payment of interest, it does not apply under the circumstances of this case because such a waiver could extend only as to an award of backpay made by an arbitrator and interest awarded by an arbitrator in conjunction with an award of backpay under the BPA.

2. The BPA does not apply to the Agency as a matter of contract.

The Union contends that, as a contractual matter, the grievant is entitled to interest on the backpay the Agency paid to her. "[A] collective bargaining agreement may require monetary payments to employees only where there is *underlying statutory authority* for the payment." *Minot*, 61 FLRA at 370 (emphasis added) (citation omitted). The "statutory authority" that the Union relies on is the BPA; however, as we have already held, Congress has not made the BPA applicable to payments of backpay made by the Agency. Nevertheless, the Union maintains that the BPA applies to the Agency because the parties negotiated Article 37 of their

agreement pursuant to the terms of the Statute, which *is* applicable to the Agency.[5]

To the extent that the Union relies upon the Statute as a waiver of sovereign immunity, the Authority has rejected the assertion that the Statute itself constitutes a waiver as to monetary damages. *See, e.g., U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 329 (2009) (citing *Dep't of the Army*, 56 F.3d at 277).

The question, therefore, is whether the parties may rely on the Statute to negotiate a general waiver of the Agency's sovereign immunity to monetary relief under the BPA. The federal courts and the Authority have not directly addressed this issue. *Cf. Dep't of the Treasury, IRS v. FLRA*, 521 F.3d 1148, 1155 (9th Cir. 2008) (*IRS*) (in finding that Authority properly relied on Fair Labor Standards Act to find waiver of sovereign immunity, court noted, in *dicta*, that agency and union's contractual agreement was "plainly insufficient to show a waiver of sovereign immunity"); *see also id.* at 1156 (stating that "requisite statutory waiver" of sovereign immunity was "present, as opposed to an insufficient contractual waiver").

The United States may enter into contractual agreements, and be held liable for violations of the same, when Congress has enacted legislation permitting such agreements. *See, e.g., U.S. v. Navajo Nation*, 129 S.Ct. 1547, 1551-52 (2009) (*Navajo*) (discussing waiver of sovereign immunity for contracts for Indian Tucker Act); *U.S. v. Mitchell*, 463 U.S. 206, 215 (1983) (*Mitchell*) (discussing waiver of sovereign immunity for contracts under Tucker Act); *IRS*, 521 F.3d at 1153-54 (discussing waiver of sovereign immunity for contracts under Portal-to-Portal Act). Such legislation contains clauses that specifically permit the United States to be sued for violations of these agreements, and therefore, to be held liable for monetary remedies. *See, e.g., Navajo*, 129 S.Ct. at 1552; *Mitchell*, 463 U.S. at 215; *IRS*, 521 F.3d at 1154. The Authority has held that the Statute constitutes a waiver of the Agency's sovereign immunity as to the BPA within the context of an unfair labor practice (ULP). *FAA*, 55 FLRA at 1271. However, this case does not involve an ULP.

Moreover, "officers of the United States possess no power through their actions to waive [sovereign] immunity . . . in the absence of some express provision [of] Congress." *U.S. v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Parties "entering into an agreement with the Government take[] the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority." *Harbert/Lummus Agrifuels Projects v. U.S.*, 142 F.3d 1429, 1432 (Fed. Cir. 1998) *cert. denied* 525 U.S. 1177 (1999) (quoting *Trauma Serv. Group v. U.S.*, 104 F.3d 1321, 1325 (Fed. Cir. 1997)). The Union has failed to cite to any provision in the Statute that expressly authorizes an agency head, or other agency official, contractually to waive an agency's sovereign immunity as to monetary relief under the BPA. Consequently, even if the Agency head approved this provision of the parties' agreement, that would provide no basis for concluding that the Agency waived sovereign immunity. *See id*.

Furthermore, as to the specific matter at issue, the Statute is subject to multiple plausible interpretations. Specifically, although an interpretation of the Statute as permitting contractual waivers of sovereign immunity is a plausible one, an equally plausible interpretation of the Statute is that it does *not* permit contractual waivers. If a statute has multiple plausible interpretations, then that statute cannot be considered definitive enough to constitute a waiver of sovereign immunity. *See U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 35 (1992).

Based on the foregoing, we conclude that the Statute does not permit parties contractually to waive sovereign immunity as to the BPA in situations not specifically addressed by the Statute. The Union's arguments as to why we should permit a contractual waiver of sovereign immunity are unpersuasive.

First, the Union argues that the Agency is bound by the BPA because, pursuant to the terms of the Statute, the Agency negotiated its inclusion into the parties' agreement. Opp'n at 5. However, as explained above, the Statute does not provide a basis for allowing parties contractually to waive sovereign immunity.

Second, the Union contends that the parties' agreement takes precedence over Agency rules; thus,

5. We note that Article 37 of the parties' agreement states only that an arbitrator can render remedies under the BPA "[i]n accordance with 5 USC Chapter 71[.]" Award at 3 (quoting Article 37, Section 1 of parties' agreement). This language suggests that the BPA is incorporated in the agreement *only* to the extent that it is consistent with the Statute. Nevertheless, both the parties and the Arbitrator agree that Article 37 fully incorporates the BPA; accordingly, we will limit our analysis to this interpretation.

the grievant is entitled to interest on her backpay even though the PMS prohibits it. *Id.* at 5, 10. To support this position, the Union relies on a decision in which the Authority held that language contained in a contract trumped a contrary Agency rule. *See* Opp'n at 5 (citing *U.S. Dep't of Transp., FAA*, 61 FLRA 750, 752 (2006)). However, this decision is inapplicable because there was no question that the contract provision in that case was valid. Moreover, that provision did not purport to waive sovereign immunity. By contrast, we have held that the provision in dispute here does not validly waive sovereign immunity. Thus, the Union's argument does not support its position.

Third, and finally, the Union asserts that the Agency's position should not be given deference because it is inconsistent with positions that it has taken in the past. Specifically, the Union contends that the Agency has previously relied on provisions of the BPA to overturn arbitration awards. Opp'n at 6-7 (citing *U.S. Dep't of Transp., FAA*, 63 FLRA 502 (2009); *U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 492 (2009) (*FAA, Wash., D.C.*); *U.S. Dep't of Transp., FAA, Airways Facility Serv., Nat'l Airway Sys., Eng'g Div., Okla. City, Okla.*, 60 FLRA 565 (2005) (*FAA, Okla.*)). Even if it were appropriate to examine whether the Agency's arguments are entitled to deference, the Union's argument lacks merit because, in each of the decisions cited by the Union, *the arbitrator* awarded backpay, not the Agency. *See U.S. Dep't of Transp., FAA*, 63 FLRA at 502; *FAA, Wash., D.C.*, 63 FLRA at 492; *FAA, Okla.*, 60 FLRA at 567. Thus, the Agency's current position is not inconsistent with these decisions.

V. Decision

The Agency's exception is granted and the award is set aside.[6]

6. Based on this decision, we find that it is unnecessary to address the Agency's remaining exceptions.