66 FLRA No. 96

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3955
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4733

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DECISION

February 27, 2012

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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 Richard D. Fincher 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.

As relevant here, the Arbitrator sustained a grievance alleging that the Agency failed to deduct Union members' dental allotments from their pay in violation of the parties' agreement. The Arbitrator ordered the Agency to reimburse the Union for the payments the Union would have received but for the Agency's failure to promptly process the dental allotments. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union represents correctional officers at the Agency's Tucson, Arizona facility. Award at 1, 4. In 1990, because the Agency did not offer employees dental benefits, the Union made a dental plan available to its members. *Id.* at 5. An employee who participated in the Union's dental plan paid only a single monthly allotment that combined the union dues allotment with the dental benefits allotment. *Id*. at 4-5. The Agency deducted this combined allotment from the employee's pay as a single deduction. *Id*. Although union members could cancel their dental allotments at any time, they could only cancel their union dues allotments annually. *Id.* at 12. This practice remained in effect until the Union notified the Agency of a union dues allotment increase in December 2009. *Id.* at 4, 13.

The Agency implemented a centralized payroll system several years before the union dues allotment increase. *Id*. at 4. When the dues allotment increase took effect in 2009, the Agency's payroll system failed to process the increase and erroneously stopped withholding the dental allotments for the first pay period of 2010. *Id*. The Agency partially corrected the error and increased the union dues allotment by the second pay period of 2010. But the system still failed to withhold the dental allotments, even though the Agency continued to correctly process combined union dues and dental allotments for employees at its facility in Connecticut. *Id.* at 4-5. Therefore, to keep the dental plan active, the Union paid the cost of the dental allotments from Union funds. *Id*. at 13.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to promptly process the combined allotments. *Id*. at 6. After failing to withhold the dental allotments for seven months, the Agency corrected the error. Once employees signed dental allotment forms under the new payroll system, the Agency began to withhold the combined allotments and remit them to the Union. *Id*. at 5. But the Union sought reimbursement from the Agency to recover the payments it would have received if the Agency had deducted the dental allotments from the employees' pay from January to September 2010. *Id.* at 5, *see also id.* at 3.

The parties could not resolve the grievance and submitted it to arbitration. As relevant here, the Arbitrator framed the issue as: "Did the Agency violate the [a]greement when it allegedly . . . failed to collect certain dental [allotments] . . . ? If so, what shall the remedy be?" [1] *Id.* at 1.

The Arbitrator found that the Agency violated Article 7 of the parties' agreement when it stopped its practice of withholding dental allotments without

[1] The Arbitrator also addressed the Union's claims that the Agency violated the parties' agreement when it failed to discontinue union dues deductions after employees transferred to other agencies and failed to provide the Union with copies of dues deduction cancellation forms. Award at 6. As neither party challenges the Arbitrator's findings with respect to those issues, we do not address them further.

bargaining with the Union.[2] *Id.* at 12-13. The Arbitrator determined that, for over fifteen years, the parties had a past practice of combining the dental and union dues allotments into a single monthly allotment that was deducted from employees' pay. *Id.* He found that this past practice "clarifie[d]" the parties' agreement and became a "binding past practice" on the parties. *Id.* at 13. The Arbitrator concluded that by changing this past practice without bargaining with the Union, the Agency violated Article 7 of the parties' agreement. *Id.* at 12-13. In support of this conclusion, the Arbitrator stated that there is no detailed definition of "union dues" in Article 8 of the parties' agreement.[3] He found that Article 8 does "not include or exclude dental dues," but does allow for combined allotments that are deducted as a single monthly allotment. *Id.* at 13.

Having found that the Union incurred a financial loss, the Arbitrator ordered the Agency to reimburse the Union for the amounts that it would have received but for the Agency's failure to deduct the dental allotments from employees' pay. *Id.* at 14.

III. Positions of the Parties

A. Agency's Exceptions

First, the Agency argues that the award is contrary to law because it violates the doctrine of sovereign immunity. The Agency contends that it has immunity from monetary awards unless a waiver of immunity is unequivocally expressed by statute. Exceptions at 5. The Agency further asserts that such a waiver may not be implied. *Id.* The Agency recognizes that, under § 7115(a) of the Statute,[4] the Agency must deduct a union dues allotment upon an employee's request. *Id.* But the Agency argues that the Arbitrator had no statutory authority to order the Agency to reimburse the Union for dental allotments because they are not union dues and they are not paid to the Union. *Id.* at 4-5. Therefore, the Agency asserts, the award is contrary to law.

Second, the Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator ignored the plain language of Article 8, Section g by finding that dental allotments are part of union dues allotments.[5] *Id.* at 7-8. The Agency also claims that the Arbitrator has changed the terms of the parties' agreement in violation of Article 32, Section h.[6] *Id.*

B. Union's Opposition

The Union contends that the Agency's exceptions are untimely. Opp'n at 2. According to the Union, the Agency received the award on January 4, 2011, but did not file its exceptions until February 7, 2011, thirty-four days later. *Id.* Therefore, the Union argues, the Agency's exceptions should be dismissed.

The Union also argues that the award is not contrary to law because, under Authority precedent, an

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[2] Article 7 provides:

> In all matters relating to personnel policies, practices . . . the Employer will adhere to the obligations imposed on it by . . . this Agreement. This includes . . . the obligation to notify the Union of any changes in the conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures.

Award at 12-13.

[3] Article 8 provides for union dues payroll deductions and provides, in pertinent part:

> *Section a.* The Employer and the Union agree that unit employees who are Union members in good standing may have allotments deducted from their regular paychecks for the payment of Union dues for the term of this Agreement in accordance with applicable regulations. This article may be amended when required by any changes in such regulations.
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> . . . .
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> *Section e.* A multi-level dues structure will be utilized. Dues will be withheld on a biweekly basis conforming to the regular pay period . . . . Dues erroneously omitted . . . shall be retroactively deducted by the [Agency] . . . . The Employer . . . shall take appropriate action to correct errors in dues deductions . . . .

Award at 2-3.

[4] Section 7115(a) states:

> [i]f an agency has received from an employee . . . a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic [union] dues . . . , the agency shall honor the assignment and make an appropriate allotment . . . at no cost to the [union] or the employee. . . .

5 U.S.C. § 7115(a).

[5] Article 8, Section g provides, in pertinent part, that:

> [a]n employee may terminate a Union dues allotment in accordance with 5 U.S.C. [§] 7115(a) by the local Union submitting a properly completed SF-1188 to the Human Resource Office at any time during a forty-five (45) day period following the employee's Union membership anniversary date . . . .

Exceptions at 7; *id.*, Attach. F at 20.

[6] The Agency appears to have inadvertently cited Article 31, Section h, intending to cite Article 32, Section h. Article 32, Section h contains the language quoted by the Agency in its exceptions. Exceptions at 7-8. Article 32, Section h provides, in relevant part: "The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. this Agreement; or 2. published Federal Bureau of Prisons policies and regulations." Opp'n, Attach. 3 at 78; Exceptions at 7-8.

agency is liable for a union's monetary loss when it fails to process dues allotments. *Id.* at 3. The Union further asserts that the dental allotments were paid to the Union and that the Agency's statement to the contrary is incorrect. *Id.* at 2.

And the Union argues that the award draws its essence from the parties' agreement because the parties had a past practice of combining dental and union dues allotments into a single combined allotment. The Union asserts that this past practice was in place for many years and that the Agency continued to follow it at other facilities. *Id.* at 2-3. Therefore, the Union contends, because Article 8, Section e of the parties' agreement requires the Agency to take appropriate action to correct any errors regarding its failure to process union dues allotments,[7] the parties' past practice requires the same Agency action to correct errors in failing to properly process dental allotments. *Id.* at 3.

IV. Preliminary Issue

The Union claims that the Agency's exceptions are untimely and should be dismissed. *Id.* at 2. Section 7122(b) of the Statute requires that exceptions be filed within thirty days from the date of service of the award. 5 U.S.C. § 7122. Under the Authority's Regulations, the thirty-day period for filing exceptions begins to run the day after the award's date of service. *See* 5 C.F.R. § 2425.2(b). Section 2429.22 of the Authority's Regulations provides that five days be added if the award is served by mail or commercial delivery. 5 C.F.R. § 2429.22.

It is undisputed that the Arbitrator served the award on the parties by mail on January 3, 2011. Opp'n, Ex. 2 at 10. Therefore, the Agency was required to file its exceptions by February 7, 2011. 5 C.F.R. §§ 2425.2(b), 2429.22. As the exceptions were filed by personal delivery on February 7, they are timely.

V. Analysis and Conclusions

A. The award does not violate the doctrine of sovereign immunity.

The Agency contends that the Arbitrator's monetary award is contrary to law because it violates the doctrine of sovereign immunity. When an exception challenges an award's consistency with law, the Authority reviews the 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 this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The United States, as a 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 *United States 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. Where a monetary award is equitable in nature, however, sovereign immunity does not apply. *See Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995) (*Fort Benjamin Harrison*), *vacating in part Dep't of the Army, U.S. Army Soldier Support Ctr., Fort Benjamin Harrison, Office of the Dir. of Fin. & Accounting, Indianapolis, Ind.* 48 FLRA 6 (1993); *see also FAA*, 55 FLRA 1271, 1277 (2000); *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 298-99 (1999) (*FAA Renton*).

In *Fort Benjamin Harrison*, the court found that monetary awards that are "legal" in nature are barred by sovereign immunity, but monetary awards that are "equitable" in nature are not. 56 F.3d at 276. The court determined that a monetary award is legal in nature when it is a substitute for the plaintiff's loss in consequence of the defendant's action. *Id.* In contrast, a monetary award is equitable in nature when it "does not attempt to provide the injured party with a substitute for a consequential loss, but rather 'attempt[s] to give the plaintiff the very thing to which he was entitled.'" *Id.* (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) and citing *Md. Dep't of Human Resources v. Dep't of HHS*, 763 F.2d 1441 (D.C. Cir. 1985)). In *Fort Benjamin Harrison*, the court vacated the Authority's decision, finding that the award of interest was a substitute for employees' consequential loss due to the agency's failure to provide the union with notice of a change in policy – 'the very thing" to which the union was entitled. *Id.* The court concluded, therefore, that the remedy was legal in nature and barred by sovereign immunity. *Id.* at 276-77.

In *FAA*, the Authority found that the make-whole remedy was equitable in nature because it represented money the employees would have received but for the agency's unlawful action. 55 FLRA at 1277. There, an Authority administrative law judge (judge) found that the agency improperly repudiated the parties' memorandum of understanding (MOU) concerning performance appraisals and that this caused employees to suffer the loss of monetary performance awards. *Id.*

[7] *See supra* note 4.

at 1276-77. The Authority found that *Fort Benjamin Harrison* did not bar the monetary award because it was equitable in nature in that it represented the money employees would have received as an appraisal-linked award but for the agency's improper repudiation of the parties' MOU. *Id.* at 1277.

And in *FAA Renton*, the Authority found that sovereign immunity did not apply to a remedy that required the agency to obtain parking for employees at a location other than the location the Agency made available at no cost to employees. In upholding the judge's finding that the agency had failed to comply with an arbitration award, the Authority determined that the judge's remedy was equitable in nature because it was the very thing to which the employees were entitled under the award. 55 FLRA at 294, 298-99; *see U.S. Dep't of Veterans Affairs*, 55 FLRA 1213, 1216 (2000) (finding award that required agency to reimburse employees for increased parking rates was equitable where agency unilaterally increased the rates without bargaining with the union).

Here, as in *FAA* and *FAA Renton*, and unlike the consequential monetary loss to employees in *Fort Benjamin Harrison*, the monetary award is equitable in nature. The award represents the money the Union would have received but for the Agency's failure to deduct the dental allotments. In order to keep the dental plan active, the Union paid the cost of the dental allotments that the Agency failed to timely deduct from the employees' pay and remit to the Union. Although the Agency eventually began to withhold and remit the dental allotments after seven months, the Agency did not reimburse the Union for the amount the Union paid to cover the costs of the dental allotments during that seven-month period. The award, therefore, reimburses the Union for "the very thing" to which the Union is entitled – the amount of money that would have been remitted to the Union for the dental allotments but for the Agency's error and contract violation. *Fort Benjamin Harrison*, 56 F.3d. at 276; *FAA*, 55 FLRA at 1277; *FAA, Renton*, 55 FLRA at 298-99. Accordingly, because the award provides for equitable relief, we find that the doctrine of sovereign immunity does not apply.

In the alternative, sovereign immunity does not apply because the monetary award concerns employee funds. Funds withheld from an employee's pay for allotments, such as allotments for dental benefits, are employee funds, and the agency acts only as the agent of the employee with respect to the withheld funds. *AFGE, Council 214 v. FLRA*, 835 F.2d. 1458, 1460 (D.C. Cir. 1987) (*Council 214*), *rev'g Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 23 FLRA 376 (1986). When an agency deducts allotments from employees' pay, the agency "is viewed as a neutral and passive intermediary between the employee and the union." *Id.* (citing 5 C.F.R. § 550.312(e)).[8]

In *Council 214*, the court reversed the Authority's finding that the agency had not violated the Statute by deducting union dues overpayments from subsequent remittances. The court held that, because withheld union dues are employee funds until they are remitted to the union, the agency could not use those funds to recoup overpayments to the union. 835 F.2d at 1460.

In finding that union dues are employee funds, the court considered the regulations that govern employee allotments. *Id.* These regulations provide that an allotment is "a recurring specified deduction for a legal purpose from pay authorized by an employee . . . to an allottee." 5 C.F.R. § 550.301. The employee is the "allotter" and the institution or person to whom an allotment is made payable is the "allottee." *Id.* An agency's obligation to honor certain allotments, such as union dues allotments, is mandatory. *Id.* § 550.311(a)(1).[9] In addition to mandatory allotments, "an agency may permit an employee to make an allotment for any legal purpose deemed appropriate . . . ." *Id.* § 550.311(b).

Sovereign immunity does not apply to allotments properly authorized under 5 C.F.R. Part 550. *Cf. U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi*, 58 FLRA 77, 81 (2002) (Chairman Pope dissenting on other grounds) (where agency head declined to authorize employee allotments to pay for attorney fees, allotment was barred by sovereign immunity). Here, the record indicates that the Agency authorized the employee dental allotments and acted only as an agent in transmitting the funds from the employees to the Union. Award at 4-5. In fact, the Agency continued to combine the dental allotments with the union dues allotments and deduct them from employee pay after it corrected the error. *Id.* at 5. Thus, because the award involves employee funds for properly authorized dental allotments that the Agency failed to deduct from the employees' pay and remit to the Union,

[8] 5 C.F.R. §550.312(e) provides that "disputes regarding any authorized allotment are a matter between the allotter and the allotee."

[9] Other mandatory allotments include: dues to professional associations, 5 C.F.R. § 550.311(a)(2); allotments to a Combined Federal Campaign, *id.* § 550.311(a)(3); allotments for income tax withholdings, *id.* § 550.311(a)(4); allotments to an employee's financial institution, *id.* § 550.311(a)(5); allotments for child support or alimony, *id.* § 550.311(a)(6); and any allotment affecting a salary reduction as part of a flexible benefits plan established by the Office of Personnel Management, *id.* § 550.311(a)(7).

the award does not constitute a monetary award against the government. Accordingly, we find that the award does not implicate the doctrine of sovereign immunity because the monetary award concerns employee funds, not Agency funds.

Consequently, for both of the foregoing reasons, we deny the Agency's exception.

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator ignored the plain language of Article 8, Section g[10] by finding that dental allotments were part of union dues allotments. Exceptions at 7-8. The Agency also claims that the Arbitrator changed the terms of the parties' agreement in violation of Article 32, Section h.[11] *Id.* at 8.

When reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See, e.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The courts defer to the arbitrator's interpretation of the collective bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

Under Authority precedent, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement. Such a determination is a matter of contract interpretation subject to the deferential essence standard of review. *U.S. Dep't of Homeland Sec., Customs & Border Prot., El Paso, Tex.*, 61 FLRA 684, 686 (2006) (*DHS*); *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005); *see* Elkouri & Elkouri, *How Arbitration Works*, 630 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) ("an arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent") (quoting *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984)).

Here, the Arbitrator found that the parties' "binding past practice" of combining dental and union dues allotments into a single monthly allotment that was deducted from employees' pay modified the parties' agreement. Award at 12-13. The Arbitrator concluded that by changing this past practice without bargaining with the Union, the Agency violated Article 7 of the parties' agreement.[12] *Id.* The Agency does not except to these findings.

The Agency's claim that the award violates Article 8 is unsupported. The Arbitrator found only that Article 8 does "not include or exclude dental dues," but does allow for combined allotments that are deducted as a single monthly allotment. *Id.* at 13. He did not find, as the Agency alleges, that dental allotments were part of union dues allotments. Moreover, as set forth above, the Arbitrator did not base his finding of a contractual violation on Article 8, but rather, on his undisputed finding of a binding past practice.

The Agency's argument with respect to Article 32, Section h is similarly unpersuasive. Although this provision states that an arbitrator may not alter or modify the terms of the parties' agreement, *supra* note 7, an arbitrator may appropriately determine that the parties have modified their agreement by past practice. *DHS*, 61 FLRA at 686. Here, the Arbitrator found that the parties' practice of combining dental and union dues allotments into a single monthly allotment that was deducted from employees' pay had modified the parties' agreement and became a binding past practice. Award at 12-13. As the Agency does not challenge this finding, its essence exception fails to demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny the Agency's exception.

VI. Decision

The Agency's exceptions are denied.

[10] *See supra* note 6.
[11] *See supra* note 7.
[12] *See supra* note 3.