

**67 FLRA No. 118**

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS  
LOCAL 26  
(Union)

and

GENERAL SERVICES ADMINISTRATION  
(Agency)

0-AR-4930

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DECISION

June 19, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator James M. Harkless concluded that twenty-one electricians (grievants) were not entitled to a hazard-pay differential (HPD) because they were not performing hazardous duties and, therefore, denied a Union grievance seeking a retroactive HPD.

In exceptions to the Arbitrator's award, the Union argues that: (1) the Arbitrator exceeded his authority by determining that the grievants' duties were not hazardous (exceeds-authority exception); (2) the Arbitrator's determination that the grievants were not performing hazardous duties is contrary to law (first contrary-to-law exception) and public policy (public-policy exception); (3) the Arbitrator based his conclusion that the work was not hazardous on a nonfact (nonfact exception); and (4) the Arbitrator's determination that the grievants were not entitled to an HPD is contrary to 5 U.S.C. § 5545(d) (second contrary-to-law exception).

Because the Union had the opportunity to raise its exceeds-authority, first contrary-to-law, and public-policy exceptions before the Arbitrator but failed to do so, we dismiss these exceptions. And because we find that the claimed nonfact was disputed at arbitration and that the Union fails to establish that the award is contrary to § 5545(d), we deny the Union's nonfact and second contrary-to-law exceptions.

**II. Background and Arbitrator's Award**

For many years, the Agency paid the grievants a premium because their work exposed them to polychlorinated biphenyls (PCBs), which are toxic. When the Agency started paying the premium, the grievants held wage-grade (WG) positions, entitling them to an 8% environmental-pay differential (EPD). The Agency later converted the grievants to the General Schedule (GS), but it continued paying them an 8% premium. Under OPM regulations, GS employees who work with "[t]oxic chemical materials when there is a possibility of leakage or spillage" are eligible for a 25% HPD.<sup>1</sup>

After realizing that the Agency was still paying the grievants at the WG rate, the Union filed a grievance on their behalf. The Agency denied the grievance, and the Union invoked arbitration. As stipulated by the parties, the issue was "[w]hether or not [the Agency] properly paid [the grievants] the correct rate for the period of time they worked as GS[-]level [f]ederal employees classified as working in hazardous[-]duty positions."<sup>2</sup>

Before the Arbitrator, the Union argued that: (1) the Agency's "continued payment of [an EPD] . . . confirms its determination that [5 C.F.R. §] 532.511 entitled [the grievants] to [an] HPD for the *entire* time period"<sup>3</sup> that the Agency paid them the premium; and (2) the appropriate rate of premium pay was 25% rather than 8%. Conversely, the Agency argued, as relevant here, that the PCBs had been removed by the time it converted the grievants to GS positions, and accordingly, the grievants "were not performing a hazard or physical hardship . . . nor were they performing a hazardous duty," and that they, therefore, were not entitled to *any* premium pay.<sup>4</sup>

The Arbitrator found for the Agency. He concluded that "there [wa]s no persuasive evidence that the Agency has not practically eliminated the potential for serious personal injury" posed by PCBs.<sup>5</sup> Moreover, he found that, "once [the Agency] stopped using PCB fluids in its transformers, the employees would not be working with or in close proximity to toxic chemical materials 'when there is a possibility of leakage or spillage,'"<sup>6</sup> and that the Union had failed to show that the level of PCBs in the air "exceeded the permissible limits

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<sup>1</sup> 5 C.F.R. pt. 550, subpt. I, app. A; *see also id.* §§ 550.901-.907.

<sup>2</sup> Award at 2.

<sup>3</sup> Exceptions, Attach. 1, Union's Post-Hr'g Br. at 10 (citing 5 C.F.R. § 532.511).

<sup>4</sup> Opp'n, Attach. 1, Agency's Post-Hr'g Br. at 2-3 (citing 5 C.F.R. § 550.902; *id.* at pt. 550, subpt. I, app. A).

<sup>5</sup> Award at 19.

<sup>6</sup> *Id.* at 16 (quoting 5 C.F.R. pt. 550, subpt. I, app. A).

set by [the Occupational Safety and Health Administration (OSHA)].”<sup>7</sup> Likewise, he found that, although the Union had presented evidence of some contamination above the Environmental Protection Agency’s (EPA’s) specified cleanup levels, “the EPA regulations do not govern [for purposes of] setting a[n] HPD.”<sup>8</sup> Finally, the Arbitrator noted that, even assuming the grievants were performing hazardous duties, the Union had not introduced into evidence the grievants’ position description, which would be necessary to show that the Agency had not considered the grievants’ exposure to PCBs when it classified their positions.<sup>9</sup> Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the Arbitrator’s award, and the Agency filed an opposition to the Union’s exceptions.

**III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Union’s exceeds-authority, first contrary-to-law, and public-policy exceptions.**

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations,<sup>10</sup> the Authority will not consider any evidence or arguments that could have been, but were not, presented before the Arbitrator.<sup>11</sup>

The Union argues that the Arbitrator exceeded his authority by deciding that the grievants “were not engaged in hazardous duty, and therefore not entitled to any extra pay,”<sup>12</sup> because the parties had “stipulated that the [grievants] were ‘classified as working in hazardous[-]duty positions.’”<sup>13</sup> At arbitration, the Agency introduced evidence supporting its position that the grievants were not entitled to extra pay because they had not performed hazardous duties during the time period at issue.<sup>14</sup> If the Union believed that the parties had stipulated that the grievants were working in

hazardous-duty positions, the Union could have objected to the introduction of this evidence on the basis that, given the stipulation, this issue was not properly before the Arbitrator. Because there is no evidence that the Union did so, we find that its argument that the Arbitrator exceeded his authority by considering whether the grievants were engaged in hazardous duties is barred by §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.

The Union also argues that the “award is contrary to public policy and established law” because the “Arbitrator determined the grievants’ exposure to PCBs was not ‘hazardous.’”<sup>15</sup> Specifically, the Union argues that the Arbitrator ignored the Occupational Safety and Health Review Commission’s decision in *Kaiser Aluminum & Chemical Corp.*,<sup>16</sup> in which the Commission found that accidental exposure to PCBs could result in serious injury or death.<sup>17</sup> And the Union claims that the Arbitrator erred in considering OSHA’s permissible exposure limits for airborne PCBs because “the permissible[-]exposure[-]limit language in 5 U.S.C. § 5545(d) applies only to hazards related to asbestos.”<sup>18</sup>

The Union admits that it “did not raise the issue that the [grievants’] work was properly classified as hazardous,”<sup>19</sup> claiming that it “believed the parties had stipulated to this point and such an argument was beyond the Arbitrator’s authority in th[e] grievance.”<sup>20</sup> But, as discussed above, the Union should have realized that whether the grievants were performing hazardous duties was at issue before the Arbitrator, and that, as a result, the Arbitrator might find that the grievants were not performing hazardous work. As such, the Union should have known to raise, before the Arbitrator, its claim that working with PCBs was hazardous as matter of law. Because the Union could have done so, but by its own admission did not do so, we find that §§ 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Union’s first contrary-to-law exception.

Likewise, at arbitration, the Union failed to raise any arguments concerning public policy. Thus, to the extent that the Union is raising a separate public-policy exception, we find that it is barred for the same reasons as set forth above.

Accordingly, we dismiss the Union’s exceeds-authority, first contrary-to-law, and public-policy exceptions.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.*

<sup>9</sup> See 5 C.F.R. § 550.904(a) (“hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position”).

<sup>10</sup> *Id.* §§ 2425.4(c), 2429.5.

<sup>11</sup> *E.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (citing *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012); 5 C.F.R. §§ 2425.4(c), 2429.5).

<sup>12</sup> Exceptions Br. at 16 (citing Award at 20).

<sup>13</sup> *Id.* at 17 (quoting Award at 2).

<sup>14</sup> *E.g.*, Opp’n, Supporting Citation #8, Hr’g Tr. at 95 (Q: “In its current inventory, does the [A]gency have or use PCB transformers?” A: “No.”); *id.* at 106 (“[The] three conditions [that the Agency considered in deciding to pay an HPD] were focused on . . . preventing exposure to leaks and spills . . . . So these three conditions were removed when the [PCB-containing] transformers were removed . . .”).

<sup>15</sup> Exceptions Br. at 14.

<sup>16</sup> 10 BNA OSHC 1893 (No. 77-699, 1982)

<sup>17</sup> Exceptions Br. at 14-15.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 13 n.2.

<sup>20</sup> *Id.*

#### IV. Analysis and Conclusions

##### A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>21</sup> The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.<sup>22</sup>

The Union argues that the Arbitrator's conclusion that there was "no possibility of leakage or spillage" of PCBs is a nonfact.<sup>23</sup> The Union admits that it "presented evidence to the Arbitrator regarding the risk of leakage and spillage," but contends that "these matters were not 'disputed' before the [A]rbitrator because the Union believed the parties had stipulated that the [grievants] were engaged in hazardous work."<sup>24</sup>

Notwithstanding the Union's subjective belief in this regard, by admitting that there is conflicting factual evidence in the record, the Union has conceded that the matter was disputed before the Arbitrator.<sup>25</sup> And because the claimed nonfact was disputed before the Arbitrator, the Union's nonfact exception provides no basis for finding the award deficient.

Accordingly, we deny the Union's nonfact exception.

##### B. The award is not contrary to 5 U.S.C. § 5545(d).

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.<sup>26</sup> 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.<sup>27</sup> In

making that assessment, the Authority defers to the arbitrator's underlying factual findings.<sup>28</sup>

The Union argues that the award is contrary to law because the Arbitrator "determined that the [Agency] had properly paid the [grievants] after they had been reclassified as GS[-]level employees"<sup>29</sup> even though "[t]here is no legal authority for paying a GS[-]level employee" an 8% EPD.<sup>30</sup> The Union contends that the award therefore violates 5 U.S.C. § 5545(d), which concerns HPDs for GS employees.<sup>31</sup>

Contrary to the Union's claim, the Arbitrator determined that the Union "failed to establish . . . all the necessary prerequisites for entitlement to [an] EPD or [an] HPD."<sup>32</sup> Moreover, the Union does not argue, or cite authority for, the proposition that being paid an EPD entitled the grievants to an HPD as a matter of law. So even if we were to conclude that there was no authority for the Agency to pay the grievants an 8% premium, it would not follow that they were necessarily entitled to receive 25%. Accordingly, the Union has not shown that § 5545(d) required the Agency to pay the grievants a 25% HPD, and it therefore fails to establish that the award is contrary to law.

Consequently, we deny the Union's second contrary-to-law exception.

#### V. Decision

We dismiss the Union's exceptions, in part, and deny them, in part.

<sup>21</sup> E.g., *U.S. Dep't of VA Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

<sup>22</sup> E.g., *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*DHS*) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009)).

<sup>23</sup> Exceptions Br. at 16 (citing Award at 16).

<sup>24</sup> *Id.* at 15 n.3.

<sup>25</sup> See *DHS*, 66 FLRA at 628-29 (citing *AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 712 (2011)).

<sup>26</sup> *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)).

<sup>27</sup> *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>28</sup> *Id.*

<sup>29</sup> Exceptions Br. at 13.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> *Id.*

<sup>32</sup> Award at 20.