

74 FLRA No. 39

UNITED STATES  
DEPARTMENT OF THE TREASURY  
BUREAU OF ENGRAVING AND PRINTING  
(Agency)

and

FRATERNAL ORDER OF POLICE  
DISTRICT OF COLUMBIA LODGE NO. 1/  
BUREAU OF ENGRAVING AND PRINTING  
LABOR COMMITTEE  
(Union)

0-AR-5891

DECISION

April 22, 2025

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Susan Tsui Grundmann and Anne Wagner,  
Members

**I. Statement of the Case**

The Union filed a grievance alleging the Agency violated the parties’ collective-bargaining agreement when it failed to pay bargaining-unit employees (the grievants) a hazardous-pay differential (HPD) during the COVID-19 pandemic (pandemic). In an initial award, Arbitrator Roger P. Kaplan found the grievance arbitrable (arbitrability award); neither party filed exceptions to that award. The Arbitrator subsequently issued a merits award (merits award) that sustained the grievance and awarded backpay. The Agency filed exceptions to the merits award on contrary-to-law, nonfact, and contrary-to-public-policy grounds. For the reasons below, we find the merits award is contrary to law and set it aside.

<sup>1</sup> Exceptions, Jt. Ex. 6 at 1.

<sup>2</sup> Merits Award at 7.

<sup>3</sup> Opp’n, Jt. Ex. 2, Grievance at 1. We note that the grievance and the Arbitrator use the term “hazardous duty/environmental differential pay,” and that in asserting that the Agency failed to pay HPD, the grievance also referenced 5 U.S.C. § 5343(c)(4) as allowing for HPD. *Id.* While § 5343(c)(4) establishes a separate pay differential – environmental differential pay for prevailing-rate employees – we find it clear from the record that the Union

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

The grievants are police officers who safeguard the Agency’s facility, including patrolling the facility, and screening individuals entering and exiting the facility. In response to the pandemic, the Agency implemented safety measures to mitigate risks associated with COVID-19 in the facility. On March 16, 2020, the Union requested “hazardous duty pay” under Article 23 of the parties’ agreement (Article 23).<sup>1</sup> In lieu of such pay, the Agency issued special act awards “in recognition of [the grievants’] continuing work efforts through the . . . pandemic.”<sup>2</sup>

On April 6, 2020, the Union filed a grievance alleging the Agency violated: (1) Article 23 by “failing to provide hazardous duty/environmental differential pay to . . . officers during the . . . pandemic”;<sup>3</sup> and (2) 5 U.S.C. § 5545(d) (§ 5545(d)), which establishes HPD for general-schedule (GS) employees.<sup>4</sup> Article 23 requires the Agency “to eliminate or reduce to the lowest level possible, all hazards . . . and working conditions of an unusual nature,” and states that “[w]hen such action does not overcome the unusual nature of the hazard[,] an environmental differential may be warranted.”<sup>5</sup> Article 23 further states, “Work situations for which hazardous duty/environmental differential pay will be authorized are listed in 5 C[.]F[.]R[.] p[art] 550, [s]ubpart I, App[endix] A.”<sup>6</sup>

The grievance went to arbitration. In the arbitrability award, the Arbitrator found the Agency correctly argued that “[t]here is nothing in 5 U.S.C. [§ 5378 (§ 5378)] which authorizes the payment of” HPD to the grievants.<sup>7</sup> However, the Arbitrator also concluded that § 5378’s silence with respect to HPD “does not mean that the Agency does not have discretion to make such payments.”<sup>8</sup> The Arbitrator concluded the grievance was arbitrable.

In the merits award, the Arbitrator stated that the parties stipulated the issue as: “Whether the [Union] has met its burden of proof to demonstrate that the [Agency] violated Article 23 . . . by not paying [HPD] for hours worked by bargaining[-]unit employees between March 2020 and March 2021.”<sup>9</sup>

Addressing this issue, the Arbitrator first considered § 5545(d). He found that this statute does not

was only claiming, and the Arbitrator only considered, entitlement to HPD.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> Merits Award at 3 (quoting Art. 23).

<sup>6</sup> *Id.* at 3-4 (quoting Art. 23).

<sup>7</sup> Exceptions, Jt. Ex. 3, Arbitrability Award (Arbitrability Award) at 7-8.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> Merits Award at 3.

apply to the grievants because it covers GS employees, and the grievants are not GS employees. Rather, he found that the grievants' pay "falls under a pay system unique to the Agency, as authorized by" § 5378.<sup>10</sup> Again, the Arbitrator determined that, although § 5378 does not authorize HPD, the Agency had discretion to make such payments. He further found that the Agency could negotiate how to exercise that discretion, and had done so by agreeing to Article 23.

The Arbitrator also determined that Article 23 incorporates 5 C.F.R. part 550, subpart I, Appendix A (Appendix A),<sup>11</sup> which implements § 5545(d). He noted that, like § 5545(d), Appendix A covers GS employees and, therefore, does not apply to the grievants. However, he found that the Agency had legal authority to make Appendix A applicable to the grievants by agreeing to incorporate Appendix A into the parties' agreement.

Further, the Arbitrator determined that, although Article 23 provides that HPD "may be warranted" in certain circumstances, "Appendix A sets out work situations for which [HPD] will be authorized."<sup>12</sup> The Arbitrator found that "[o]ne such situation involves exposure to virulent biologicals which could cause death and for which protective devices do not afford complete protection."<sup>13</sup> The Arbitrator further found the parties stipulated that COVID-19 was a virulent biological.

The Arbitrator determined that the Agency implemented security measures to mitigate risks associated with COVID-19, but those measures "did not overcome the unusual threat" of COVID-19.<sup>14</sup> The Arbitrator found that the grievants' exposure "to an increased risk of contracting [COVID-19]" entitled them to HPD,<sup>15</sup> and that the Agency violated Article 23 by failing to pay it.<sup>16</sup> As a remedy, the Arbitrator awarded the grievants HPD for the period from March 2020 to March 2021.

On June 2, 2023, the Agency filed exceptions to the merits award, and the Union filed an opposition to the Agency's exceptions on August 2, 2023.<sup>17</sup>

### III. Preliminary Matter: An expedited, abbreviated decision is inappropriate in this case.

The Agency requests we resolve its exceptions in an expedited, abbreviated decision.<sup>18</sup> An expedited, abbreviated decision is one that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."<sup>19</sup> Under § 2425.7 of the Authority's Regulations, when a party requests such a decision in an arbitration matter that does not involve an unfair labor practice, the Authority will resolve the request by considering "all of the circumstances of the case," including whether the opposing party objects to issuance of such a decision, and "the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues."<sup>20</sup>

The Union does not object to the Agency's request.<sup>21</sup> However, after considering the circumstances of this case, particularly the limited number of Authority decisions concerning HPD related to COVID-19, we find that an expedited, abbreviated decision is inappropriate. Accordingly, we deny the Agency's request for an expedited, abbreviated decision.<sup>22</sup>

### IV. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law.<sup>23</sup> When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.<sup>24</sup> In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent

<sup>10</sup> Merits Award at 10.

<sup>11</sup> 5 C.F.R. pt. 550, subpt. I, app. A.

<sup>12</sup> Merits Award at 17.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 16 ("The record demonstrates that the Agency acted in good faith trying to protect employees by following the sometimes conflicting and changing measures issued by various government entities. However, those measures did not overcome the unusual threat posed by the Covid virus."); *see also id.* at 24 (finding the grievants entitled to HPD even though "the Agency's efforts to mitigate that risk were commendable" because "a significant risk remained despite those best efforts").

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

<sup>16</sup> *Id.* at 18-19 ("By agreeing in Article 23 to pay [HPD] to police officers, even with retained discretion, the Agency undertook an obligation to exercise that discretion in a good[-]faith manner. . . . I find that under the circumstances present in this

case, the Agency should have exercised its discretion to pay [HPD] to the [grievants]."); *see also id.* at 26 ("the [Agency] violated Article 23 . . . when it failed to pay" HPD).

<sup>17</sup> The Authority's Office of Case Intake and Publication granted the Union's request for an extension of time to file an opposition, giving the Union until August 2, 2023. Extension of Time Order at 1. Therefore, the opposition is timely.

<sup>18</sup> Exceptions at 2-3.

<sup>19</sup> 5 C.F.R. § 2425.7.

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

<sup>21</sup> Opp'n at 1.

<sup>22</sup> *See NAIL, Loc. 19*, 74 FLRA 25, 27 (2024) (denying unopposed request for expedited, abbreviated decision where Authority determined such decision was not appropriate under circumstances of case).

<sup>23</sup> Exceptions at 8-23.

<sup>24</sup> *U.S. Dep't of the Treasury, IRS*, 73 FLRA 888, 889 (2024).

with the applicable standard of law.<sup>25</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.<sup>26</sup>

To support this exception, the Agency argues there is no statutory basis to support the award of HPD.<sup>27</sup> Citing Authority decisions concerning sovereign immunity,<sup>28</sup> the Agency argues that where a statute explicitly excludes employees from entitlement to a monetary benefit, neither that statute, nor a contract provision referencing that statute, can authorize a monetary payment. Accordingly, the Agency argues that any incorporation of Appendix A into Article 23 does not entitle the grievants to HPD and, consequently, the Arbitrator's finding that the Agency violated Article 23 cannot separately sustain the backpay remedy.<sup>29</sup>

We agree with these arguments. The Arbitrator did not identify a statute or regulation that entitles the grievants to the payment of HPD in the circumstances of this case. Additionally, the reference to Appendix A in Article 23 does not entitle the grievants to HPD.<sup>30</sup> Appendix A does not itself specifically authorize HPD, but instead merely sets forth a list of situations in which HPD is authorized under § 5545(d).

Moreover, to the extent the merits award could be construed as relying on § 5545(d) to authorize the payment of HPD to the grievants, that reliance is misplaced. In pertinent part, § 5545(d) authorizes OPM to "establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard."<sup>31</sup> Section 5545(d) further provides that the regulations governing HPD,<sup>32</sup> including Appendix A,<sup>33</sup> entitle "an employee to whom chapter 51 . . . of this title . . . applies"

– GS employees – to HPD.<sup>34</sup> In turn, 5 U.S.C. § 5102(c) provides that chapter 51 of title 5 of the U.S. Code "does not apply to . . . members of the police forces of the [Agency] . . . whose pay is fixed under [§ 5378]."<sup>35</sup>

Because § 5102(c)(5) specifically excludes the grievants from chapter 51 of the U.S. Code, and § 5545(d) applies only to GS employees, neither § 5545(d) nor Appendix A authorizes the payment of HPD to the grievants.

As noted, apart from his reference to Appendix A, the Arbitrator cited no other statute or regulation that could potentially provide this authorization. In its opposition, the Union cites § 5378 as authorizing payment of HPD to the grievants.<sup>36</sup> However, the Arbitrator appears to have found that § 5378 neither authorized nor prohibited the Agency from paying HPD,<sup>37</sup> and the Union does not except to this conclusion. Also in its opposition, the Union cites 5 U.S.C. § 4503 as authorizing special act awards for performing hazardous duty.<sup>38</sup> However, the Arbitrator did not award backpay for a special act award. To the extent the Union's opposition arguments could be considered exceptions to the merits award, they are untimely.<sup>39</sup>

In sum, the Arbitrator did not cite any statutory basis to award HPD to the grievants, and the parties' agreement cannot separately sustain such an award.<sup>40</sup> Therefore, the award of HPD is contrary to law.<sup>41</sup> Because the only alleged violation of Article 23 was the Agency's

<sup>25</sup> *Id.*

<sup>26</sup> *U.S. Dep't of the Navy, Naval Med. Ctr. Camp LeJeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).

<sup>27</sup> Exceptions at 1, 4, 8-13.

<sup>28</sup> *Id.* at 9-10 (citing *U.S. Dep't of Transp., FAA*, 65 FLRA 325, 327 (2010) (*FAA*); *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366 (2005) (*Air Force*) (Member Pope dissenting in part); *Ass'n of Civilian Technicians, P.R. Army Chapter*, 60 FLRA 1000, 1006 (2005)).

<sup>29</sup> *Id.* at 4, 9-12.

<sup>30</sup> See *FAA*, 65 FLRA at 327 ("[A] collective[-]bargaining agreement may require monetary payments to employees only where there is an underlying statutory authority for the payment." (quoting *Air Force*, 61 FLRA at 370)).

<sup>31</sup> 5 U.S.C. § 5545(d).

<sup>32</sup> See 5 C.F.R. pt. 550, subpt. I.

<sup>33</sup> See *id.* App. A.

<sup>34</sup> 5 U.S.C. § 5545(d) (emphasis added).

<sup>35</sup> 5 U.S.C. § 5102(c)(5).

<sup>36</sup> Opp'n at 7-11.

<sup>37</sup> Arbitrability Award at 7-9.

<sup>38</sup> Opp'n at 11-13.

<sup>39</sup> 5 C.F.R. § 2425.2(b) (time limit for filing exceptions to an arbitration award is thirty days after the award's service date); see, e.g., *U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 203 n.31 (2022) (dismissing request in opposition as an untimely exception to award); *U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 604 n.45 (2021) (Chairman DuBester concurring) (finding argument in opposition was untimely exception to award).

<sup>40</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 73 FLRA 762, 764 (2023) (*FCI*) ("The Authority has explained that a collective-bargaining agreement may authorize monetary awards only where the requirements for a statutory waiver of sovereign immunity . . . have been satisfied." (citing *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019))).

<sup>41</sup> *Id.* at 763-64 (finding award contrary to doctrine of sovereign immunity where arbitrator erred by finding grievants entitled to HPD under Appendix A and no other statutory waiver of sovereign immunity supported monetary remedy); *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 633 (2023) (setting aside monetary remedy where no waiver of sovereign immunity supporting remedy).

failure to pay the grievants HPD, we set aside the merits award.<sup>42</sup>

Additionally, because we set aside the merits award on this basis, it is unnecessary to address the Agency's remaining exceptions.<sup>43</sup>

## V. Decision

We set aside the merits award.

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<sup>42</sup> Compare *FCI*, 73 FLRA at 763-64 (where arbitrator's finding that agency violated contract "through its lax enforcement of required mitigation measures related to COVID-19" was "undisturbed," Authority set aside unlawful HPD remedy and remanded for alternative remedy (internal quotation mark omitted)), with *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 470 (2023) (VA) (where award based only on arbitrator's

erroneous finding that grievants were entitled to pay differential, Authority set aside entire award).

<sup>43</sup> See Exceptions at 25-27 (arguing Arbitrator's interpretation of Article 23 is based on a nonfact), 23-25 (arguing HPD remedy is contrary to public policy); see, e.g., *VA*, 73 FLRA at 470 n.27 (after setting aside award as contrary to law, finding it unnecessary to address remaining exceptions).