65 FLRA No. 13

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
SAN DIEGO HEALTHCARE SYSTEM
SAN DIEGO, CALIFORNIA
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES/SEIU
(Union)

0-AR-4355

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DECISION

August 31, 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 Charles A. Askin 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 exceptions.

The Arbitrator determined that the Agency improperly denied hazard and/or environmental differential pay to five affected job classifications and ordered that the Agency pay the appropriate amounts of hazard pay to the affected General Schedule (GS) employee and environmental differential pay (EDP) to the affected Wage Grade (WG) employees. For the reasons that follow, we grant the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The grievants, who are responsible for handling medical waste products, filed a grievance alleging that the Agency improperly denied their entitlement to hazard pay and/or EDP. Award at 2. The issue framed by the Arbitrator was:

> Whether the [Agency] improperly denied hazard and/or environmental differential pay to five affected job classifications; and, if so, what is the appropriate remedy?

Award at 2.

The Arbitrator made the following findings regarding each of the job classifications at issue:

Wastes Manager Position (Environmental Protection Specialist) (GS position)

The Arbitrator found that the position description for Wastes Manager showed that the position's duties focus on administrative, management, and technical assistance. Award at 4, 16. Further, the description cites "occasional exposure to moderate risks" in certain hazardous areas and "regular and recurring exposure to moderate risks" that require safety precautions, including the use of personal protective equipment. *Id*. at 4, 17. He found that the job description "does *not* encompass regular direct handling or transport of hazardous materials, or indicate that there is a 'high potential' for exposure to medical wastes." *Id*. at 4. However, the incumbent in the position testified that she routinely handled hazardous waste and that this duty "did not involve mere speculative 'potential exposure." *Id.* at 5. The Arbitrator found that the incumbent in the Waste Manager position performed at least two hazardous duties: (1) the collection and transportation of "red bags" containing bio-hazardous waste and (2) the operation of equipment related to the disposal of medical and bio-hazardous waste material. Award at 15. Although the Arbitrator found that the latter duty occurred "only occasionally," he found that the collection and transportation of the containers of bio-hazardous waste materials occurred "daily – indeed, apparently for a significant period each work day." *Id*.; *see also id.* at 17 (noting the position's "direct, daily, hands-on contact with containers (red bags) of medical waste"). Further, the Arbitrator found that "protective devices [provided by the Agency] do not afford complete protection" from exposure to bio-hazardous waste. *Id*. at 16.

Hazardous Waste Disposer Position (WG position)

The Arbitrator noted that the position description for Hazardous Waste Disposer stated that ninety percent of the duties involve the processing of "bio-hazardous/infectious" medical waste and that the position "entails a high potential risk for exposure to regulated medical wastes." *Id*. at 6. He found that the testimony of the incumbent in the position was consistent with the position description. *Id*. In addition, the Arbitrator found that protective gear

provided by the Agency did not provide complete protection from exposure to bio-hazardous waste. *Id*. at 6, 18.

Housekeeper Aid, Levels 1 and 2 (WG positions)

The Arbitrator found that the position descriptions for Housekeeper Aid, Levels 1 and 2 did not refer to: (1) any duties to handle hazardous waste or (2) any exposure or proximity to bio-hazardous or other hazardous waste materials. *Id*. at 7-8. However, the Arbitrator found that testimony and evidence showed that the incumbents in the positions were required to work with bio-hazardous waste on a daily basis and were exposed to a "high degree hazard of micro-organisms." *Id*. at 8, 18.

Housekeeper Aid, Level 3 (WG position)

The Arbitrator found that both the position description for Housekeeper Aid, Level 3 and testimony showed that incumbents in the position were required to work with bio-hazardous waste on a daily basis. In addition, the Arbitrator found that protective gear provided by the Agency was "insufficient to protect the body 'one hundred percent.'" *Id*. at 8, 18.

Based on the foregoing findings, the Arbitrator ruled, as to the Wastes Manager position, that, because the incumbent performed hazardous duties that were not part of her usual job responsibilities and not taken into account in the classification of her position, and because protective gear could not afford complete protection, she was entitled to a 25% hazard pay differential under 5 U.S.C. § 5545(d) and Appendix A to Subpart I of Part 550 of title 5 of the Code of Federal Regulations (Schedule of Pay Differentials).[1] *Id*. at 15-17. As for the Hazardous Waste Disposer and Housekeeper Aid, Levels 1, 2, and 3 positions, the Arbitrator could find no legal basis for the Agency's claim that, in order for these positions to be entitled to EDP, the job classifications "must not have taken into account the hazards of the particular position." *Id*. at 18. Based on the evidence and arguments, the Arbitrator found that, because the incumbents in each of these positions were exposed to "high degree hazard of micro-organisims," they were entitled to EDP of 8% pursuant to 5 U.S.C. § 5343(c)(4) and Appendix J to Subpart E of Part 532 of title 5 of the Code of Federal Regulations (Schedule of Environmental Differentials).[2] *Id*. at 18.

III. Positions of the Parties

A. Agency's Exceptions

The Agency alleges that the award is contrary to law because the employees' "exposure risk . . . [was]

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1. 5 U.S.C. § 5545(d) provides, in pertinent part, that:

> The Office [of Personnel Management] shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard . . . . Under such regulations as the Office may prescribe . . . an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential –
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> > (1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof, except in such circumstances as the Office may by regulation prescribe; and
> >
> > (2) may not exceed an amount equal to 25 percent of the rate of basic pay applicable to the employee.

Appendix A to Subpart I of Part 550 provides that a 25% differential is warranted for exposure to hazardous agents, work with or in close proximity to:

> (5) Virulent biologicals. Materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection.

2. 5 U.S.C. § 5343(c) provides, in pertinent part, that:

> The Office of Personnel Management, by regulation, shall prescribe practices and procedures for . . . establishing wage schedules and rates . . . . The regulations shall provide –
> . . . .
>
> (4) for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or unusually severe hazards . . . .

Appendix J to Subpart E of Part 532 provides for EDP of 8% for

> Working with or in close proximity to micro-organisms which involves potential personal injury [for which] the use of safety devices and equipment . . . have not practically eliminated the potential for such personal injury.

practically eliminated through [the] use of the protective gear[.]" Exceptions at 3. According to the Agency, under both Agency guidance and Authority precedent, an employee is entitled to an environmental differential only "for exposure [to hazardous materials] . . . which cannot be practically eliminated." *Id*. at 3-6. Further, the Agency claims that the incumbent in the Wastes Manager position is not entitled to hazard pay because the employee "usually performed" the duties for which she was claiming hazard pay. *Id*. at 7. The Agency contends that employees are not entitled to hazard pay for duties that are usual, but rather, only for duties that are "not usually involved" or that are "unusually severe." *Id*. Finally, the Agency contends that the employees are not entitled to hazard pay and EDP because the employees' exposure to hazardous materials already was factored into their pay grades. *Id*. at 7-8.

B. Union's Opposition

The Union contends that the Agency's exceptions should be denied because they are mere disagreements with the Arbitrator's factual findings and, as such, do not provide a basis for finding the award deficient. Opposition at 3-4. Additionally, the Union contends that, to the extent the exceptions constitute a "contrary to law" argument, they should be denied because the Arbitrator correctly applied the applicable standards of law. *Id*. at 6-16.

IV. Preliminary Matters

A. Union's motion to strike.

The Union's opposition includes a Motion to Strike several portions of the Agency's exceptions. In its Motion to Strike, the Union argues that the Agency's counsel never mentioned, referred to, or submitted into evidence at the arbitration hearing or in the Agency's post-hearing brief "the statistical evidence of a ten year record of reported needle-stick and other potential blood-borne pathogen exposure[,]" referred to on pages 4 and 5 of the Agency's exceptions. Motion to Strike at 2. In its exceptions, the Agency states that it is "resubmit[ing] the statistical information that [it] referenced at the arbitration." Exceptions at 4. However, as the Union notes, the ten-year record includes an incident that occurred three days after the Arbitrator issued his decision and, thus, could not have been presented at the hearing. Motion to Strike at 3; *see also* Exceptions at 1 (stating date of award) and 5 (ten-year record listing event that occurred three days later).

Arbitration awards "are not subject to review on the basis of evidence that comes into existence after the arbitration hearing." *Office & Prof'l Employees Int'l Union, Local 268*, 54 FLRA 1154, 1156 n.1 (1998). Accordingly, because the statistical evidence came into existence after the arbitration hearing, we grant the Union's Motion to Strike.

B. The Agency's exceptions were timely filed.

The Union raises the question of whether the Agency's exceptions were timely filed. Opposition at 2-3. Section 7122(b) of the Statute requires that exceptions be filed thirty days from the date of service of the award. The Authority's Regulations, at 5 C.F.R. § 2429.22, provide that 5 days be added if the award is served by mail or commercial delivery. The award was sent via U.S. Mail on February 22, 2008. Opp'n at 2-3. Therefore, as the Union states, the Agency's exceptions should have been filed by March 27, 2008. *Id*. at 3. Because the Agency filed its exceptions via Federal Express, a commercial delivery service, the date of filing, at that time, would have been the date the Authority received the exceptions. 5 C.F.R. § 2429.21(b) (2008).[3] The record shows that the Authority received the exceptions on March 27, 2008. Accordingly, we find that the Agency's exceptions were timely filed.

V. Analysis and Conclusion

A. Whether 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.*

3. The Authority's Regulations, as amended effective November 8, 2009, now provide that a filing via a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service is considered filed on the date the matter is deposited with the commercial delivery service. 5 C.F.R. § 2429.21(b) (2010).

As an initial matter, we find that the Agency's argument that the award is contrary to law because the employees' exposure risk . . . [was] practically eliminated through [the] use of protective gear" is not properly before the Authority. Exceptions at 3. Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, raised or presented to the Arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). There is no indication in the record that the Agency raised this argument before the Arbitrator.[4] Accordingly, the issue is not properly before the Authority. *See id.*[5]

1. Hazard Pay

The Agency contends that the incumbent in the Wastes Manager position is not entitled to hazard pay because the employee "usually performed" the duties for which she was claiming hazard pay. Exceptions at 7. According to the Agency, employees are not entitled to hazard pay for duties that are usual, but rather, only for duties that are "not usually involved." *Id*.

Pursuant to 5 U.S.C. § 5545(d), a GS employee is entitled to a hazardous duty differential for any period in which "he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position."[6] In *Adair v. United States*, the U.S. Court of Appeals for the Federal Circuit defined the term "usually involved in carrying out the duties of his position" as "inherent in a position, which regularly recurs, and which is performed for a substantial part of the working time." 497 F.3d 1244, 1253 (Fed. Cir. 2007).

Here, the Arbitrator found that the incumbent in the Waste Manager position performed at least two hazardous duties: (1) the collection and transportation of "red bags" containing bio-hazardous waste and (2) the operation of equipment related to the disposal of medical and bio-hazardous waste material. Award at 15. Although the Arbitrator found that the employee performs the latter duty "only occasionally," he found that she collects and transports containers of bio-hazardous waste materials "daily – indeed, apparently for a significant period each work day." *Id.*; *see also id.* at 17 (noting employee's "direct, daily, hands-on contact with containers (red bags) of medical waste"). These factual findings, which are undisputed, support a conclusion that this duty is inherent in the Waste Manager position, regularly recurs, and is performed for a substantial part of the working time. As such, it is usually involved in carrying out the duties of the Waster Manager position. Because a GS employee is entitled to a hazard duty pay only if the hazard duty is not usually involved in the employee's position, contrary to the Arbitrator's holding, the incumbent in the Waste Manager position is not entitled to such pay.[7]

Accordingly, we find that the Arbitrator's conclusion that the incumbent in the Waste Manager

4. Although the Union asserted before the Arbitrator that "[p]rotective measures, including the clothing provided, are incapable of practically eliminating the hazards" of the Hazardous Waste Disposer and the Housing Aids, Level 3, positions, *see* Award at 10, the Agency does not appear to have responded to this argument. Moreover, the Agency did not assert that the employees' exposure risk was practically eliminated through the use of protective gear in its Post-hearing brief.

5. Even if the issue were properly before the Authority, the Arbitrator made explicit factual findings that the risk of exposure to bio-hazards experienced by the Hazardous Waste Manager, Hazardous Waste Disposer, and Housekeeper Aid, Level 3 positions was not practically eliminated through the use of protective gear. *See* Award at 6 (Hazardous Waste Disposer position), 8 ((Housekeeper Aid, Level 3 position), and 16 (Hazardous Waste Manager position). As for the Housekeeper Aid, Levels 1 and 3 positions, the Arbitrator found that incumbents in those positions are required to carry "red bags" of bio-hazardous waste on a daily basis and, therefore, were entitled to EDP of 8 percent. *Id.* at 8, 17-18. In making these findings, the Arbitrator had before him the Union's evidence that spillage or leakage from the "red bags" could occur easily and that protective gear could not practically eliminate the risk of exposure to bio-hazardous waste. *See* Opp'n, Attach. Ex. A at 28. The Agency did not rebut that evidence. As stated above, in applying the *de novo* standard of review, the Authority must defer to the Arbitrator's factual findings.

6. In addition, hazard pay is not warranted where the classification of the position "takes into account" the fact of such exposure to hazards. 5 U.S.C. § 5545(d).

7. The Arbitrator also found that the employee's daily exposure to the bio-hazardous materials was not taken into account in classifying her position. Award at 17. In enacting 5 U.S.C. 5545(d), Congress noted that "unusual physical hardships or hazards which are inherent in a position, which regularly recurs, and which is performed for a substantial part of the working time, are best compensated for through the regular position classification process[,]" rather than enhanced compensation." *Adair*, 497 F.3d at 1253. We note that Article 13 of the parties' agreement describes the process that an employee may follow if she believes her position is improperly classified.

position was entitled to hazard pay is contrary to law and grant the Agency's exception.

2. EDP

Pursuant to 5 U.S.C. § 5343(c)(4), the Office of Personnel Management is required to provide for WG employees "proper differentials . . . for duty involving unusually severe working conditions or unusually severe hazards." As the Arbitrator explained, those differential rates, 8% for high degree hazard and 4% for low degree hazard, are set out in Appendix J to Subpart E of Part 532.

Applying the legal standard in § 5543(c)(4) and the regulations, the Arbitrator found that the incumbents in the WG positions worked with, or in close proximity to, bio-hazardous waste and were exposed to a high degree of risk. Award at 17-18. The Agency claims, however, that the duties regularly performed by the WG positions are not "unusually severe" for purposes of § 5343(c)(4). Exceptions at 2, 7. Pursuant to § 5343(c)(4), OPM's regulations define "unusually severe" hazards warranting an EDP. The Arbitrator, based on the evidence and arguments, found that the WG positions fell within the "high degree hazard of micro-organisms" category within OPM's schedule of EDPs for "unusually severe" hazards, warranting an EDP of 8%. Award at 18. Except for its argument that the employees' exposure risk was practically eliminated -- an argument which, as discussed *supra*, is not properly before the Authority -- the Agency does not argue that the Arbitrator improperly placed the hazard within this EDP category. Moreover, contrary to the Agency's contention, unlike § 5545(d), § 5343(c)(4) does not provide that an employee is not entitled to EDP if the position's classification factored in exposure to hazards. *See supra* pages 2-3, nn.1-2.

Accordingly, we find that the Arbitrator's conclusion that the incumbents were entitled to EDP of 8% is consistent with the applicable standard of law. Therefore, we find that the award of EDP to the WG positions is not contrary to law and deny the Agency's exception.

VI. Decision

The Agency's exceptions are granted in part and denied in part.