64 FLRA No. 51

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
DETROIT, MICHIGAN
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4314

DECISION

December 24, 2009

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 Daniel M. Winograd 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 directed the Agency, in conjunction with the Union, to request Office of Personnel Management (OPM) approval of hazardous-duty pay for employees who were exposed to mold contamination in one of the Agency's facilities (the hazardous-duty-pay remedy). The Arbitrator also directed the Agency to reimburse the Union for expenses that the Union incurred in decontaminating the Union office located in one of the Agency's facilities (the cleaning-reimbursement remedy).

For the reasons that follow, we dismiss the exception regarding the hazardous-duty-pay remedy, and we set aside the cleaning-reimbursement remedy.

II. Background and Arbitrator's Award

As relevant here, the parties discovered mold in some of the Agency's facilities. *See* Award at 54-55. The Agency engaged in various remediation efforts, including hiring a contractor who used a chemical wash to clean a particular area. *See id.* at 57-58. Employees were neither informed that the chemical wash was being used nor given any instructions to avoid contact with the chemical or its fumes. Some employees became ill, and management temporarily evacuated the building. *See id.* at 57.

Subsequently, the Agency engaged in additional remediation efforts. *See id.* at 58-60. In addition, the Union, which has an office in one of the Agency's facilities, paid to have its office cleaned. *See id.* at 77.

Five grievances were filed regarding the Agency's remediation efforts, and when the grievances were unresolved, they were submitted to arbitration. *See id.* at 7, 10. As the parties were unable to agree on a statement of issues, the Arbitrator framed the issues as follows, in pertinent part:

> Has the Agency violated the applicable provisions of the Collective Bargaining Agreement and applicable law, rules, orders and regulations by failing to make every reasonable effort to provide and maintain safe and healthful working conditions in the [Agency's facilities, including the] Union offices since its discovery of mold contamination . . .? If so, what is the appropriate remedy? . . .
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> Are the employees who worked in [one of the facilities] on [the day of the chemical wash], entitled to hazardous duty pay under Articles 9, 81 and 102 of the Collective Bargaining Agreement, or other applicable law, rules, regulations or orders? If so, what is the appropriate remedy?

Id. at 3.

The Arbitrator found "[i]n general terms, the grievances assert that the Agency violated" Article 53, Sections 2 and 9 of the parties' agreement "by failing to make every reasonable effort to 'provide and maintain safe and healthful working conditions'. . ., and by failing to 'insure [sic] that proper safeguards are maintained to prevent injury to bargaining unit employees.'" [1] *Id.*

1. Article 53, Sections 2 and 9 provide, in pertinent part:

> Section 2. The Agency shall make every reasonable effort to provide and maintain safe and healthful working conditions. . . .
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> . . . .
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> Section 9. In the event of construction or remodeling within a facility, the Agency shall insure that proper safeguards are maintained to prevent injury to bargaining unit employees.

Award at 62.

at 62. The Arbitrator also found that Article 53, Section 1 of the agreement "amplifies those requirements[]" because it requires the Agency to comply with various provisions of law, including regulations promulgated by the Occupational Safety and Health Administration (OSHA).[2] *Id.* Further, the Arbitrator determined that "[t]he Agency's own Occupational Health and Safety order, FAA Order 3900.19B, confirms that the Agency has taken it upon itself to remediate toxic conditions as promptly and effectively as [possible]."[3] *Id.* at 64.

The Arbitrator stated that, as of the time of the arbitration proceedings, the Agency had "employed every reasonable means of abating the mold and preventing future problems." *Id.* at 72. However, the Arbitrator also stated that "[t]he success of [the Agency's final remediation] plan is yet to be determined[,]" and that some of the Agency's earlier mold-abatement measures had been "inadequate or incomplete[]" because the Agency or its contractors had sometimes "breached . . . some of the generally accepted standards" for the abatement of hazardous materials. *Id.* at 73, 65.

The Arbitrator addressed the Union's request that the Agency be directed to provide bargaining-unit members hazardous-duty pay as a result of having been required to work in a contaminated work environment since the discovery of the mold. *See id.* at 75. The Arbitrator stated that the Union "recognizes that the Agency lacks the authority to award hazardous duty pay without the approval of" OPM. *Id.* In this connection, the Arbitrator stated that "OPM regulations permit the OPM to award hazardous duty pay under circumstances where the job description of an employee does not involve the performance of dangerous work, but circumstances cause an unusual hazard to exist." *Id.* The Arbitrator stated that "[w]hether the OPM would consider it hazardous for an air traffic controller to be required to work in a mold contaminated building is an issue which should be raised with OPM and it cannot be decided by the arbitrator." *Id.* Thus, the Arbitrator stated that he "defer[red] to . . . OPM," and he directed that "the Agency, in conjunction with the Union, formulate a request to the OPM to approve hazardous duty pay for employees who have worked in the facility" since the discovery of the mold. *Id.* at 75-76.

The Arbitrator also addressed the Union's request to be reimbursed for the expenses that it had incurred in cleaning its office. The Arbitrator found that Article 53's obligation to provide a safe and healthful work environment includes the obligation to abate mold contamination, and that "[t]he Agency could not fully abate the contamination without decontaminating the Union's office[.]" *Id.* at 77. The Arbitrator determined that "[t]he Union performed . . . part of that function by having the contents of the office decontaminated[,]" and he concluded that, "[a]s the Agency would have been required to engage in the same process if the Union had not undertaken it, . . . the Union should be reimbursed for the expenses it incurred[.]" *Id.*

III. Positions of the Parties

A. Agency Exceptions

The Agency argues that the hazardous-duty-pay remedy is contrary to law because the Agency is not subject to the jurisdiction of OPM. In this regard, the Agency cites 49 U.S.C. § 40122(g)(2) and contends that its personnel management system (PMS) is exempt from the hazard pay provisions set

2. Article 53, Section 1 provides: "The Agency shall abide by P.L. 91-596 and Executive Order 12196, concerning occupational safety and health, and regulations of the Assistant Secretary of Labor for Occupational Safety and Health and such other regulations as may be promulgated by appropriate authority." Award at 4.

3. FAA Order 3900.19B provides, in pertinent part, that the Agency will "[e]valuate the workplace to identify the presence or potential for toxic and hazardous substances[,]" and "[i]f the presence of a toxic or hazardous substance(s) is identified, appropriate testing should be conducted by technically qualified safety personnel." Award at 6. It further provides, as relevant here, that if an

> exposure determination reveals that acceptable levels [of toxic and hazardous substances] are exceeded, a hazard control program should be established to remove or reduce the hazard, or substitute the substance with a less hazardous material. . . . To achieve compliance with exposure limits . . ., engineering controls must be evaluated and implemented whenever feasible. . . . When engineering controls are not feasible, nor sufficient to reduce exposure to within acceptable limits, administrative controls (such as, rotation of workers, employee training, etc.) shall be evaluated and implemented.

Id.

forth in 5 U.S.C. § 5545 and its implementing regulations.[4] Exceptions at 7. Additionally, the Agency contends that, although Article 81 of the parties' agreement provides that hazardous-duty pay differentials shall be paid by the Agency in accordance with 5 C.F.R. Part 550, Subpart I, the agreement "did *not* adopt the procedures of 5 [C.F.R.] § 550.903 for requesting that OPM amend its pay differential schedules."[5] Exceptions at 8 (emphasis in original).

The Agency also argues that the cleaning reimbursement remedy is contrary to the doctrine of sovereign immunity because the Arbitrator did not cite a statutory basis for the remedy. *Id.* at 5-6. In addition, the Agency contends that the remedy is contrary to OSHA regulations. *See id.* at 6-7.

B. Union Opposition

The Union argues that the Agency's exceptions should be dismissed under § 2425.2(d) of the Authority's Regulations because they do not include copies of the cases and regulations cited therein. *See* Opp'n at 4 (citing *U.S. DOJ, Fed. Bureau of Prisons, Corr. Inst., McKean, Pa.*, 49 FLRA 45 (1994) (*BOP McKean*), and *AFGE, Local 1815*, 47 FLRA 254 (1993) (*Local 1815*)). In addition, the Union contends that the exceptions should be dismissed under § 2429.5 of the Authority's Regulations because they consist of arguments that the Agency could have, but did not, raise before the Arbitrator. *See* Opp'n at 5. The Union also contends that the hazardous-duty-pay remedy is not contrary to law because, under Article 81 of the parties' agreement, the Agency is required to abide by 5 C.F.R. Part 550, and because the award is not contrary to OSHA regulations. *See id.* at 8-11.

Moreover, the Union contends that the cleaning-reimbursement remedy is not barred by sovereign immunity. In this connection, the Union asserts that a waiver of sovereign immunity may occur through a statute other than the one at issue in a particular case. *See id.* at 6. For support, the Union cites *Loeffler v. Frank*, 486 U.S. 549 (1988) (*Loeffler*), which the Union contends involved a situation "where the Back Pay Act was used to award pre-judgment interest in a Title VII suit[.]" Opp'n at 6. In addition, the Union asserts that 49 U.S.C. § 40122 requires the parties to bargain pursuant to the Statute, and that the Agency waived its sovereign immunity by agreeing to Article 53 and by the Agency head's approval of that article. *See id.* at 6-7.

IV. Analysis and Conclusions

A. The exceptions comply with § 2425.2 of the Authority's Regulations.

The Union asserts that the Authority should dismiss the Agency's exceptions under § 2425.2(d) of the Authority's Regulations. Section 2425.2 provides, in pertinent part, that "[a]n exception must be a dated, self-contained document which sets forth in full . . . (d) . . . legible cop[ies] of . . . pertinent documents." The Authority has found these requirements met where an excepting party cites Federal statutes and/or Authority decisions. *See, e.g., AFGE, Local 1698*, 57 FLRA 1, 2

4. 49 U.S.C. § 40122(g)(2) provides, in pertinent part, that "[t]he provisions of title 5 [of the United States Code] shall not apply to the new personnel management system[,]" with certain listed exceptions, including the Statute. *See* 49 U.S.C. § 40122(g)(2)(C). Chapter 55, which includes the statutory provisions relating to hazardous duty pay, is not a listed exception. *See* 49 U.S.C. § 40122(g)(2).

5 U.S.C. § 5545 provides, in pertinent part:

> (d) [OPM] shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard . . . . Under such regulations as [OPM] may prescribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of [title 5] 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 [OPM] may by regulation prescribe . . . .

5 C.F.R. § 550.903, which implements 5 U.S.C. § 5545, provides, in pertinent part:

> (a) A schedule of hazard pay differentials, the hazardous duties or duties involving physical hardship for which they are payable, and the period during which they are payable is set out as appendix A to this subpart and incorporated in and made a part of this section.
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> (b) Amendments to appendix A of this subpart may be made by OPM on its own motion or at the request of the head of an agency (or authorized designee). The head of an agency (or authorized designee) may recommend the rate of hazard pay differential to be established and must submit, with its request for an amendment, information about the hazardous duty or duty involving physical hardship . . . .

5. Article 81, Section 1 of the parties' agreement provides: "Hazardous duty pay differential(s) shall be paid by the Agency in accordance with 5 CFR Part 550, Subpart [I]." Award at 5. The pertinent provisions of 5 C.F.R. Subpart I are set forth supra, note 4.

(2001) (*Local 1698*) (Federal statutes); *SSA*, 59 FLRA 108, 109 n.4 (2003) (Authority decisions). By contrast, the requirements have not been met where an excepting party merely cites, without providing, agency-specific regulations. *See BOP McKean*, 49 FLRA at 49; *Local 1815*, 47 FLRA at 256-57.

The Agency's exceptions cite Federal statutes, government-wide regulations, and Authority and court decisions. These cited materials are the same types of materials that the Authority previously has not required parties to include in their exceptions. *See, e.g., Local 1698*, 57 FLRA at 2; *SSA*, 59 FLRA at 109 n.4. In this connection, they are not Agency-specific regulations to which the Authority would not otherwise have access. Accordingly, we find that the Agency's exceptions comply with § 2425.2 of the Authority's Regulations and, thus, we consider them.

B. The exception regarding the hazardous-duty-pay remedy is dismissed, but we consider the exception regarding the cleaning-reimbursement remedy.

The Union argues that the Authority should dismiss the Agency's exceptions under § 2429.5 of the Authority's Regulations. Under § 2429.5, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001) (Chairman Cabaniss concurring) (§ 2429.5 barred exception where agency's position before the arbitrator that a statute prohibited the union's requested remedy was inconsistent with its argument to the Authority that the statute was inapplicable).

With respect to the hazardous-duty-pay remedy, before the Arbitrator, the Agency expressly argued: "While the [Agency] has been exempted by statute from the OPM regulations interpreting the Hazardous Duty Act, those regulations were given effect by the Parties[']Collective Bargaining Agreement." Union Opp'n, Attachment 10 (Agency Post-Hearing Brief) at 33 n.3 (citations omitted). In other words, before the Arbitrator, the Agency conceded that the parties' agreement incorporates OPM regulations regarding hazardous-duty pay, which include 5 C.F.R. § 550.903. In its exceptions, the Agency claims that the parties' agreement does *not* incorporate 5 C.F.R. § 550.903 and, thus, that § 550.903 does *not* apply to the parties. This claim is inconsistent with the arguments that the Agency raised below. Accordingly, we dismiss this exception.

With regard to the cleaning-reimbursement remedy, the Agency contends that "[s]overeign immunity was addressed at arbitration[,]" but, even if it had not been raised, it is "jurisdictional . . . and may be raised . . . at any time." Exceptions at 5 n.3 (citing *Dep't of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995) (*Army*)). Although the record does not clearly indicate whether the Agency made its sovereign-immunity claim before the Arbitrator, "a claim of federal sovereign immunity can be raised at any time." *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005) (citing *Army*, 56 F.3d at 275). *Accord Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) (sovereign immunity is a matter of "jurisdiction and may properly be raised at any time."). Consistent with these principles, the Agency's sovereign-immunity argument is properly raised, and we consider it below.

C. The cleaning-reimbursement remedy is contrary to the doctrine of sovereign immunity.

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) (*Testan*)). 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 desire 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 *Army*, 56 F.3d at 277). "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 AFB*) (then-Member Pope dissenting in part on another matter) (citing *United States 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 AFB*, 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.

Here, the Arbitrator did not cite any statutory basis for the cleaning-reimbursement remedy. According to the Union, the Agency agreed to Article 53 as part of Congress' order to collectively bargain under the Stat-

ute, thereby waiving sovereign immunity, and this waiver was "validated" by the Agency-head review process under the Statute. Opp'n at 7. To the extent that the Union is citing the Statute as a waiver of sovereign immunity, the Statute does not waive sovereign immunity with respect to money damages. *See Army*, 56 F.3d at 277. Thus, the Union's reliance on the Statute is unavailing.

The Union also asserts that a violation of a statute can be remedied by another statute such as the Back Pay Act. *See* Opp'n at 6 (citing *Loeffler*, 486 U.S. 549). In this regard, the Back Pay Act, 5 U.S.C. § 5596, is a waiver of sovereign immunity. *See DOT*, 52 FLRA at 49 (citing *Testan*, 424 U.S. at 405). However, under the Back Pay Act, backpay is authorized only when: (1) an unjustified or unwarranted personnel action; (2) resulted in the withdrawal or reduction of "pay, allowances, or differentials." *See United States Dep't of Transp., FAA, Atlanta, Ga.*, 60 FLRA 985, 986 (2005) (Chairman Cabaniss concurring). Where a monetary remedy fails to satisfy the requirements of the Back Pay Act, and no other statutory waiver of sovereign immunity is present, the Authority has set aside the remedy. *See, e.g., DOT*, 52 FLRA at 49; *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 212 (2004) (*Gallup*) (Chairman Cabaniss dissenting in part on other grounds and then-Member Pope dissenting in part as to whether there was violation of underlying statute at issue).

A violation of a collective bargaining agreement is an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *See, e.g., U.S. Dep't of Transp., FAA*, 63 FLRA 502, 503 (2009). Thus, the Arbitrator's finding of a contract violation satisfies the first requirement of the Back Pay Act. *See id.*

With regard to whether the contract violation resulted in the withdrawal or reduction of pay, allowances, or differentials, OPM defines "pay, allowances, and differentials" as "monetary and employment benefits to which an employee is entitled by statute or regulation . . . ." 5 C.F.R. § 550.805. *See DOT*, 52 FLRA at 50-51 (payment of personal medical expenses not "pay, allowances, and differentials" under Back Pay Act). Thus, in order to constitute "pay, allowances, and differentials" recoverable under the Back Pay Act, a remedy must not only constitute "pay, leave, [or] other monetary employment benefits[,]" but also must be something to which the employee "is entitled by statute or regulation." *Gallup*, 60 FLRA at 212.

The Union does not assert, and the award does not provide, a basis for finding that the cleaning-reimbursement remedy that the Arbitrator awarded to the Union constitutes "pay, leave, [or] other monetary employment benefits" to which "an employee" is entitled "by statute or regulation[.]" Thus, there is no basis for finding that the Back Pay Act authorizes this remedy.

Based on the foregoing, we find that the Union has not established that sovereign immunity has been waived with respect to the cleaning-reimbursement remedy. Accordingly, we set aside that remedy as contrary to the doctrine of sovereign immunity. [6]

V. Decision

The cleaning-reimbursement remedy is set aside, and the Agency's exception regarding the hazardous-duty-pay remedy is dismissed.

6. Accordingly, it is unnecessary to address the exception alleging that this remedy is contrary to OSHA regulations.