64 FLRA No. 38

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
ATLANTA, GEORGIA
(Agency)

and

PROFESSIONAL AIRWAYS
SYSTEMS SPECIALISTS
(Union)

0-AR-4130

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DECISION

November 24, 2009

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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 Joshua M. Javits 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.

The Arbitrator sustained a grievance alleging that the Agency improperly revoked the grievant's incentive pay. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is an airway transportation systems specialist and is assigned to the Agency's New York Air Route Traffic Control Center (the facility). Under an Agency regulation, employees in the grievant's job series who are assigned to the facility are entitled to incentive pay. [1] In 2001, the grievant was appointed as the Union regional assistant to the Union vice president, and he began working from home performing representational duties on 100% official time. During this time, the grievant was still officially assigned to the facility. When the grievant was first approved for 100% official time in 2001, the Agency determined that he was no longer eligible for the incentive pay, and the Union filed a grievance. In resolution of the grievance, the Agency agreed to continue paying the grievant incentive pay "during his tenure in this position[.]" Award at 5.

In 2005, the Agency revoked the grievant's incentive pay after again determining that he was not eligible. The Union filed the grievance involved in this case, which, as relevant here, was submitted to arbitration on the following stipulated issue: "Did the Agency violate Agency policy, the collective bargaining agreement, and/or the law by revoking [the grievant's] Interim Incentive Pay (IIP)?" *Id.* at 2.

Although the Arbitrator found that the Agency reasonably determined that the grievant was not eligible for incentive pay under the Agency regulation because he was not physically performing his assigned duties at an eligible facility, the Arbitrator concluded that the Agency had acted within its discretion in entering into the settlement agreement in which it agreed to pay the grievant the incentive pay. In so concluding, the Arbitrator specifically rejected the Agency's claim that it had not entered into a settlement agreement. In addition, the Arbitrator found that the Agency violated the settlement agreement when it revoked the grievant's incentive pay. The Arbitrator further found that the settlement agreement had been incorporated into the parties' collective bargaining agreement and that, consequently, the violation of the settlement agreement also violated the parties' collective bargaining agreement.

For these reasons, the Arbitrator sustained the grievance. *Id.* at 28.

III. Positions of the Parties

A. Agency's Exceptions

Preliminarily, the Agency asserts that "[w]hile the [A]rbitrator did not specifically state [that] the grievant was entitled to premium pay, his decision nonetheless found [that] the [A]gency was obligated to pay it[.]" Exceptions at 4. On this basis, the Agency contends that the award is contrary to law for several reasons.

The Agency first asserts that the award violates § 7101(a) of the Statute because "paying an employee premium pay for work not performed is contrary to safeguarding the public interest[.]" *Id.* at 5. The Agency also asserts that the grievant was not entitled to the incentive pay because he was not performing the work of the Agency. The Agency notes that its appropriations acts prohibit it from paying an employee premium pay under 5 U.S.C. § 5546(a) unless the employee actually performed work during the time corresponding to the

1. The relevant regulation is set forth, in pertinent part, in the appendix to this decision.

premium pay. [2] *Id.* at 6. In addition, the Agency argues that the performance of union representational duties is not "work" within the meaning of § 5546(b) or § 7106(a)(2)(B) of the Statute. [3] *Id*. at 4. For these reasons, the Agency asserts that the settlement agreement is unlawful and unenforceable. *Id*. at 7.

The Agency further asserts that the awarded incentive pay is tantamount to an award of punitive damages and that the Back Pay Act does not authorize awards of punitive damages. Similarly, the Agency argues that, because there is no statutory authorization for the awarded pay, the award violates the doctrine of sovereign immunity.

B. Union's Opposition

The Union contends that the award is not contrary to law because the award enforces the parties' settlement agreement. In addition, the Union maintains that the Agency's agreement to pay the incentive is enforceable "even if [it] is inconsistent with the Agency's . . . regulations." Opp'n at 8.

The Union also maintains that the Agency's reliance on the Sunday and holiday pay provisions of § 5546 and its appropriations acts is misplaced because the grievance does not concern Sunday or holiday work and because § 5546 does not apply to the Agency. The Union further maintains that the definition of "work" under § 7106(a)(2)(B) of the Statute does not apply to the incentive pay at issue here. Finally, the Union asserts that the award does not violate the doctrine of sovereign immunity because the award is authorized by the Back Pay Act.

IV. Analysis and Conclusions

The Agency claims that the award is contrary to law because it implicitly awards incentive pay. The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. *NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE Local 1437*, 53 FLRA 1703, 1710 (1998

For the following reasons, even assuming that the Arbitrator implicitly awarded incentive pay, we conclude that the Agency fails to establish that the award is contrary to law.

Applying the general principle under the Statute that "collective bargaining agreements, rather than agency wide regulations, govern the disposition of matters to which they both apply[,]" the Authority has held that otherwise-enforceable contract provisions control any matter to which they apply even if they are inconsistent with the Agency's personnel management system regulations. *U.S. Dep't of Transp., Fed. Aviation Admin., Mike Monroney Aeronautical Ctr.*, 58 FLRA 462, 464 (2003) (*DOT*). Moreover, under Authority precedent, an otherwise-enforceable settlement agreement is enforceable in arbitration in the same manner as a collective bargaining agreement. *AFGE Local 12*, 61 FLRA 507, 508 (2006) (denying essence exception to an award enforcing a settlement agreement).

Under the Federal Aviation Reauthorization Act of 1996 (FAA Act), the Agency is expressly authorized to negotiate pursuant to the Statute with exclusive bargaining representatives concerning the compensation of its employees. [4] 49 U.S.C. § 40122(a)(1); *DOT*, 58 FLRA at 463. In this case, the Arbitrator found that the parties entered into a settlement agreement to continue the grievant's incentive pay. In this regard, the Arbitrator found that the settlement agreement was "signed at the [Agency's] highest level[,]" and that "[t]he Agency committed itself to providing [incentive pay] to the [g]rievant for the 'tenure of his position' with the Union." Award at 24. According to the Arbitrator, the Agency made this commitment "in spite of [its] policy" against paying the incentive in the circumstances of this case. *Id.* at 25.

There is no dispute that both the Agency's regulation and the settlement agreement apply to the incentive pay at issue and that the two conflict. Moreover, the Agency does not except to the Arbitrator's findings that: (1) the settlement agreement requires it to provide the grievant incentive pay for the duration of his tenure as a Union representative; and (2) the official making the agreement had actual authority to do so. Consequently, in these circumstances, the settlement agreement governs rather than the incentive pay regulation.

The Agency's sole argument regarding the enforceability of the settlement agreement is that the grievant is not entitled to incentive pay under the agreement because he did not perform work for the Agency. In this regard, the Agency relies on its appropriation acts

2. Relevant portions of 5 U.S.C. § 5546 are set forth in the appendix to this decision.

3. As relevant here, § 7106(a)(2)(B) sets forth management's right "to assign work[.]"

4. Relevant portions of the FAA Act are set forth in the appendix to this decision.

prohibiting the payment of premium pay under § 5546(a) unless the employee actually performed work. However, this prohibition is inapplicable here because this case does not involve premium pay under § 5546. The Agency also relies on Authority precedent holding that the performance of union representational duties is not "work" for the purpose of Sunday and holiday pay under § 5546. [5] However, this precedent is likewise inapplicable because the grievance in this case does not concern Sunday or holiday pay. Similarly, the Agency's reliance on Authority precedent defining "work" under § 7106(a)(2)(B) is misplaced because the right to assign work is also not at issue. The Agency does not contend that the award affects its right to assign work. Consequently, the Agency fails to establish the definition of work under § 7106(a)(2)(B) is controlling. Furthermore, the Agency has not identified any law, including the FAA Act, which would preclude it from agreeing to pay an incentive to Union representatives on official time.

It is not clear whether the Arbitrator provided a remedy. His award was solely to sustain the grievance. *See* Award at 28. However, assuming, without deciding, that the Arbitrator awarded a remedy, the remedy would encompass incentive pay authorized by the parties' enforceable settlement agreement, and not punitive damages. As such, the remedy is not contrary to the Back Pay Act as the Agency alleges. For the same reason, we conclude that the Agency fails to establish that such a remedy fails to safeguard the public interest in violation of § 7101(a) of the Statute. Finally, as the FAA Act authorized the Agency to negotiate with the Union regarding the compensation (including incentive pay) of its employees – and as the Agency does not dispute generally the enforceability of the settlement agreement – there is no basis for finding that an award of incentive pay pursuant to that agreement would be contrary to the doctrine of sovereign immunity.

Based on the foregoing, we deny the Agency's exceptions.

5. The Agency also claims that premium pay can never be paid for the performance of union representational duties. Contrary to the Agency's claim, in some circumstances, the performance of union representational duties is considered work for the purpose of premium pay. For example, under Fair Labor Standards Act regulations, "'[o]fficial time' granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work" including "overtime hours[.]" 5 C.F.R. § 551.424(b); *Assoc. of Civilian Technicians, Montana Air Chapter 29*, 57 FLRA 55, 58 (2001) (Chairman Cabaniss concurring and dissenting in part on other grounds) (official time is "hours of work" under § 551.424(b) for the purpose of overtime pay).

V. Decision

The Agency's exceptions are denied.

APPENDIX

49 U.S.C. § 40122(g)(2) provides, in pertinent part:

> (a) In general.
>
> > (1) Consultation and negotiation. In developing and making changes to the personnel management system . . . the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.
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> . . . .
>
> (g) Personnel management system.
>
> > (2) Applicability of title 5. The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of—
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> > (A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5;
> >
> > (B) sections 3308-3320, relating to veterans' preference;
> >
> > (C) chapter 71, relating to labor-management relations;
> >
> > (D) section 7204, relating to antidiscrimination;
> >
> > (E) chapter 73, relating to suitability, security, and conduct;
> >
> > (F) chapter 81, relating to compensation for work injury;
> >
> > (G) chapters 83-85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage; and

> (H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

As relevant here, 5 U.S.C. § 5546 provides:

> (a) An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work . . . a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay….
>
> (b) An employee who performs work on a holiday . . . is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—
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> (1) in excess of 8 hours; or
>
> (2) overtime work as defined by section 5542(a) of this title.

Personnel Reform Implementation Bulletin 009A provides, in pertinent part:

> Purpose: To establish ATS authority to use various incentives for attracting, hiring, and retaining personnel for hard to staff facilities and positions. **Policy/Guidance**: ATS retains the authority to design incentives to attract and retain employees for hard to staff facilities and to further define hard to staff facilities.
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> . . . .
>
> Chapter 1: Interim Incentive Pay
>
> In Airway Facilities (AF) this incentive covers **certain** employees in . . . job series . . . GS-2101[.] Those AF employees in the covered series who are assigned directly to the effected [sic] facilities are included in this incentive pay program. . . . The Interim Incentive Pay shall be paid in addition to the employee's base pay. . . .
>
> . . . .
>
> **General Provisions**: Payments under this program shall be made to employees on a quarterly basis. If an employee is detailed outside of the facility, on Leave Without Pay (LWOP), or in a part time status, the employee will receive payment on a pro-rated basis for the time actually worked in the facility. . . . An employee shall not be paid under this program for any quarter in which the employee separates from the covered facility, or is in the following status for any position of the quarter: Absent Without Leave (AWOL) or suspended.

Union Opp'n, Attach. 2 at 1-2 (emphasis original).