64 FLRA No. 15

BREMERTON METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
BREMERTON, WASHINGTON
(Agency)

0-AR-4237

DECISION

September 28, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Michael D. Rappaport filed by the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

As relevant here, the Arbitrator found that the Union's grievance seeking environmental differential pay (EDP) was not arbitrable. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Federal Office of Safety and Health Administration (OSHA) has the responsibility for determining the level known as the OSHA permissible exposure level (PEL), above which the presence of asbestos is deemed hazardous and could trigger the payment of EDP. Award at 1-2. The parties' agreement provides that EDP payments will be provided to those employees exposed to asbestos hazards that cannot be overcome or reduced to negligible levels. *Id.* The Agency asserts that it has a past practice of providing EDP to those employees exposed to asbestos at or above the OSHA PEL. *Id.* at 2.

Upon receipt of an arbitration award in another case that awarded EDP to employees exposed below the OSHA PEL, the Union filed a grievance alleging that the Agency had violated the parties' agreement by failing to pay EDP to those employees exposed to potentially harmful levels of asbestos. *Id.* Subsequent to the filing of the grievance, Congress passed Public Law 108-136 (the Act), which provides that, in order to trigger EDP, the asbestos exposure must be at the OSHA PEL or higher. [2] As relevant here, the Agency denied the grievance, stating that it was not arbitrable because it: was untimely; listed grievants who were former employees or supervisors; listed employees who previously received EDP; and listed employees exposed at or below the OSHA PEL who were therefore ineligible for EDP under the Act. *Id.* at 5.

The grievance was unresolved and was submitted to arbitration. The parties stipulated to the following issue: "Was the decision of the [Agency] to deny the grievance as non-grievable and/or untimely, or any part of that decision, proper? What should be the remedy if all, part, or none of the decision is found to have been proper?" *Id.* at 6. As relevant here, the Arbitrator found that the grievance was not arbitrable because the Act applied retroactively and prevented the Union from proceeding with the grievance unless the grievants had a reasonable expectation of proving that their asbestos exposure levels were above the OSHA PEL. [3]

1. Member DuBester did not participate in this decision.

2. As relevant here, Public Law 108-136 § 1122 states:

> (a) PREVAILING RATE SYSTEMS - Section 5343(c)(4) of title 5, United States Code, is amended by inserting before the semicolon at the end the following: and for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970.
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> (b) GENERAL SCHEDULE PAY RATES- Section 5545(d) of such title is amended by inserting before the period at the end of the first sentence the following: and for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970.
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> (c) Applicability - Subject to any vested constitutional property rights, any administrative or judicial determination after the date of the enactment of this Act concerning backpay for a differential established under sections 5343(c)(4) or 5545(d) of such title shall be based on occupational safety and health standards described in the amendments made by subsections (a) and (b).

Pub. L. No. 108-136 § 1122, 117 Stat. 1637-37 (Nov. 24, 2003).

Id. at 24. The Arbitrator further found that the grievants did not have a "vested constitutional property right" to EDP payments within the meaning of § 1122(c) of the Act because exposure to asbestos at a level below the PEL was not sufficient to establish such right. *Id.*

In addition, the Arbitrator found that the parties' agreement provided no entitlement to EDP for exposure below the PEL "even before the Act was passed." *Id.* In particular, as relevant here, the Arbitrator concluded that neither the parties' agreement nor federal law established a right to EDP payments for exposure at or below the OSHA PEL and that the parties' agreement did not define the threshold for payment of EDP as above or below the OSHA PEL. *Id.*

III. Preliminary Issue

Both parties filed motions to file supplemental submissions. In support of its motion, the Union filed a reply brief to address the Agency's alleged misstatements of the Union's arguments in its exceptions and to address new arguments raised by the Agency for the first time in its opposition. The Agency filed an opposition to the Union's motion and requested leave to address the Union's misstatements of the Agency's arguments. The Union filed a response.

Although, the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 provides that the Authority may, in its discretion, grant leave to file supplemental submissions as deemed appropriate based on a showing of need. *See, e.g., AFGE, Local 2004*, 55 FLRA 6, 9 (1998). As the parties do not sufficiently explain why the Authority should accept these supplemental submissions, the Authority will not consider them. *See, e.g., United States, Dep't of the Air Force, Minot Air Force Base, N.D.,* 61 FLRA 366, 367 (2005) (citing *NTEU, Chapter 137,* 60 FLRA 483, 483 n.2 (2004)) (Chairman Cabaniss dissenting on other grounds) (moving party needs to demonstrate why its supplemental submission should receive Authority review); *United States Dep't of the Treasury, United States Customs Serv., El Paso, Tex*., 52 FLRA 622, 625 (1996) (it is incumbent upon the moving party to demonstrate why the Authority should consider its supplemental submission).

IV. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law because the Arbitrator erred in applying the Act retroactively to the group grievance filed here, although the Union may still have had a claim for EDP for exposure at or below the OSHA PEL under the parties' agreement. Exceptions at 2-3. The Union states that the comments for Public Law 108-136 in the House Report say "nothing to suggest that Congress intended a retroactive application of this law to reach back to EDP already earned but not paid prior to the enactment of the bill." Exceptions at 19 (citing H.R. Report No. 108-354 at 762 (2003) *reprinted in* 149 Cong. Rec. 27,577 (2003)). The Union argues that if Congress is concerned about these arbitration awards that awarded EDP where the employees were exposed at a rate below the PEL, then it is "more logical" to conclude that the grievants in this case had a vested right, and not a mere "assertion," to EDP. *Id.* at 29.

The Union also argues that the Arbitrator's decision is contrary to federal law. The Union argues that Congress may prospectively reduce the pay of public employees, but may not eliminate "vested constitutional property rights," which have already been earned under the contract. *Id.* at 25-26 (citing *Schism v. U.S.*, 316 F.3d 1259, 1272-73 (Fed. Cir. 2002)). The Union asserts that the parties' agreement created a property right that is protected under the Fifth Amendment because the grievants have more than a unilateral expectation of receiving the benefit and have a legitimate claim of entitlement to the benefit. *Id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Finally, the Union alleges that the Arbitrator exceeded his authority by making a determination on the underlying merits of the Union's group grievance by finding that the Union had no "vested constitutional property rights." *Id.* at 31-32. In this respect, the Union argues that the Arbitrator was restricted to deciding timeliness and arbitrability issues and had no authority to decide the underlying merits. *Id.* at 31.

B. Agency's Opposition

The Agency argues that the Arbitrator correctly found that pay for federal employees is set by statute, finding that the Act expressly applies retroactively to bar the Union from proceeding with its claim. Opposition at 2, 26. The Agency claims that the Union's griev-

3. The Agency denied the grievance as non-grievable and untimely for nine separate reasons. The ninth reason cited by the Agency was that the grievance was not arbitrable under the Act. Award at 5. The Arbitrator addressed all nine reasons in his decision, finding that all but the ninth of the Agency's reasons were "not proper." *Id.* at 33. As the Arbitrator's findings with respect to those other reasons were not challenged in the exceptions, we do not address them further.

ance asserts a federal law pay claim and not a violation of the parties' agreement because it does not involve a condition of employment.

V. Analysis and Conclusions

As an initial matter, we find that the Arbitrator made a substantive arbitrability determination and not a procedural one. Procedural arbitrability involves procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused. Substantive arbitrability involves questions regarding whether the subject matter of a dispute is arbitrable. *Fraternal Order of Police, New Jersey Lodge 173,* 58 FLRA 384, 385 (2003) (Chairman Cabaniss dissenting) (*FOP*) (internal quotation marks and citations omitted). In particular, substantive arbitrability includes questions of subject matter jurisdiction — that is, whether the parties have agreed to arbitrate a particular category or type of dispute. *Id.*

In this case, the Arbitrator concluded that the grievance was not arbitrable because the Act applied retroactively to preclude the grievants' entitlement to EDP unless they could show a "vested constitutional property right," which he found they did not have. Award at 24. Thus, the Arbitrator found that the subject matter of the grievance was not arbitrable, and, as such, his determination constitutes a substantive arbitrability determination. *See FOP*, 58 FLRA at 385-86.

Where, as here, an arbitrator's substantive arbitrability determination is based on a statute, the Authority reviews that determination *de novo*. *See NTEU*, 61 FLRA 729, 732 (2006). 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 United States 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.*

The Union alleges that the Arbitrator erred in finding that the grievants had only a "mere assertion" to EDP and not a vested constitutional property right to EDP. Exceptions at 28-29. However, the Union does not assert that the Arbitrator's award fails to derive its essence from the parties' agreement. In particular, there is no contention that the Arbitrator erred in finding that the parties' agreement does not "establish that the [g]rievants had the right to receive EDP for exposure below the PEL even before the Act was passed." Award at 24.

The Arbitrator found that the parties' agreement did not provide a right to EDP for exposure below the OSHA PEL. *Id.* Accordingly, even if we were to assume that the Act did not apply retroactively, the grievants would not have a right to EDP for exposure below the OSHA PEL because the Arbitrator found that the parties' agreement does not provide EDP for exposure below the OSHA PEL. As the award is not contrary to law, we deny the Union's exception.

VI. Decision

The Union's exceptions are denied. [4]

4. Further, we need not address the Union's assertion that the Arbitrator exceeded his authority by determining that the grievants did not have a "vested constitutional property right to EDP" because the Arbitrator found (and the Union did not challenge his finding) that the parties' agreement does not provide a right to EDP for exposure at or below the PEL.