

67 FLRA No. 40

UNITED POWER
TRADES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
UNITED STATES
ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION
(Agency)

0-AR-4844

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DECISION

December 20, 2013

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Carol J. Teather issued an award finding that the Agency did not violate law or the parties' collective-bargaining agreement in failing to increase the wages of certain bargaining-unit employees, because the wage increases at issue constitute statutory-pay adjustments that are subject to § 147 of the Continuing Appropriations Act, 2011, as amended (Pay Freeze Act).¹ The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

There are two issues before us. The first is whether the award is contrary to law because the Arbitrator erred in finding that the wage increases constitute statutory-pay adjustments under the Pay Freeze Act. The second is whether the Arbitrator erred in basing her decision on the alleged nonfact that the Office of Personnel Management (OPM) designated a lead agency to develop wage schedules applicable to the bargaining-unit employees. We find that the award is not contrary to law and that the alleged nonfact is not a central fact underlying the award. We therefore deny the Union's exceptions.

¹ Continuing Appropriations Act, 2011, Pub. L. No. 111-242, § 147, 124 Stat. 2607 (2010), *as amended by* Continuing Appropriations and Surface Transportation Extensions Act, 2011, Pub. L. No. 111-322, sec. 1(a), § 147, 124 Stat. 3518, 3518-19 (2010).

II. Background and Arbitrator's Award

The Union represents approximately 600 Army Corps of Engineers operations and maintenance employees in the Agency's Pacific Northwest division. The Union filed a grievance on their behalf claiming that, in 2011, the Agency violated Article 17.3 of the parties' agreement and the Supplemental Appropriations Act of 1982 (SAA),² by failing to increase wages consistent with wage increases for Department of Energy (DOE) and Department of Interior (DOI) employees performing the same or comparable work.

Article 17.3 of the parties' agreement states, in relevant part, that:

[t]he basic pay and types of premium pay for bargaining[-]unit employees are established each year by the Department of Defense Wage and Salary Division (WSD). The law that confers this authority on the WSD is [the SAA]. That law provides that bargaining[-]unit employees shall be paid wages, as determined by WSD, to be consistent with wages of [DOE and DOI] employees performing comparable work in the corresponding area.³

The Agency denied the grievance, basing its decision on the Pay Freeze Act. The Pay Freeze Act states, in relevant part:

(b)(1) Notwithstanding any other provision of law, except as provided in subsection (e) [exempting the Non-Foreign Area Retirement Equity Assurance Act of 2009] no statutory pay adjustment which (but for this subsection) would otherwise take effect during the period beginning on January 1, 2011, and ending on December 31, 2012, shall be made.

(2) For purposes of this subsection, the term 'statutory pay adjustment' means –

(A) an adjustment required under section 5303, 5304, 5304a, 5318, or 5343(a) of title 5, United States Code; and

² Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 818, 832 (1982); 5 U.S.C. § 5343 note.

³ Award at 3.

(B) any similar adjustment, required by statute, with respect to employees in an Executive agency.⁴

The parties could not resolve the grievance and submitted it to arbitration. The issue, as stipulated by the parties, was whether the bargaining-unit employees were covered by the Pay Freeze Act.

The Arbitrator found it undisputed that the bargaining-unit employees at issue here are “prevailing[-]rate employees,” under the Prevailing Rate Systems Act of 1972⁵ (PRSA).⁶ The PRSA is based on the principles that “there will be equal pay for substantially equal work for all prevailing[-]rate employees who are working under similar conditions of employment in all agencies within the same local[-]wage area,” and that “rates of pay will be maintained in line with prevailing [private sector] levels for comparable work within a local[-]wage area.”⁷ The Arbitrator noted that, to effectuate these principles, the PRSA directs OPM to designate a “lead agency,” in each relevant wage area, to conduct wage surveys and develop wage schedules.⁸ Agency heads are then required to apply the wage schedules developed by their respective lead agencies. The Arbitrator further stated that OPM designated the Department of Defense Wage Fixing Authority (DODWFA) as the lead agency for the Agency.

The Arbitrator then explained that the SAA was signed into law to alleviate a disparity between the pay of bargaining-unit employees, whose wages were set by the PRSA statutory scheme, and the pay of DOE and DOI employees performing comparable work, whose wages were set through the collective-bargaining process. As relevant here, the SAA provides that:

Without regard to any other provision of law limiting the amounts payable to prevailing wage rate employees, United States Army Corps of Engineers employees paid from Corps of Engineers Special Power Rate Schedules shall be paid . . . wages as determined by the [DODWFA] to be consistent with wages of [DOE] and

[DOI] employees performing similar work.⁹

The Arbitrator found that the SAA “did not remove [bargaining-unit employees] from the requirements of [the] PRSA; it only changed the method by which [their] prevailing rate[s] [are] determined.”¹⁰ The Arbitrator thus concluded that adjustments to the bargaining-unit employees’ wages are “statutory[-]pay adjustments” pursuant to § 5343(a) of the PRSA, a statutory provision expressly subject to § 147(b)(2)(A) of the Pay Freeze Act.¹¹ The Arbitrator noted that § 147(b)(2)(B) of the Pay Freeze Act also defines statutory pay adjustments to include “similar adjustment[s] required by statute.”¹² On this basis, he found that even if the adjustments do not constitute statutory-pay adjustments under § 147(b)(2)(A), “they clearly qualify” as “similar adjustment[s]” and therefore, fall under § 147(b)(2)(B) of the Pay Freeze Act.¹³

Thus, the Arbitrator found that the Agency did not violate law or the parties’ agreement because, as the adjustments at issue constituted statutory-pay adjustments, the Pay Freeze Act precluded the Agency from adjusting the wages during the time relevant to the grievance.

III. Preliminary Matter: The Agency’s opposition is timely.

The Authority issued an order directing the Agency to show cause why its opposition should not be dismissed as untimely.¹⁴ Under the Authority’s Regulations, the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions.¹⁵ Generally, the parties are granted an additional five days to respond to documents served by first-class mail or commercial delivery.¹⁶ But a party is not entitled to an additional five days to file a responsive pleading when it is served by mail or commercial delivery and some other form of service on the same day.¹⁷

Here, the Union’s statement of service indicates that the Union served its exceptions on the Agency by both first-class mail and email on June 8, 2012.¹⁸ But the Agency did not file its opposition until more than thirty

⁴ *Id.* at 4 (citing Continuing Appropriations Act, 2011, § 147 (2010)) (see note 1 for complete statutory citation to § 147).

⁵ 5 U.S.C. §§ 5341-5349.

⁶ Award at 8.

⁷ *Id.* at 9 (quoting 5 U.S.C. § 5341) (internal quotation marks omitted).

⁸ *Id.* (quoting 5 U.S.C. § 5343(a)(1), (2), (3)) (internal quotation marks omitted).

⁹ *Id.* at 4 (quoting SAA) (internal quotation marks omitted).

¹⁰ *Id.* at 12.

¹¹ *Id.* at 13.

¹² *Id.*

¹³ *Id.*

¹⁴ Order to Show Cause (Order) at 1-2.

¹⁵ 5 C.F.R. § 2425.3(b).

¹⁶ *Id.* § 2429.22(a).

¹⁷ *Id.* § 2429.22(b).

¹⁸ Order at 2.

days later.¹⁹ The Agency asserts that its opposition is nevertheless timely because it filed its opposition within the additional five-day window, and it was entitled to do so because it did not agree to receive service of the Union's exceptions by email.²⁰

Section 2429.27(b)(6) of the Authority's Regulations states that documents may be served by email "but only when the receiving party has agreed to be served by email."²¹ The Union does not dispute the Agency's assertion that the Agency did not agree to service by email. Thus, the Union's exceptions were not properly served by email within the meaning of § 2429.27(b)(6).²² As the record demonstrates that the only proper method by which the Union served the Agency with its exceptions was by first-class mail, the Agency was entitled to an additional five days to file its opposition.²³ Because the Agency filed its opposition within the additional five-day period, we find the opposition timely.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union alleges that the award is contrary to law because the Arbitrator erred in finding that bargaining-unit employees' wage adjustments constitute adjustments required under § 5343(a) of the PRSA and thus, fall within the definition of statutory-pay adjustments under § 147(b)(2)(A) of the Pay Freeze Act.²⁴ The Union argues that, although the employees at issue here are "prevailing rate employees," as defined by the PRSA, their wages are determined solely by the SAA – a statutory provision that it contends is separate from the PRSA and therefore, not subject to § 147(b)(2)(A) of the Pay Freeze Act.²⁵

To support this argument, the Union asserts that the exclusionary language set forth in the SAA, stating that its terms are effective "[w]ithout regard to any other provision of law limiting the amounts payable to prevailing wage rate employees,"²⁶ establishes that the bargaining-unit employees' wages are set not by the PRSA, but only by the SAA – which sets wages in direct comparison to "other federal employees who obtain their pay increases through collective bargaining."²⁷ The

Union also claims that the "Agency's [s]upplement to the now[-]defunct OPM Federal Personnel Manual,"²⁸ identified the bargaining-unit employees as being part of a pay system "[o]ther [t]han the . . . Prevailing Rate System."²⁹ The Union contends that this is further evidence that wage adjustments under the PRSA do not apply to the bargaining-unit employees.³⁰

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.³¹ 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.³² In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those factual findings are deficient as nonfacts.³³

We first note that the Authority has long held that the SAA is an amendment to the PRSA, and that both provisions read together govern the wages at issue here.³⁴ The Union claims that this Authority precedent is incorrect and asserts that the SAA did not amend the PRSA but "is merely identified as a supplemental note" and therefore should be considered separate from the PRSA – excluding [bargaining-unit] employees from the PRSA's normal rate-setting provisions.³⁵ We disagree.

Contrary to the Union's argument, it is the effect of the SAA, rather than its form, that controls its application.³⁶ "[A]ny change of the scope or effect of an existing statute, by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement . . . is treated as amendatory."³⁷ Amendatory acts are construed as part of the existing statute, so that the provisions of the existing statute and its amendment "are given effect and reconciled."³⁸ Thus, despite its

²⁸ *Id.*

²⁹ *Id.* at 12.

³⁰ *Id.* at 11.

³¹ *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)).

³² *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).

³³ See, e.g., *AFGE, Local 1164*, 66 FLRA 74, 78 (2011).

³⁴ See *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, N. Pac. Div.*, 52 FLRA 670, 674 (1996); *accord Adams v. United States*, 979 F.2d 840, 841 (Fed. Cir. 1992) (finding that the PRSA amended by the SAA); *United Power Trades Org.*, 30 FLRA 639 (1987); *United Power Trades Council*, 21 FLRA 501 (1986).

³⁵ Exceptions at 11 n.5.

³⁶ See 1A Sutherland, Stat. Const., § 22.1 at 248 (7th ed. 2009).

³⁷ *Id.* at 245 (emphasis added).

³⁸ *Id.* § 22.35 at 400, 405.

¹⁹ *Id.*

²⁰ Agency's Response to Order at 1.

²¹ 5 C.F.R. § 2429.27(b)(6).

²² *AFGE, Local 1858*, 66 FLRA 913, 913-14 (2012).

²³ 5 C.F.R. § 2429.22(a).

²⁴ Exceptions at 10, 16.

²⁵ *Id.* at 10-11.

²⁶ *Id.* at 10 (quoting the SAA) (internal quotation marks omitted).

²⁷ *Id.* at 11.

identification as a supplementary note to 5 U.S.C. § 5343 and despite its exclusionary language, the SAA did not “terminate” or supersede the PRSA, but merely modified the provision to explain that certain U.S. Army Corps of Engineers employees’ wages shall also be consistent with the wages of DOE and DOI employees performing similar work.³⁹ Consequently, the provisions must be read together so that the terms of each provision are reconciled. On this basis, we affirm Authority precedent and find that the SAA amends the PRSA, so that their provisions must be read together.

Given our precedent, we find that the Union fails to show that the Arbitrator erred in finding that the PRSA, as amended by the SAA, governs the wages at issue here, and that any adjustment to those wages therefore constitutes a “statutory[-]pay adjustment” within the meaning of § 147(b)(2)(A) of the Pay Freeze Act. We also find that the Union’s contention that the Agency’s supplement to the now-defunct OPM Federal Personnel Manual evidences that wage adjustments under the PRSA do not apply to the bargaining-unit employees, provides no basis upon which to conclude that the Arbitrator’s award is contrary to law.

As an alternative argument, the Union claims that the Pay Freeze Act does not apply because the bargaining-unit employees’ pay adjustments under the SAA do not equate to “similar adjustment[s]” under § 147(b)(2)(B) of the Pay Freeze Act.⁴⁰ However, as we find that the Arbitrator’s conclusion pertaining to statutory-pay adjustments under § 147(b)(2)(A) of the Pay Freeze Act is not contrary to law, we find that there is no need to address the Union’s alternative argument concerning § 147(b)(2)(B), which challenges a separate and independent ground for the Arbitrator’s award.⁴¹

B. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact because the Arbitrator erroneously states that OPM designated DODWFA as the lead agency to develop wage schedules relevant to bargaining-unit employees at issue here.⁴² The Union argues that the SAA makes clear that, unlike other prevailing rate employees, OPM has no role in determining the lead agency to develop those schedules for bargaining-unit employees.⁴³

To establish that an award is based on a nonfact, the appealing party must show that a central fact

underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.⁴⁴ Assuming, without deciding, that the Arbitrator erred in stating that OPM has a role in designating a lead agency to develop wage schedules for these bargaining-unit employees, the Union does not demonstrate that, but for the Arbitrator’s alleged factual misstatement, she would have concluded that the employees’ wage adjustments are not statutory pay adjustments under the PRSA and the Pay Freeze Act – a statutory construction issue. Therefore, the Union has not demonstrated that the alleged misstatement constitutes a central fact underlying the award.⁴⁵ Accordingly, we find that the Union fails to show that the award is based on a nonfact and deny the Union’s nonfact exception.

V. Decision

We deny the Union’s exceptions.

³⁹ *Id.* at 245.

⁴⁰ Exceptions at 12-13.

⁴¹ *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 81 (2012).

⁴² Exceptions at 15-16.

⁴³ *Id.* at 15.

⁴⁴ *See U.S. DHS, CBP Agency, N.Y.C., N.Y.*, 60 FLRA 813, 816 (2005).

⁴⁵ *See U.S. Dep’t of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 49 FLRA 588, 595-96 (1994) (finding that the agency failed to show that the arbitrator’s misstatement constituted a nonfact).