70 FLRA No. 55

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-5225

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DECISION

June 26, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency denied the grievant's reimbursement request for medical expenses related to maintaining his air-traffic-controller certification. The Union filed a grievance alleging, in part, that the reimbursement denial is contrary to a government-wide regulation. Arbitrator Richard B. Danehy denied the grievance.

The main question before us is whether the award is contrary to law because, according to the Union, an Office of Personnel Management (OPM) regulation, 5 C.F.R. § 339.304, requires the Agency to reimburse employees for certain medical tests. Because § 339.304 does not obligate the Agency to reimburse employees for the medical tests at issue in this case, the answer is no.

II. Background and Arbitrator's Award

The grievant is an air-traffic-control specialist (ATC) at the Agency's Air Force base. A different agency, the Federal Aviation Administration (FAA), is charged with overseeing and regulating ATCs. The FAA requires ATCs to maintain an FAA-issued medical certificate (FAA certificate). To maintain this certificate, an ATC must recertify annually and undergo an "annual Class II" medical exam (annual exam) conducted by an administrative medical examiner (AME) qualified by the FAA.[1]

A memorandum of understanding (MOU) between the Union and the Agency also states that all ATCs must take an annual "Class II medical physical[]," and requires the Agency to reimburse ATCs "for the cost of the physical[]" "[p]ursuant to the [p]arties' [agreement] and 5 C.F.R. § 339.304."[2]

During the grievant's 2015 recertification process, the FAA, through the Agency, notified the grievant that in addition to his annual exam, he would need a pulmonary function test and a vision test (additional tests). After undergoing his annual exam, the grievant took these additional tests. The grievant then requested that the Agency reimburse him not only for the annual exam, but also for the additional tests' out-of-pocket costs. The Agency denied the grievant's reimbursement request, and the Union filed a grievance on behalf of the grievant and other similarly-situated bargaining-unit employees. All issues concerning similarly-situated employees have been resolved.

The grievance alleged that the Agency violated the MOU, the parties' agreement, and § 339.304,[3] by failing to reimburse the grievant for the additional tests the FAA required in order to recertify him. At the time the Union filed the grievance, § 339.304 provided that "[a]gencies shall pay for all examinations ordered or offered under this subpart."[4] Section 339.304 also provided that "where the purpose of the examination is to secure a benefit sought by the applicant or employee," the employee pays for the examination.[5] An amendment to § 339.304 proposed in 2007, but not adopted until after the award issued, added the requirement that an agency pay for "special evaluations or diagnostic procedures required by [the] agency."[6]

When the parties could not resolve the matter, they invoked arbitration. At arbitration, the Arbitrator framed the issue as: "Is the Agency required to reimburse [bargaining-unit employees] for any or all expenses incurred as a result of AME[-]requested medical consultations, surgical procedures, laboratory

[1] Award at 2.
[2] *Id.* at 6.
[3] 5 C.F.R. § 339.304 (2016). Unless otherwise stated, all references to § 339.304 are to the 2016 version, which the Arbitrator discussed.
[4] *Id.*
[5] *Id.*
[6] *See* Award at 7; *see also* 72 Fed. Reg. 73282, 73285 (Dec. 27, 2007). Section 339.304 has since been amended to include this requirement. *See* 82 Fed. Reg. 5340, 5349 (Jan. 18, 2017).

tests, etc. subsequent to the [bargaining-unit employees'] annual . . . exam?"[7]

As relevant here, the Arbitrator concluded that the Union failed to demonstrate that § 339.304 requires the Agency to reimburse employees for the cost of additional tests. The Arbitrator found that for purposes of the regulation, the FAA, not the Agency, is the "agency" that requires the additional tests.[8] The Arbitrator based his determination in part on findings that the FAA, not the Agency, sets the standards and implements physical and medical exams for ATCs. And based on those standards and exams, the FAA issues, revokes, or suspends a certificate to work as an ATC. Therefore, the Arbitrator determined, the FAA alone "orders" or "offers" examinations under § 339.304.[9] In the Arbitrator's view, the Agency only acted "as a conduit" in relaying what tests "the FAA [was] requesting."[10] Accordingly, because the Agency did not "order[]" or "offer[]" the additional tests, the Arbitrator concluded that § 339.304 does not require the Agency to pay for those tests.[11]

The Arbitrator found his conclusion reinforced by § 339.304's requirement that employees pay for tests whose purpose is to "secure a benefit."[12] The Arbitrator found that the tests enable an employee to secure a benefit by "retain[ing] an important job with decent wages and benefits."[13]

Moreover, the Arbitrator rejected the Union's reliance on the proposed 2007 amendment to § 339.304, addressing who pays "for special evaluations or diagnostic procedures."[14] The Arbitrator found that the proposed revision to § 339.304 "carrie[d] no weight" because OPM had not yet implemented it.[15]

Accordingly, the Arbitrator denied the grievance and ordered the Union to pay the arbitration's fees and expenses.

The Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions.

[7] Award at 8.
[8] *See id.* at 9-10.
[9] *Id.* at 9.
[10] *Id.* at 10.
[11] *Id.* at 9.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 8.
[15] *Id.*

III. Preliminary Matter: We consider the Union's supplemental submission, in part, and do not consider the Agency's supplemental submission.

The Union and the Agency each filed a supplemental submission. The Authority's Regulations do not provide for the filing of supplemental submissions, but § 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate.[16] Generally, a party must request leave to file a supplemental submission,[17] and explain why the Authority should consider the submission.[18] Where a party seeks to raise issues that it could have addressed, or did address, in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[19] The Authority may, however, take official notice of such matters as would be proper.[20] The Authority has generally taken official notice of documents not presented for the arbitrator's consideration when those documents are of widespread application, and not applicable only to one agency.[21]

The Union requested leave to file, and did file, a supplemental submission asking the Authority to take official notice of the revision to § 339.304 that OPM published after the Arbitrator issued the award.[22] The Union also asks the Authority to request an advisory opinion from OPM regarding the meaning of that regulation.[23]

As the revision to § 339.304 did not exist at the time of the arbitration hearing, we take official notice of this regulation.[24] We do not consider, however, the portion of the Union's supplemental submission that merely repeats or expands on arguments that the Union already made in its exceptions asking the Authority to

[16] 5 C.F.R. § 2429.26; *see also AFGE, Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*).
[17] *E.g., AFGE, Local 3571*, 67 FLRA 178, 179 (2014) (*Local 3571*).
[18] *Local 3652*, 68 FLRA at 396 (citing *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012)).
[19] *See, e.g., U.S. Dep't of HUD*, 69 FLRA 213, 218 (2016) (citations omitted); *see also Local 3652*, 68 FLRA at 396 (citing *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015)).
[20] 5 C.F.R. § 2429.5.
[21] *AFGE, Local 2142*, 58 FLRA 692, 693 (2003).
[22] Union's Supp. Submission at 1-2.
[23] *Id.* at 2-3.
[24] *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000) (taking official notice of government-wide OPM classification standard).

seek an advisory opinion from OPM.[25] We address the Union's request in Section IV., below.

The Agency failed to request leave to file its supplemental submission. Consequently, we will not consider that submission.[26]

IV. Analysis and Conclusion: The award is not contrary to law.

The Union contends that the award is contrary to § 339.304.[27] 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.[28] 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.[29] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[30]

The Union contends that the award is contrary to § 339.304 because, in the Union's view, the Agency – not the FAA – required the grievant to take the additional tests.[31] The Union explains that the Agency required the grievant to take the additional tests to satisfy an Agency-established requirement for the grievant to retain his FAA medical certificate.[32] The Union further asserts that the additional tests benefit the Agency, not the grievant.[33] Finally, the Union argues that the Authority should consider the revision to § 339.304 published in 2017 because the revision clarifies that the examinations an agency must pay for include "special evaluations . . . [and] diagnostic procedures" like the additional tests the grievant took.[34]

We are not persuaded by the Union's arguments. Rather, we agree with the Arbitrator that the "[a]gency" that ordered the additional tests is the FAA, not the Agency.[35] Section 339.304 requires an agency that "order[s] or offer[s]" an examination to pay for it.[36] As the Arbitrator found, the FAA, not the Agency, sets the standards and implements physical and medical exams for ATCs. And based on those standards and exams, the FAA issues, revokes, or suspends a certificate to work as an ATC. Also, as the Arbitrator found, the FAA – not the Agency – required the grievant to take the additional tests.[37] In short, the FAA, not the Agency, is in charge of the recertification process. And we agree with the Arbitrator that although the additional tests may benefit the Agency, they clearly "secure a benefit sought by the . . . employee"[38] – retention of the employee's job.

The revised version of § 339.304 does not alter our opinion. Like its predecessor, the 2017 version of the regulation assigns responsibility for medical-examination costs to the agency that "require[s]" or "offer[s]" the examinations.[39] As we explain, above, that "agency" in this case is the FAA, not the Agency.[40] And as we reject the Union's interpretation of § 339.304, we also reject the Union's related claim that the Union should prevail because § 339.304 controls this case and the Arbitrator misunderstood the relationship between government-wide regulations and collective-bargaining agreements.[41]

The Union's remaining arguments likewise lack merit. First, we find it unnecessary to seek, as the Union requests, an advisory opinion from OPM regarding whether § 339.304 requires the Agency to pay for the additional tests.[42] We find that the Arbitrator's interpretation of the regulation is consistent with its plain wording. Moreover, although OPM's advisory opinion on the regulation's interpretation would be entitled to deference, the Authority has never held that such an opinion would be binding.[43]

Second, we reject the Union's claim that the arbitration "fees and expenses [should] be reallocated to the Agency"[44] under the parties' agreement because the award is contrary to § 339.304. This claim is premised on the Union's proposed finding, contrary to our decision, that the award violates § 339.304.

V. Decision

We deny the Union's exceptions.

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[25] *AFGE, Local 2002*, 70 FLRA 17, 18 (2016).
[26] *See, e.g.*, *Local 3571*, 67 FLRA at 179.
[27] Exceptions at 7-8.
[28] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994) (citing 5 U.S.C. § 7122(a)(1)).
[29] *Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[30] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[31] Exceptions at 7-8.
[32] *Id.* at 6.
[33] *Id.* at 8.
[34] Union's Supp. Submission at 2.
[35] Award at 9.
[36] *Id.* at 7 (quoting 5 C.F.R. § 339.304).
[37] *Id.* at 8-10.
[38] 5 C.F.R. § 339.304.
[39] 5 C.F.R. § 339.304(a) (2017).
[40] *Id.*
[41] Exceptions at 5.
[42] *Id.* at 8.
[43] *See NTEU*, 68 FLRA 334, 339 (2015).
[44] Exceptions at 9.