70 FLRA No. 147

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
LITTLE ROCK DISTRICT
LITTLE ROCK, ARKANSAS
(Agency)

and

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 2219
(Union)

0-AR-5210

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DECISION

July 25, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

The central question of this case is whether bargaining-unit employees, working in a federally-operated, hydroelectric power plant, can be paid a night-differential wage under federal regulations when other comparable federal employees are not.

The Agency operates hydroelectric plants where the grievants work. On June 3, 2016, Arbitrator Vicki Peterson Cohen found that the grievants were entitled to night-differential pay pursuant to 5 U.S.C. § 5343(f), and awarded them backpay.

Because the Supplemental Appropriations Act of 1982 (SAA)[1] requires that the grievants be paid wages that are comparable to employees who are specifically denied a statutory entitlement to night-differential pay under § 5343, we find that the award is contrary to law and we vacate it.

[1] Pub. L. No. 97-257, 96 Stat. 818, 832 (1982).

II. Background and Arbitrator's Award

The grievants are prevailing-rate employees.[2] Under the SAA and Department of Defense Instruction (DODI) 5120.39, the Agency pays the grievants according to a pay schedule created by the Special Pay Branch of the Department of Defense Civilian Personnel Advisory Service, Wage and Salary Division (the Wage Fixing Authority). The Wage Fixing Authority's current pay schedule, the Southwest Power Rate Schedule, does not pay the grievants a night differential.

On May 1, 2015, the Union filed a grievance alleging that the Agency improperly failed to pay the grievants a night differential as required by § 5343(f) of the Prevailing Rate Systems Act of 1972 (PRSA).[3] Under § 5343(f), "[a] prevailing[-]rate employee is entitled to pay at his scheduled rate plus a night differential."[4] Unable to resolve the grievance, the parties submitted it to arbitration.

As relevant here, the Arbitrator framed the issue as: "Are the [g]rievants entitled to shift[-]differential pay pursuant to 5 [U.S.C.] § 5343(f)? If so, what is the appropriate remedy[?]"[5]

The Agency argued that there is no requirement to pay the grievants a night differential because the SAA requires the Wage Fixing Authority to survey the pay practices of comparable Department of Energy (DOE) and Department of the Interior (DOI) employees to determine what the prevailing pay practices are and to pay the grievants consistent with those practices. The Agency contended that, because the relevant DOE and DOI employees negotiated their pay without regard to § 5343(f)'s night-differential provision—and because the grievants' pay must be consistent with that of the surveyed DOE and DOI employees—the grievants are not entitled to a differential.

Following the Authority's rationale in *International Brotherhood of Electrical Workers, Local 2219* (*Local 2219*),[6] which concluded that a statutory entitlement to Sunday-premium pay pursuant to 5 U.S.C. § 6128(c) is not inconsistent with the SAA or DODI 5120.39,[7] the Arbitrator found that the SAA does not allow the Agency to set compensation without regard to § 5343(f)'s night-differential requirements. In *Local 2219*, the Authority found that Sunday-premium pay does not *limit* prevailing-rate-employee

[2] The definition of "prevailing rate employee" is set forth in 5 U.S.C. § 5342(a)(2).
[3] 5 U.S.C. §§ 5341-5349.
[4] *Id.* § 5343(f).
[5] Award at 3.
[6] 68 FLRA 448 (2015).
[7] *Id.* at 450.

compensation, but rather "requires agencies . . . *to increase* the pay" of such employees.[8]

The Arbitrator found that the SAA's "plain wording" states that the Wage Fixing Authority shall set wages "without regard to any other provision of law *limiting* the amounts payable to prevailing[-]wage[-]rate employees."[9] Applying *Local 2219*, she found that "§ 5343(f) is not a provision 'limiting' the amounts payable to prevailing[-]wage[-]rate employees. Rather, . . . it requires agencies to increase the pay of . . . employees working a night shift. Therefore, the [SAA] does not allow the Agency to set compensation without regard to . . . § 5343(f)."[10]

The Arbitrator also rejected the Agency's argument that not paying a night differential is consistent with prevailing DOE and DOI pay practices. She found that DOE and DOI "did not have regularly scheduled night shifts,"[11] and that therefore "there were no comparable [DOE or DOI] employees . . . by which to set a prevailing rate for [Agency] employees working rotating shifts."[12] The Arbitrator directed that employees who worked a night shift but did not receive a night differential should receive backpay.

On July 5, 2016, the Agency filed exceptions to the award,[13] and the Union filed an opposition to those exceptions on July 28, 2016.

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law, specifically, the SAA, because the award requires the Agency to pay the grievants a night differential under § 5343(f).[14]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[15] In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the relevant legal standard.[16] In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that those findings are nonfacts.[17]

DODI 5120.39 gives the Wage Fixing Authority the power to approve salaries, wages, and compensation policies for employees, including the grievants.[18] Accordingly, the Wage Fixing Authority established the Southwest Power Rate Schedule, which does not include a night differential, pursuant to the SAA. The SAA provides that:

> Without regard to any other provision of law limiting the amounts payable to prevailing[-]wage[-]rate employees, [Agency] employees paid from [Agency] Special Power Rate Schedules shall be paid . . . wages as determined by the . . . Wage Fixing Authority to be consistent with wages of the [DOE] and the [DOI] employees performing similar work in the corresponding area whose wage rates are established in accordance with [§] 9(b) of Public Law 92-392 or [§] 704 of Public Law 95-454.[19]

The Wage Fixing Authority established the grievants' wages consistent with comparable DOE and DOI employees whose wages were established in accordance with the cited Public Law sections. This distinguishes the present case from *Local 2219* and makes the Arbitrator's award contrary to law.

Public Law 92-392 is the PRSA.[20] Section 9(b) of the PRSA provides in part that

> [t]he amendments made by this Act shall not be construed to—
>
> (1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for

[8] *Id.*
[9] Award at 18 (quoting *Local 2219*, 68 FLRA at 450 (quoting SAA)).
[10] *Id.*
[11] *Id.* at 16.
[12] *Id.* at 17.
[13] In its exceptions, the Agency presents as evidence an agreement between a different union and agency, which it did not present to the Arbitrator, and requests that the Authority take official notice of it. Exceptions at 6 n.4. As the Agency could have presented this to the Arbitrator, but did not, we decline to take notice of or consider it. 5 C.F.R. §§ 2425.4(c), 2429.5.
[14] Exceptions at 3-11.
[15] *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)).
[16] *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277, *recons. denied*, 68 FLRA 807 (2015), *pet. for review dismissed sub nom., U.S. DHS, U.S. CBP v. FLRA*, No. 15-1342, 2016 WL 231956 (D.C. Cir. 2016).
[17] *E.g., AFGE, Nat'l Council 118*, 70 FLRA 63, 67 (2016).
[18] DODI 5120.39.
[19] Pub. L. 97-257, 96 Stat. 818, 832 (1982).
[20] Pub. L. 92-392, 86 Stat. 564 (1972).

> Government[-]prevailing[-]rate employees and resulting from negotiations between Government agencies and organizations of Government employees[.][21]

Section 9(b) of the PRSA has been generally held to mean that employees covered by this section negotiate their wages through collective bargaining, rather than having them set through prevailing-rate surveys.[22] Based on this, the DOE and DOI employees, who served as comparators for the grievants, set wages through collective bargaining. As far back as 1976, the Comptroller General determined that "Congress intended to exempt prevailing[-]rate employees who negotiate their wages from the effects of the amended prevailing[-]rate law."[23] After carefully reviewing the legislative history of § 9(b), the Comptroller General further determined that prevailing-rate employees who negotiate their wages through collective bargaining are exempted by § 9(b) from the statutory pay provisions, including provisions regarding night differentials.[24] Then the Comptroller General specifically concluded that the § 9(b) employees at issue were *not* entitled to the night-differential pay provided by § 5343(f).[25]

The SAA provision set forth above also refers to § 704 of Public Law 95-454, which is part of the Civil Service Reform Act (CSRA).[26] Congress used § 704 of the CSRA to enact the following Miscellaneous Provisions:

> (a) Those terms and conditions of employment and other employment benefits with respect to Government[-]prevailing[-]rate employees to whom [§] 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of [§] 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.
>
> (b) The pay and pay practices relating to employees referred to in paragraph (1) [treated as paragraph (a)] of this subsection shall be negotiated in accordance with prevailing rates and pay practices *without regard to any provision of—*
>
> > (A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;
> >
> > (B) *subchapter IV of chapter 53* and subchapter V of chapter 55 of title 5, United States Code; or
> >
> > (C) *any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53* or subchapter V of chapter 55 of title 5, United States Code.[27]

Like § 9(b), § 704(a) serves to "grandfather-in" bargaining rights for subjects that might otherwise be non-negotiable management rights under § 7106 of the Federal Service Labor-Management Relations Statute (Statute) or non-negotiable pay provisions reserved to agency regulation.[28] As noted by the U.S. Court of Appeals for the D.C. Circuit, "the two sections preserve historical subjects of collective bargaining that otherwise would be preempted by the PRSA or CSRA, or by other federal labor statutes."[29]

In light of § 704(a)'s meaning, § 704(b) preserves the status quo for collective bargaining concerning pay and pay practices of covered employees. The scope of collective bargaining for covered employees' pay and pay practices is limited to the specific subjects that were bargained before 1972,[30]

[21] *Id.*; *see also U.S. Dep't of the Interior, Bureau of Reclamation, Grand Coulee Power (Project) Office, Grand Coulee, Wash.*, 59 FLRA 101, 103-04 (2003).
[22] *Matter of Dep't of the Interior—Pay Adjustment Limitation*, 58 Comp. Gen. 251 (1979).
[23] *Matter of: Oil, Chem., & Atomic Workers Int'l Union—Entitlement of Prevailing Rate Employees Who Negotiate Wages to Statutory Night Differentials*, B-184858, 1976 WL 9835 (Comp. Gen. August 19, 1976).
[24] *Id.*
[25] *Id.*
[26] Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[27] *Id.* (emphasis added).
[28] *U.S. Info. Agency, Voice of Am. v. FLRA*, 895 F.2d 1449, 1451 (D.C. Cir. 1990) (Circuit Judge Williams concurring).
[29] *U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C. v. FLRA*, 23 F.3d 518, 521 (D.C. Cir. 1994) (*Bureau*).
[30] *U.S. Dep't of the Interior, Bureau of Reclamation, Rio Grande Project v. FLRA*, 908 F.2d 570, 574 (10th Cir. 1990);

"without regard to any provision of . . . subchapter IV of chapter 53 . . . or . . . any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53."[31] Section 5343(f), which is at issue here, is part of subchapter IV of Chapter 53, so Congress clearly intended that previously bargained pay and pay practices of employees covered by § 704 would continue to be negotiable without regard to any provision of § 5343(f).

Thus, by enacting § 704, Congress specifically intended that § 5343 and "(a)ny rule, regulation, decision, or order relating to rates of pay or pay practices" based on § 5343 must be disregarded when covered employees engage in collective bargaining over wages.[32] Covered employees include the DOE and DOI employees, whom the Wage Fixing Authority used for comparison. And they are still used as comparators regardless of whether they worked night shifts when the underlying grievance arose in this case. It does not matter whether the covered employees' collective-bargaining agreement contains a shift-differential-pay provision.[33]

Congress could not reasonably have intended that the grievants could assert a statutory entitlement to night-differential pay based on § 5343(f) *in addition to* receiving the wage rate negotiated by comparable DOE and DOI employees, yet deny those same DOE and DOI employees the same statutory entitlement to a night differential. Such an outcome would fail to implement Congress's stated intent to establish wage parity between the grievants and the DOE and DOI employees.[34]

Without an independent statutory entitlement to night differential, Congress could reasonably expect DOE and DOI bargaining units to negotiate wages that appropriately take that into account. Therefore, basing prevailing-rate-employee wages on wages bargained by these comparable DOE and DOI employees strikes the appropriate balance that Congress sought when enacting relevant provisions of the SAA and the Statute. Adding an independent statutory entitlement to night differential only for prevailing-rate employees would be antithetical to this interest.

The Arbitrator's finding to the contrary is in error, as is the Arbitrator's reliance on *Local 2219*. In *Local 2219*, the Authority sustained the arbitrator's award of a statutory entitlement to Sunday-premium pay pursuant to 5 U.S.C. § 6128(c).[35] In contrast to § 5343(f), which is at issue here, § 6128 is not explicitly referenced in the SSA or § 704. The *Local 2219* analysis of the SAA for purposes of Sunday-premium pay is inapplicable to the instant case.

For the foregoing reasons, we find that the award is contrary to law, and we vacate the award.[36]

IV. Decision

We grant the Agency's contrary-to-law exception and vacate the award.

see also Bureau, 23 F.3d at 525 ("[§§] 9(b) and 704 were designed to preserve for prevailing[-]rate employees the same scope of bargaining enjoyed by private[-]sector workers for those issues that were subjects of negotiation prior to enactment of the PRSA"); H.R. Rep. No. 95-1717, at 159 (1978) (Conf. Rep.) (§ 704 "provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy").

[31] Pub. L. No. 95-454, 92 Stat. 1111 (1978).

[32] *Id.*

[33] *Medler v. United States, Bureau of Reclamation, Dep't of the Interior*, 616 F.2d 450, 453 (9th Cir. 1980) ("[§] 9(b)(1) precludes the appellants from claiming any entitlement to . . . differential pay as provided in Pub. L. No. 92-392").

[34] *United Power Trades Council*, 21 FLRA 501, 503 (1986) ("The [Senate] Committee has been informed that certain [Agency] power plant operational personnel are paid less than personnel of the agencies doing comparable jobs in nearby locations. The Committee believes that all [f]ederal employees should receive comparable compensation for performing comparable work and has concurred with the House provision in the bill that would remove the inequity.").

[35] *Local 2219*, 68 FLRA at 450.

[36] Accordingly, we find it unnecessary to reach the Agency's remaining exceptions. *See* Exceptions at 3, 11-12.

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's award in this case. The Arbitrator correctly determined that the grievants are entitled to night-differential pay under § 5343 of the Prevailing Rate Systems Act of 1972 (PRSA)[1] and the Supplemental Appropriations Act of 1982 (SAA).[2]

Section 5343(f) of the PRSA provides, in pertinent part, that "[a] prevailing[-]rate employee is *entitled* to pay at his scheduled rate plus a night differential."[3] Section 5343(f) does not include any exceptions to this entitlement. Therefore, in order to find that prevailing-rate employees (like the grievants) are *not* entitled to a night differential, that restriction must be clearly set forth in another statutory provision.

The SAA, which addresses pay-setting for Agency prevailing-rate employees, does not include such a restriction. The SSA provides, in pertinent part:

> [Agency] employees paid from [Agency] Special Power Rate Schedules shall be paid . . . wages as determined by the . . . Wage Fixing Authority to be consistent with wages of the Department of Energy [(DOE)] and the Department of the Interior [(DOI)] employees *performing similar work* in the corresponding area whose wage rates are established in accordance with section 9(b) of Public Law 92-392 or section 704 of Public Law 95-454.[4]

Thus, under the SAA, the Wage Fixing Authority sets the grievants' pay "to be consistent" with wages of DOE and DOI employees who perform *similar work*.[5] But unlike the grievants, and as the Arbitrator found,[6] the DOE and DOI employees that the Wage Fixing Authority used as comparators do *not* perform night-shift work. Therefore, because the grievants and the pertinent DOE and DOI employees do not perform "similar work," the Wage Fixing Authority should not have used these other employees as comparators. The Wage Fixing Authority was therefore not restricted, for consistency reasons, from granting the grievants a night differential.

This conclusion is consistent with the policies behind both the PRSA and the SAA. Regarding the policies behind the PRSA, § 5341 provides that Congress intended for prevailing-rate employees' pay be fixed and adjusted "based on principles that": (1) "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;" (2) "there will be *relative differences in pay* within a local wage area *when there are substantial or recognizable differences in*," among other things, "*duties[and] responsibilities* . . . among positions;" (3) "the level of rates of pay will be maintained in line with prevailing levels for *comparable work* within a local wage area;" and (4) "the level of rates of pay will be maintained so as to *attract and retain* qualified prevailing[-]rate employees."[7]

In other words, the PRSA is intended to ensure that prevailing-rate employees receive equal pay for substantially equal (or comparable) work, but that there be relative *differences* in pay when there are substantial or recognizable differences in duties or responsibilities. The PRSA is also intended to ensure that pay is set to attract and retain prevailing-rate employees. Ensuring that the grievants receive night-differential pay, even though DOE and DOI employees, who do not work night shifts, (obviously) do not receive night-shift differentials, is consistent with these policies.

Regarding the policies behind the SAA, relevant legislative history makes clear Congress's concern with eliminating inequities affecting, among others, Agency power-plant employees. This legislative history notes that

> [t]he [Senate] Committee has been informed that certain Corps of Engineers power plant operational personnel are paid less than personnel of the agencies doing comparable jobs in nearby locations. The Committee believes that all [f]ederal employees should receive comparable compensation for performing *comparable work* and has concurred with the House provision in the bill that would *remove the inequity*.[8]

In other words, in the SAA, Congress was concerned with ensuring that the Agency's prevailing-rate employees receive comparable pay for

[1] Majority at 1.
[2] Pub. L. No. 97-257, 96 Stat. 818, 832 (1982).
[3] 5 U.S.C. § 5343(f) (emphasis added).
[4] Pub. L. 97-257, 96 Stat. 818, 832 (1982) (emphasis added).
[5] *Id.*
[6] Award at 16-17.
[7] 5 U.S.C. § 5341 (emphasis added); *see also Medler v. United States, Bureau of Reclamation, Dep't of the Interior*, 616 F.2d 450, 453 (9th Cir. 1980) (discussing 5 U.S.C. § 5341).
[8] S Rep. No. 97-516, 97th Cong., 2nd Sess. 80 (1982) (emphasis added).

comparable work, and that they would no longer be *disadvantaged*; that is, that they would no longer suffer an *inequity*, relative to DOE and DOI employees. These policy concerns, focusing on eliminating Agency employees' disadvantages relative to DOI and DOE employees, further support interpreting the SAA as *not* being intended to deprive the grievants of their entitlement to night-differential pay. Such pay is not an issue for the DOE and DOI employees whom the Wage Fixing Authority used as comparators.

The majority's reliance on § 9(b) of the PRSA and § 704 of Public Law 95-454[9] is misplaced. Regarding § 704 in particular, that provision states that "[t]he pay and pay practices relating to" relevant DOE and DOI employees "shall be negotiated . . . without regard to any provision of" 5 U.S.C. §§ 5341-3549 and 5 U.S.C. §§ 5541-5550(b).[10] This wording merely reflects that, in negotiating their pay and pay practices, relevant DOE and DOI employees are not constrained by the specific provisions of 5 U.S.C. §§ 5341-5349 and 5 U.S.C. §§ 5541-5550(b). But § 704 does not take away the grievants' right to night-differential pay simply because DOE and DOI employees, who do not work night shifts, omit, for obvious reasons, to negotiate night-differential pay into their collective-bargaining agreements.

Also without merit is the majority's suggestion that granting the grievants a night differential is inconsistent with "Congress's stated intent to establish wage parity between the grievants and the DOE and DOI employees."[11] As discussed above, Congress acknowledged in the PRSA that "there will be *relative differences in pay* within a local wage area *when there are substantial or recognizable differences in*," among other things, "*duties*[*and*] *responsibilities* . . . among positions."[12]

Similarly without merit is the majority's suggestion that granting the grievants a night differential would give the grievants an undeserved double benefit.[13] It is not clear, and the majority does not explain, how and why DOE and DOI employees might "negotiate wages that appropriately take . . . into account"[14] those employees' lack of an entitlement to a night differential for night work they do not do. Such speculation by the majority verges on the meaningless.

Because the majority's rationales for setting aside the award are incorrect, and consequently the majority's decision is fundamentally flawed, I disagree with the majority, and would find that the award is not contrary to the SAA. I would also deny the Agency's contrary-to-law exception challenging the award as deficient under the Back Pay Act.[15]

[9] *See* Exceptions at 3-4.
[10] Pub. L. 95-454, 92 Stat. 1111 (1978).
[11] Majority at 6.
[12] 5 U.S.C. § 5341 (emphasis added).
[13] *See* Majority at 6-7.
[14] *Id.* at 7.
[15] Exceptions at 11-12; 5 U.S.C. § 5596.