

**71 FLRA No. 20**

UNITED STATES  
DEPARTMENT OF ENERGY  
WESTERN AREA POWER ADMINISTRATION  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3824  
(Union)

0-AR-5396

DECISION

April 26, 2019

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

**I. Statement of the Case**

The Agency has the sole-and-exclusive discretion to set the rates of pay for power-system dispatchers (dispatchers), so it was contrary to law for the Arbitrator to permit the Union to challenge the dispatchers' holiday-pay rate through the parties' negotiated grievance procedure. Accordingly, we set aside Arbitrator Fred D. Butler's award holding otherwise.

**II. Background and Arbitrator's Awards**

Historically, the Agency had difficulty retaining dispatchers because they could earn more money elsewhere. Therefore, Congress gave the Agency the authority to set dispatchers' rates of basic and premium pay, "[n]otwithstanding provisions of title 5 [of the] United States Code [(Title 5)]," but required that dispatchers' "rates [be] based on those prevailing for similar occupations in the electric power industry."<sup>1</sup> The Agency has exercised this pay-setting authority since 1989.

The Union filed a grievance on behalf of a group of dispatchers who alleged that they were not receiving the prevailing rate of pay for work on holidays. The Agency denied the grievance. At arbitration, as relevant here, the Arbitrator addressed whether the grievance was arbitrable and whether the Agency should have paid the dispatchers a higher rate of holiday premium pay.

Before the Arbitrator, the Agency emphasized that it had the authority to set dispatchers' pay notwithstanding Title 5, which contains not only the compensation provisions that apply to most federal-government employees, but also the Federal Service Labor-Management Relations Statute (the Statute).<sup>2</sup> And the parties negotiated their grievance procedure *pursuant to* the Statute. Therefore, because the Agency had the authority to set dispatchers' pay *notwithstanding* the Statute, the Agency argued that the dispatchers could not challenge their rates of holiday premium pay through a grievance.

The Arbitrator rejected the Agency's argument, citing the "important function[s]" of the negotiated grievance procedure and arbitration in the federal sector.<sup>3</sup> Further, the Arbitrator found that the Agency had failed to provide dispatchers with prevailing holiday premium pay, and he awarded the grievants backpay.<sup>4</sup> Finally, because the Union prevailed on most of the issues before the Arbitrator,<sup>5</sup> he made the Agency responsible for two-thirds, and the Union responsible for one-third, of the costs of arbitration.

On July 25, 2018, the Agency filed exceptions, to which the Union filed an opposition on August 23, 2018. And on July 29, 2018, the Union filed exceptions, to which the Agency filed an opposition on August 31, 2018.

**III. Analysis and Conclusion: The award is contrary to the Agency's sole-and-exclusive discretion to set dispatchers' pay.**

The Agency argues that dispatchers' holiday premium pay is not subject to grievances or arbitration because the Agency's pay-setting authority operates "notwithstanding" Title 5, which includes the Statute.<sup>6</sup>

If a law indicates that an agency's discretion over a matter is "sole and exclusive" – in other words,

<sup>1</sup> Act of Nov. 1, 1985, Pub. L. No. 99-141, 99 Stat. 564. In the same provision, Congress maintained an overall limit on dispatchers' rates of pay, but that limit is not relevant here.

<sup>2</sup> 5 U.S.C. §§ 7101-7135.

<sup>3</sup> Award at 19.

<sup>4</sup> The parties later requested, and the Arbitrator provided, a clarification of his award. But because that clarification is not relevant here, we do not discuss it further.

<sup>5</sup> The Union did not prevail on an issue concerning the timing for implementing pay raises.

<sup>6</sup> Agency's Exceptions Br. at 12.

that such discretion is intended to be exercised only by the agency – “then the agency is not obligated under the Statute to exercise that discretion through collective bargaining.”<sup>7</sup> However, in *NTEU, Chapter 302* (*Chapter 302*), the Authority held that, once an agency exercises its sole-and-exclusive discretion to establish an employee-compensation system, “*individual applications*” of that system may be subject to grievances and arbitration.<sup>8</sup>

This case illustrates why the distinction between *establishing* a compensation system and *applying* that system is untenable in the context of sole-and-exclusive discretion.<sup>9</sup> Here, the Agency exercised its sole-and-exclusive discretion to establish a rate of holiday premium pay.<sup>10</sup> Nevertheless, the Union filed a grievance on behalf of a group of dispatchers contesting the *individual application* of that pay rate – a grievance of the type that the majority decision in *Chapter 302* would permit. Then, using the grievance and arbitration processes that the Statute provides, the Union obtained an award that directs the Agency to *change* its rate of holiday premium pay.

By allowing the grievance and arbitration processes to apply to this dispute, the precedent set in *Chapter 302* permitted the Union to employ provisions of Title 5 – namely, the Statute – to override the Agency’s pay-setting discretion, even though Congress prohibited that very result.<sup>11</sup> Therefore, we overrule previous decisions that distinguished between establishing and applying compensation systems in the context of sole-and-exclusive discretion.<sup>12</sup> If an agency’s discretion over a matter is “sole and exclusive,” then the exercise of that discretion is not subject to negotiation *or* grievances and arbitration.<sup>13</sup>

Applying that rule here, the Arbitrator’s award is contrary to the statute granting the Agency sole-and-exclusive discretion to set dispatchers’ pay notwithstanding Title 5. Accordingly, we set aside the award.<sup>14</sup>

#### IV. Decision

We set aside the award.<sup>15</sup>

<sup>7</sup> *NTEU*, 59 FLRA 815, 816 (2004); *see also, e.g., Dep’t of VA, VA Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 162, 164 (1992) (citing *U.S. DOD, Office of Dependents Sch.*, 40 FLRA 425, 441-43 (1991); *NTEU*, 30 FLRA 677, 682 (1987)).

<sup>8</sup> 65 FLRA 746, 748 (2011) (Member Beck dissenting) (emphasis added).

<sup>9</sup> *See id.* at 751 (Dissenting Opinion of Member Beck) (“If [certain] . . . compensation decisions are not subject to the coverage of our Statute, then, *a fortiori*, they are not subject to the grievance and arbitration procedures that exist pursuant to our Statute.”).

<sup>10</sup> Award at 7 (noting that the Agency pays double wages on holidays).

<sup>11</sup> Act of Nov. 1, 1985, Pub. L. No. 99-141, 99 Stat. 564.

<sup>12</sup> *NTEU, Chapter 299*, 65 FLRA 857, 858-59 (2011) (Member Beck dissenting); *Chapter 302*, 65 FLRA at 749-750.

<sup>13</sup> *See U.S. DOD, Nat’l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 841-43 (2002) (Member Pope dissenting) (applying this rule), *overruled by Chapter 302*, 65 FLRA at 750.

<sup>14</sup> Because we are setting aside the award on this basis, we need not address the Agency’s other contrary-to-law arguments. Agency’s Exceptions Br. at 11 (subject-matter jurisdiction), 14 (failure to defer to Agency’s statutory interpretation), 15-16 (sovereign-immunity violation), 17 (reliance on inapplicable statutes), 17-18 (management-rights violations); *see, e.g., U.S. Dep’t of the Navy, Naval Supply Sys. Command, Fleet Logistics Ctr.*, 70 FLRA 817, 818 n.14 (2018) (Member DuBester dissenting) (Authority did not consider additional arguments after setting aside award). And because we are setting aside the backpay remedy, we do not address the Union’s exceptions challenging the backpay amounts. Union’s Exceptions at 5-7 (compounding interest), 9 (additional holiday pay and earlier pay-raise implementation). Those exceptions are moot. *E.g., U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 n.6 (2012) (Member DuBester dissenting) (citing *U.S. Dep’t of VA, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, 62 FLRA 508, 511 n.4 (2008)).

<sup>15</sup> The Agency filed nonfact and essence exceptions challenging the Arbitrator’s division of arbitration expenses. Agency’s Exceptions Br. at 21-23. But our decision changes the premises on which the Arbitrator allocated those expenses. Further, the parties’ agreement makes clear that such allocations are strictly within the province of the Arbitrator. Agency’s Exceptions, Attach. 6, Collective-Bargaining Agreement, Art. 13, § 7.11.1 (“The arbitrator shall be empowered to determine the percentages of their fee for which each party is liable. . . . [T]he arbitrator shall be bound by the relative merits of each party’s case. . . . The arbitrator shall prepare written justification for their determination.”). Therefore, we remand this issue to the parties for resubmission to the Arbitrator, absent settlement, to resolve in light of our decision about the Agency’s sole-and-exclusive discretion. *See AFGE, Local 3294*, 70 FLRA 432, 437 (2018) (remanding allocation of arbitration expenses for redetermination).

**Member DuBester, dissenting:**

The majority's decision represents its latest assault upon the primary role played by the negotiated grievance procedure under our Statute.<sup>1</sup> Reversing Authority precedent, the majority deprives a union recourse to challenge an agency's misapplication of its statutory mandate to establish basic and premium pay rates. Because the majority's decision cannot be reconciled with the Statute's language, legislative history, and purpose, I dissent.

The Arbitrator concluded that the Agency failed to compensate its dispatchers in accordance with Public Law 99-141, which requires it to establish the dispatchers' rates of basic and premium pay "based on those prevailing for similar occupations in the electric power industry."<sup>2</sup> Rather than assessing the merits of the Arbitrator's conclusion, the majority concludes that continued adherence to *National Treasury Employees Union, Chapter 302 (NTEU, Chapter 302)*<sup>3</sup> is "untenable," and that the Agency's authority under Public Law 99-141 to establish compensation rates "[n]otwithstanding provisions of Title 5" excludes any complaint regarding application of that compensation system from the scope of the parties' negotiated grievance procedure.<sup>4</sup>

We have been down this road before. Indeed, the Authority rejected this premise in *NTEU, Chapter 302*<sup>5</sup> because it is contrary to the plain language of the Statute and the principles underlying the collective-bargaining relationship. For the same reasons, I do so here again.

First, the majority ignores the broad scope and importance Congress afforded to negotiated grievance procedures. The Statute broadly defines a "grievance" to include "any complaint . . . by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."<sup>6</sup> In enacting the Statute, Congress explained that "[a]ll matters that under the provisions of law could be submitted to the grievance procedures shall in fact be

within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures."<sup>7</sup>

Consistent with Congressional intent, particular subject matters may be excluded from the scope of grievance procedures by operation of law. This is illustrated by Section 7121(c) of the Statute, which excludes specifically enumerated matters from the scope of the grievance procedure. Additionally, a law creating an exclusive appeals procedure with regard to certain matters may preclude the use of the negotiated grievance procedure to challenge those matters, so long as there are "clear, specific indications that the statutory procedures were intended to be exclusive."<sup>8</sup> However, Public Law 99-141 neither excludes complaints regarding the dispatchers' compensation from the scope of the parties' grievance procedure nor creates an exclusive procedure for appealing applications of the Agency's established compensation policy.<sup>9</sup>

Second, the majority's decision fundamentally misconstrues the difference between the *scope* of bargaining permitted by the Statute and the *enforceability* of parties' agreements by means of the negotiated grievance procedure. As noted in *NTEU, Chapter 302*, agreements over matters that may be outside the duty to bargain are still enforceable in arbitration.<sup>10</sup> Unions may also file grievances concerning conditions of employment established by laws and government-wide regulations over which they are not entitled to bargain.<sup>11</sup>

Confusing these concepts, the majority hangs its decision on the phrase in Public Law 99-141 stating that the Agency should establish the dispatchers'

<sup>1</sup> See, e.g., *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell Fort Worth, Tex.*, 70 FLRA 890, 893 (2018) (Dissenting Opinion of Member DuBester) ("the majority's constricted interpretation of 'grievance' ignores the special importance Congress attributed to the Statute's broadly inclusive grievance and arbitration procedures").

<sup>2</sup> Act of Nov. 1, 1985, Pub. L. No. 99-141, 99 Stat. 564.

<sup>3</sup> 65 FLRA 746 (2011) (Member Beck dissenting).

<sup>4</sup> Majority at 1, 3.

<sup>5</sup> 65 FLRA 746.

<sup>6</sup> 5 U.S.C. § 7103(a)(9)(C)(ii).

<sup>7</sup> *NTEU, Chapter 15*, 33 FLRA 229, 236 (1988) (quoting Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 1717, 95th Cong. 2d Sess., 157, reprinted in 1978 U.S. Code Cong. & Admin. News 2723, 2891) (emphasis added).

<sup>8</sup> *NTEU, Chapter 302*, 65 FLRA at 748 (quoting *AFGE, Local 3258*, 53 FLRA 1320, 1325 (1998)).

<sup>9</sup> Matters may also be excluded from the scope of the negotiated grievance procedure by the parties, pursuant to Section 7121(a)(2) of the Statute. The parties have not done so in this case.

<sup>10</sup> *NTEU, Chapter 302*, 65 FLRA at 749; see also, e.g., *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395, *recons. denied*, 56 FLRA 935 (2000) (contract provisions involving permissive subjects under § 7106(b)(1) of the Statute are enforceable in arbitration).

<sup>11</sup> See, e.g., *U.S. Dep't of the Treasury, IRS, Okla. City, Okla.*, 64 FLRA 615, 615 (2010) (addressing grievance alleging improper termination of grievant's grade and pay retention); *NTEU, Chapter 302*, 65 FLRA at 749 (noting that "grievances regularly are filed regarding agencies' alleged misapplication of established wage rates").

compensation system “[n]otwithstanding provisions of title 5.”<sup>12</sup> As with the provisions at issue in *NTEU, Chapter 302*, however, there is nothing in Public Law 99-141 to suggest that Congress intended this language to remove complaints regarding the *application* of the compensation system from the scope of the parties’ negotiated grievance procedure. Nor has the majority pointed to any other law that would dictate this conclusion.<sup>13</sup>

Rather, the majority announces that it must discard our well-reasoned precedent in *NTEU, Chapter 302* because the “distinction between *establishing* a compensation system and *applying* that system is untenable in the context of sole-and-exclusive discretion.”<sup>14</sup> In the majority’s view, permitting the Union to grieve an allegedly unlawful application of the dispatchers’ compensation system allowed it to “override the Agency’s pay-setting discretion.”<sup>15</sup> But even assuming that Public Law 99-141 grants the Agency “sole-and-exclusive discretion” to establish the dispatchers’ compensation system, the Union’s grievance did not threaten that discretion. Instead, as recognized by the Arbitrator, the grievance simply challenged whether the Agency “violate[d] Public Law 99-141” with respect to the manner in which it compensated the dispatchers.<sup>16</sup> Complaints of this sort fall squarely within the definition of a “grievance” under the Statute.<sup>17</sup>

Moreover, in resolving the grievance, the Arbitrator did not usurp the Agency’s authority to establish the dispatchers’ compensation rates – he simply ordered the Agency to do so within the confines of the law.<sup>18</sup> This outcome is only “untenable” if one concludes that the Agency’s discretion to establish the dispatchers’ pay system grants it license to disregard the Congressional constraints placed upon the exercise of this discretion. In the face of the plain language of our Statute, its legislative history, and well-reasoned Authority precedent, I decline to do so.<sup>19</sup>

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<sup>12</sup> Majority at 1.

<sup>13</sup> See, e.g., *NTEU, Chapter 302*, 65 FLRA at 749 (“[T]he mere fact that the Agency had no duty to *bargain* over compensation does not compel a conclusion that alleged misapplications of the Agency’s established compensation system ... are not *grievable*.”).

<sup>14</sup> Majority at 3.

<sup>15</sup> *Id.*

<sup>16</sup> Award at 4; see also *id.* at 8 (“The Union maintains that the Agency is violating Public Law 99-141 by failing to pay prevailing wages locally for holiday premium pay.”).

<sup>17</sup> 5 U.S.C. § 7103(a)(9).

<sup>18</sup> Award at 21 (“In this case, the Agency by not following PL 99-141 resulted in the Employees not receiving the holiday pay that they were entitled and Title 5 and the Union contract is the avenue by which to achieve redress.”).

<sup>19</sup> I would therefore consider the Agency’s remaining exceptions, as well as the exceptions filed by the Union.