

**71 FLRA No. 196**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JAMES J. PETERS VA MEDICAL CENTER  
BRONX, NEW YORK  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1168  
(Union)

0-AR-5486

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DECISION

October 5, 2020  
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Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member Abbott dissenting)

**I. Statement of the Case**

Arbitrator George Aleman sustained the Union's grievance alleging that the Agency violated the parties' collective bargaining agreement by failing to provide safe working conditions for housekeeper and laborer employees. The questions before us are whether the award: (1) is incomplete, ambiguous, or contradictory, (2) is contrary to law, or (3) fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the award is impossible to implement, fails to support its contrary-to-law exception, and challenges the Arbitrator's factual findings rather than his interpretation of the parties' agreement, we deny the exceptions.

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

The Agency's housekeeping and laborer employees (the grievants) are responsible for cleaning patient rooms and other patient areas. In discharging these duties, the grievants handle both general waste and regulated medical waste.

In September 2015, the Union advised several Agency management officials that the storage room containing medical waste was unsafe and the grievants

were being exposed to hazardous working conditions. A year later, the Union notified Agency management that the grievants still were being exposed to hazardous waste without proper training regarding the use of personal protective equipment (PPE). Citing Article 29 of the parties' agreement, the Union requested both environmental differential pay (EDP) and proper training per Occupational Safety and Health Administration (OSHA) guidelines for the grievants.

Article 29 of the parties' agreement contains various provisions related to health and safety.<sup>1</sup> Specifically, it requires the Agency to comply with OSHA standards and to provide employees with personal protective equipment (PPE) and training to use it properly.<sup>2</sup> Additionally, Article 29, Section 28 provides for EDP when employees are exposed to hazardous conditions.<sup>3</sup>

The Union subsequently filed a grievance alleging that the Agency violated Article 29 because the grievants were not properly trained or provided adequate equipment to handle medical waste, and because the Agency failed to pay the grievants EDP. In February 2017, the Agency denied the grievance and the Union referred the grievance to arbitration.

In April 2017 – after the Agency denied the grievance, but before the arbitration hearing – OSHA notified the Agency that it had inspected the Agency's facility from October 2016 to April 2017 and found that the Agency had committed three serious violations. Specifically, OSHA found that the Agency: (1) failed to require protective eye equipment where there was a reasonable probability of injury that could be prevented by such equipment; (2) failed to ensure that employees used appropriate PPE when there was occupational exposure to blood borne pathogens; and (3) did not

<sup>1</sup> Award at 3-4.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 4. Article 29 requires EDP to be paid, in accordance with 5 C.F.R. Part 532, Subpart E, Appendix A, to an employee “who is exposed to an unusually severe hazard, physical hardship, or working condition meeting the standards described under the categories stated therein.” *Id.* (quoting Art. 29, § 28(A)(1) of the parties' agreement). In relevant part, 5 C.F.R. § 532.511 states that, “[i]n accordance with [5 U.S.C. § 5343(c)(4)], an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management.” 5 C.F.R. § 532.511 (2019). The Arbitrator noted that 5 C.F.R. Part 532, Subpart E, Appendix A at Part II provides that a four percent differential shall be paid to employees working at a “low degree hazard” with “micro-organisms.” Award at 4 (citing 5 C.F.R. Pt. 532, Subpt. E, App. A (2019)); *see also* Award at 5, 8, 10-11, 13 (crediting testimony that employees were exposed to biohazardous waste without proper training and equipment).

ensure that appropriate safety training was provided to employees on at least an annual basis.

At arbitration, the Arbitrator concluded that the Agency violated Article 29 by denying the grievants proper training in the use of PPE, denying them necessary PPE in the performance of their duties, and failing to pay them EDP for handling hazardous waste. He noted that the Agency's current standard operating procedures (SOP) listed only gloves as necessary PPE, rather than the OSHA-required PPE. Therefore, he discredited an Agency witness's contrary testimony that the SOP "should be read" as implicitly including all necessary PPE.<sup>4</sup> And based on the plain wording of the SOP, the Arbitrator found that employees "seeking guidance" from the SOP regarding necessary PPE would "reasonably conclude" that gloves are the only required PPE.<sup>5</sup>

Additionally, the Arbitrator concluded that the Agency "concede[d]" that OSHA found that the Agency committed serious violations related to the handling of hazardous materials without the use of proper PPE and training in the use of PPE, and did not "seriously contest[]" the evidence that it had failed to correct those violations.<sup>6</sup> And he found that, until these issues were addressed, the grievants were entitled to EDP as a result of their exposure to these hazardous conditions.<sup>7</sup>

Consequently, the Arbitrator concluded that the Agency violated Article 29 of the parties' agreement. As a remedy, he ordered the Agency to provide the grievants with all necessary PPE and with training on the use of PPE, and to make the grievants whole by paying four percent environmental differential pay to all grievants who were in a pay status from September 8, 2015 through the date that the Agency issues a new SOP or modifies its existing one to expressly include, in addition to gloves, all necessary PPE for handling medical waste.

The Agency filed exceptions to the award on March 21, 2019. The Union filed an opposition on April 16, 2019.

<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 13 ("The Agency's only real argument here is that the [EDP], to which the housekeepers and laborers are otherwise entitled, should be limited to the OSHA inspection period of October 2016 to April 2017"); *see also id.* at 12 (Agency contended that EDP remedy "'should be limited to the period of October 2016 to April 2017,' the OSHA inspection period").

<sup>7</sup> *Id.* at 13-16.

### III. Analysis and Conclusions

#### A. The award is not incomplete, ambiguous, or contradictory as to make implementation impossible.

The Agency argues that the award is incomplete and ambiguous because the Arbitrator did not expressly state that former employees should receive environmental differential pay and because he did not provide a fixed date when the Agency's obligation to provide environmental differential pay would end.<sup>8</sup>

The Authority has held that for an award to be found deficient as incomplete, ambiguous, or contradictory, "the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain."<sup>9</sup> While the Agency claims that the award is ambiguous because the Arbitrator did not expressly state that former employees should receive environmental differential pay,<sup>10</sup> the award clearly delineates the backpay period and specifies that any grievant who was in pay status during the relevant period is entitled to the remedy.<sup>11</sup> Further, the Authority has specifically rejected alleged ambiguities as a basis for finding an award deficient on this ground when – as here<sup>12</sup> – the arbitrator has retained jurisdiction to clarify the award.<sup>13</sup>

The Agency also argues that the award "does not impose a fixed obligation on [the Agency] in terms of completion of its monetary obligation."<sup>14</sup> On this point, the Agency contends that, because it will be obligated to bargain with the Union before issuing an SOP, there may be an "indeterminate time period" before it issues a revised SOP.<sup>15</sup> However, the Authority has held that an award is not impossible to implement merely because its implementation may depend on bargaining between the parties.<sup>16</sup>

Consequently, we deny this exception.

<sup>8</sup> Exceptions at 5-6.

<sup>9</sup> *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 n.30 (2019).

<sup>10</sup> Exceptions at 5-6.

<sup>11</sup> Award at 17.

<sup>12</sup> *Id.*

<sup>13</sup> *U.S. DHS, U.S. CBP*, 68 FLRA 253, 258 (2015) (holding that any such ambiguities are for clarification by the arbitrator and provide no basis for finding the award deficient) (citing *U.S. VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011)).

<sup>14</sup> Exceptions at 6.

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

<sup>16</sup> *See, e.g., U.S. DOJ, Fed. BOP*, 68 FLRA 546, 548 (2015); *U.S. EPA*, 63 FLRA 30, 32 (2008).

**B. The Agency does not support its argument that the award is contrary to law.**

The Agency states that the award is contrary to law because the award denies the Agency substantive due process.<sup>17</sup> To support this exception, however, the Agency merely “adopts and incorporates by reference” its arguments supporting its first exception and contends that the award denies it substantive due process because it does not “finally dispose[] of the rights of the parties.”<sup>18</sup>

We have already concluded that the award is not incomplete, ambiguous, or contradictory as to make its implementation impossible. Insofar as the Agency has failed to provide any additional argument in support of its contrary to law exception, we deny this exception as unsupported.<sup>19</sup>

**C. The award does not fail to draw its essence from the parties’ agreement.**

In rejecting the Agency’s argument that it had taken adequate efforts to remedy the violations found by

OSHA, the Arbitrator found that employees would reasonably conclude that the only PPE required by the Agency’s SOP is protective gloves.<sup>20</sup> The Agency argues that this finding “manifest[ly] disregard[s]” Article 29 of the parties’ agreement, which lists “[s]ome commonly needed types of PPE” in addition to gloves.<sup>21</sup> In reaching this finding, the Arbitrator discounted the testimony of the Agency’s witness who asserted that the SOP implicitly included PPE in addition to gloves.<sup>22</sup> Instead, the Arbitrator credited the grievants’ testimony about their lack of knowledge and training regarding the necessary PPE, and found that employees reading the SOP would reasonably conclude that gloves are the only required PPE.<sup>23</sup> The Agency’s disagreement with the Arbitrator’s factual findings on this issue does not provide a basis for finding that the award fails to draw its essence from the parties’ agreement.<sup>24</sup>

Consequently, we deny the Agency’s essence exception.<sup>25</sup>

**IV. Decision**

We deny the Agency’s exceptions.

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<sup>17</sup> When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by an exception and the award de novo. In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are based on nonfacts. *See, e.g., U.S. Dep’t of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016).

<sup>18</sup> Exceptions at 6.

<sup>19</sup> Section 2425.6(e)(1) of the Authority’s Regulations provides that an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground” listed in § 2425.6(a)-(c). 5 C.F.R. § 2425.6(e)(1). Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception. *See, e.g., NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (citing *AFGE, Nat’l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014)).

Our dissenting colleague’s assertion that the award is contrary to law because the Arbitrator “failed to make the findings that are required by 5 C.F.R. Part 500 and Appendix A” misses the mark. Dissent at 1. At the outset, the Agency raised no such objection in its exceptions to the Award. Moreover, to the extent that our colleague suggests that the Arbitrator’s award of EDP was based solely upon the fact that the Agency had committed OSHA violations, this is simply incorrect. To the contrary, the Arbitrator both recognized and applied the regulations specifically governing EDP in reaching this conclusion. And because aspects of the Agency’s OSHA violation were relevant to this analysis, the Arbitrator can hardly be faulted for considering these findings – in addition to the robust evidentiary record developed at arbitration – in reaching this conclusion.

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<sup>20</sup> Award at 15.

<sup>21</sup> Exceptions at 7.

<sup>22</sup> Award at 15.

<sup>23</sup> *Id.* at 15-16.

<sup>24</sup> *AFGE, Local 3354*, 64 FLRA 330, 333 (2009) (“disagreement with an arbitrator’s factual finding does not provide a basis for concluding that an award fails to draw its essence from an agreement”).

<sup>25</sup> Chairman Kiko notes that where an agency has properly implemented “safety devices and equipment and other safety measures” so that the agency *has* “practically eliminated the potential for personal injury” for the position at issue, EDP would not be appropriate under the regulations. *See, e.g., 5 C.F.R. Part 532, Subpart E, Appendix A.*

**Member Abbott, dissenting:**

I would conclude that the Arbitrator's award here is contrary to law for the same reasons as the award in *U.S. Department of VA, John J. Pershing VA Medical Center (Pershing VAMC)*,<sup>1</sup> a case that involved the same contract provisions, the same agency (different facility), and essentially the same issue – here, environmental differential premium (EDP) and, in *Pershing VAMC*, hazard pay differential (HPD). In both cases, the central allegation is that the employees are entitled to an elevated differential because the Agency has failed to properly abate certain dangers associated with the handling of hazardous waste materials.

Contrary to the majority's baseless assertion, the evidentiary record here is no more "robust" than it was in *Pershing VAMC*.<sup>2</sup> In most respects, the Arbitrator's findings and directed relief are even more conclusory and overreaching than those made by the arbitrator in the earlier case. Furthermore, the Arbitrator and the majority place great stock in findings of certain violations that OSHA made regarding hazardous materials as part of the investigation requested by the same grievants. That fact, however, is no more relevant to determining whether the grievants are entitled to EDP than if the Arbitrator had found that the sky is blue.

Two points are relevant. First, the Arbitrator here, just as the arbitrator in *Pershing VAMC*, failed to make the findings that are required by 5 C.F.R. Part 500 and Appendix A.<sup>3</sup> Second, the Agency, Union, and Arbitrator all agree that OSHA investigated and found specific regulatory violations concerning the handling of hazardous materials – the same allegations made by the Union in its grievance.

Thus, insofar as the grievants are concerned that the Agency has not taken all of the abatement actions recommended by OSHA as a result of their earlier OSHA complaint, the appropriate avenue of relief is through the enforcement proceedings set forth in 29 U.S.C. § 659. It is not for this or any arbitrator to enforce OSHA abatement recommendations.<sup>4</sup>

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<sup>1</sup> 71 FLRA 769 (2020) (Member DuBester dissenting).

<sup>2</sup> Majority at 5 n.19.

<sup>3</sup> 5 C.F.R. Part 550, Subpart I, App. A.

<sup>4</sup> See 29 U.S.C. § 659; see also 29 U.S.C. § 662.