73 FLRA No. 146

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ENGLEWOOD, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 709
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5889

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DECISION

December 13, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union filed a grievance alleging the Agency violated the parties' collective-bargaining agreement and law when it failed to pay bargaining-unit employees (employees) hazard-pay differential (HPD) during the COVID-19 pandemic (pandemic). Arbitrator Pilar Vaile issued an award that sustained the grievance and awarded backpay. The Agency filed a contrary-to-law exception to the award. Because the Arbitrator erred in finding the employees were entitled to HPD, we set aside that finding and the backpay remedy. However, because the Arbitrator found the Agency violated Article 27 of the parties' agreement (Article 27), and that finding is undisturbed, we remand to the parties for resubmission to the Arbitrator, absent settlement, for an appropriate remedy, if any.

II. Background and Arbitrator's Award

The employees perform correctional duties, including custody and supervision of inmates. In response to the pandemic, the Agency implemented a series of action plans to mitigate exposure to and transmission of COVID-19 in the facility where the employees work. On September 20, 2021, the Union filed a grievance seeking HPD and alleging that the Agency violated the regulations governing HPD, and Article 27, by failing to properly protect employees from hazards associated with the pandemic. Article 27 requires the Agency to lower the "inherent hazards of a correctional environment" and those "associated with the normal industrial operations found throughout [the Agency] . . . to the lowest possible level."[1]

At arbitration, the Arbitrator framed the issues, in relevant part, as whether the Agency violated government-wide regulations and the parties' agreement when it failed to (1) adequately mitigate duty hazards related to COVID-19, and (2) pay HPD.

The Arbitrator examined the HPD regulations and found that working with inmates infected with COVID-19 is a "listed hazard"[2] under 5 C.F.R. part 550, subpart I, Appendix A (Appendix A).[3] Specifically, the Arbitrator found that COVID-19 was a "virulent biological" under Appendix A.[4] She further found the employees were required to regularly "work in close proximity to inmates," and "at least some [inmates] (and by inference a significant number of them) will more likely than not be infected with COVID-19."[5] On this basis, the Arbitrator concluded that the employees were entitled to HPD.

In reaching this conclusion, the Arbitrator rejected the Agency's claim that she was bound to follow *Adams v. United States* (*Adams*).[6] The Arbitrator noted that *Adams* also concerned correctional employees' entitlement to HPD for ambient exposure to COVID-19 due to working with or in close proximity to infected individuals. As the Arbitrator noted,[7] *Adams* held that Appendix A does not authorize HPD in that circumstance, because the regulation contemplates "assignments that involve directly or indirectly working with a virulent biological itself[,] rather than [merely] ambient exposure to a virulent biological in the workplace due to transmission by infected humans."[8] However, the Arbitrator concluded she was not legally bound to follow

[1] Award at 4 (emphasis omitted).
[2] *Id.* at 44 (internal quotations omitted).
[3] 5 C.F.R. pt. 550, subpt. I, app. A.
[4] Award at 42-43.
[5] *Id.* at 43 (internal quotations omitted).
[6] 59 F.4th 1349 (Fed. Cir. 2023) (en banc), *cert. denied*, __ S. Ct. __, No. 22-1118, 2023 WL 6558401 (Oct. 10, 2023).
[7] Award at 53-56.
[8] *Adams*, 59 F.4th at 1359.

Adams, and that Authority precedent "supports an interpretation [t]hat would sustain the [g]rievance."[9]

The Arbitrator also "conclude[d,] additionally and/or in the alternative[,] that the Agency breached Article 27 through its lax enforcement of required mitigation measures" related to COVID-19.[10] In this regard, she stated that, "[i]n the event [the Authority] were to conclude the undersigned . . . made an error of law in concluding the [g]rievants were entitled to HDP under federal law or regulation," she "would rely instead on Article 27 to sustain the [g]rievance"[11] and "would measure the appropriate remedy" for the contractual violation "by reference to the HDP differential allowed under federal law and regulation."[12]

As a remedy, the Arbitrator awarded employees a "25% [HPD] for the hours in pay status in which they worked in proximity to inmates infected with COVID-19, between . . . May 1, 2021 and May 1, 2022."[13]

On May 17, 2023, the Agency filed an exception to the award. The Union filed an opposition to the Agency's exception on May 30, 2023.

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

The Agency argues the award is contrary to law because the Arbitrator erred by finding *Adams* inapplicable and concluding the employees were entitled to HPD.[14] 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.[15] 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.[16] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[17]

Appendix A defines virulent biologicals as "[m]aterials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection."[18] In relevant part, Appendix A authorizes HPD for "work with or in close proximity to . . . [v]irulent biologicals."[19] The Arbitrator's finding that COVID-19 is a virulent biological is undisputed. However, the Agency asserts that, based on *Adams*, the employees' ambient exposure does not meet the standard for working with or in close proximity to COVID-19 under Appendix A.[20]

In *AFGE, Local 3601* (*Local 3601*),[21] the Authority addressed whether the term "work with or in close proximity to," as set forth in Appendix A, entitled healthcare employees to HPD for exposure to COVID-19.[22] The Authority relied on *Adams*' conclusion that, "under Appendix A, HPD [is] payable 'only when the employee is working with or near a virulent biological . . . itself, not doing any task that might incur exposure to a virulent biological.'"[23] The Authority further noted that *Adams* "rejected the notion that OPM authorized HPD for duties that involved 'ambient exposure to a virulent biological [like COVID-19] in the workplace due to transmission by infected humans.'"[24] Applying *Adams*, the Authority concluded that Appendix A does not authorize HPD "where COVID-19 exposure occurred due to infected humans or human-contaminated intermediary objects or surfaces."[25]

Here, the Arbitrator found employees were exposed to COVID-19 solely through ambient exposure to infected inmates.[26] Therefore, consistent with *Local 3601* – and, by implication, *Adams* – we conclude the Arbitrator erred by finding that the employees are entitled to HPD.[27]

The Agency also argues that the backpay award violates the doctrine of sovereign immunity, and that the Arbitrator's finding that the Agency violated Article 27 cannot separately sustain the backpay remedy.[28] Under the doctrine of sovereign immunity, the United States is

[9] Award at 58 (relying on "[Authority] precedent" but not citing any Authority decisions); *see also id.* at 53 (stating that *Adams* did not "countermand or defeat the Union's prima facie case in any way").
[10] *Id.* at 58 n.35.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 59.
[14] Exception Br. at 7-12.
[15] *AFGE, Council 222*, 73 FLRA 54, 55 (2022) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).
[16] *Id.*
[17] *Id.* (citing *Interior*, 68 FLRA at 180-81).
[18] 5 C.F.R. pt. 550, subpt. I, app. A.
[19] *Id.*
[20] *See* Exception Br. at 12.
[21] 73 FLRA 515 (2023).
[22] *Id.* at 519.
[23] *Id.* at 520 (quoting *Adams*, 59 F.4th at 1360).
[24] *Id.* (quoting *Adams*, 59 F.4th at 1359).
[25] *Id.* (citing *Adams*, 59 F.4th at 1351).
[26] Award at 43, 46-47.
[27] Although the Arbitrator purportedly relied upon Authority precedent, Award at 58, none of the Authority decisions the Arbitrator cited in the award concern COVID-19.
[28] Exception Br. at 12-15.

immune from suit except as it consents to be sued.[29] Sovereign immunity can be waived by statute, and the Back Pay Act (the Act)[30] is such a waiver.[31] The Authority has explained that a collective-bargaining agreement may authorize monetary awards only where the requirements for a statutory waiver of sovereign immunity – such as under the Act – have been satisfied.[32]

Under the Act, an award of backpay is authorized when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of the grievant's pay, allowances, or differentials.[33] Where the Act does not support a monetary remedy, and neither the arbitrator nor the opposing party cites another waiver of sovereign immunity, the Authority sets aside the monetary remedy.[34]

Violations of collective-bargaining agreements constitute unjustified or unwarranted personnel actions under the Act.[35] Therefore, the Arbitrator's unchallenged finding that the Agency violated Article 27 satisfies the Act's first requirement. As for the Act's second requirement, the Office of Personnel Management defines "[p]ay, allowances, and differentials," in pertinent part, as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee."[36] However, as we have concluded, the employees were not entitled to HPD under Appendix A. Further, neither the Arbitrator nor the Union cites any other statute or regulation that makes HPD "payable" to the employees in the circumstances of this case.[37] Consequently, the Act does not authorize the backpay remedy.[38] Further, because neither the Arbitrator nor the Union cites another waiver of sovereign immunity supporting the remedy, we grant the Agency's contrary-to-law exception and set aside the backpay remedy.[39]

Where the Authority sets aside an entire remedy, but leaves an arbitrator's finding of an underlying contract violation undisturbed, the Authority has frequently found it appropriate to remand the award for determination of an appropriate, alternative remedy.[40] Because the Arbitrator's finding that the Agency violated Article 27 is undisturbed, but we have set aside the Arbitrator's entire remedy, we find it appropriate to remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate non-monetary remedy, if any.[41]

IV. Decision

We grant the exception and set aside the backpay remedy. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy, if any, for the contract violation.

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[29] *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 633 (2023) (*State*) (citing *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 (2020) (Member DuBester concurring)); *see also SSA, Off. of Disability Adjudication & Rev., Region 1*, 65 FLRA 334, 337 (2010) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

[30] 5 U.S.C. § 5596.

[31] *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 775 (2022) (citing *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019) (*Local 2338*)).

[32] *Local 2338*, 71 FLRA at 344 (citing U*.S. Dep't of Transp. FAA, Detroit, Mich.*, 64 FLRA 325, 328-29 (2009)).

[33] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010)).

[34] *See, e.g.*, *State*, 73 FLRA at 633.

[35] *Local 2338*, 71 FLRA at 344 (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 568 (2012)).

[36] 5 C.F.R. § 550.803.

[37] *Id.*

[38] *Dep't of the Air Force, Griffiss Air Force Base*, 15 FLRA 213, 214-15 (1984) (finding award contrary to Act where arbitrator awarded backpay based on contract violation despite finding grievants were not entitled to claimed environmental differentials); *see also Puget Sound Naval Shipyard*, 33 FLRA 56, 59 (1988) (award contrary to Act because backpay cannot be awarded as a remedy for alleged improper denial of environmental differential pay where the grievant is not entitled to such differential under the law).

[39] *State*, 73 FLRA at 633 (finding remedy contrary to law where arbitrator did not find contract violations resulted in loss of pay or benefits under the Act and no other statutory support provided a waiver of sovereign immunity).

[40] *E.g., U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 946 (2000) (citations omitted) (upholding an arbitrator's finding of a contract violation, setting aside the arbitrator's remedy as contrary to law, and finding it "appropriate to remand the award to the parties for resubmission to the [a]rbitrator, absent settlement, to determine whether an alternative remedy is appropriate").

[41] *Id.* Member Kiko notes that remanding to an arbitrator whose remedy the Authority has found unlawful will not always be appropriate. *See, e.g.*, *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 680 n.120 (2023) (describing circumstances under which the Authority might not find it appropriate to remand a matter for resubmission to arbitration after vacating a legally deficient remedy). *Cf. AFGE, Loc. 2076*, 71 FLRA 221, 224 n.32 (2019) (Member DuBester concurring in part and dissenting in part) (noting that in "unusual circumstances, in fulfilling its statutory mandate to 'take such action and make such recommendations concerning [an arbitration] award as it considers necessary, consistent with applicable laws, rules, or regulations,' the Authority has permitted the parties to choose a different arbitrator upon remand" (quoting 5 U.S.C. § 7122(a)(2))). However, under the circumstances of this case, Member Kiko agrees that remanding the matter to the parties for resubmission to the Arbitrator is appropriate.