

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER ASHEVILLE, NORTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 446, AFL-CIO Charging Party	Case No. WA-CA-00547

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 13, 2001**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

ELI NASH

Chief Administrative Law

Judge

Dated: July 11, 2001
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: July 11, 2001

TO: The Federal Labor Relations Authority

FROM: ELI NASH
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA

Respondent

and
CA-00547

Case No. WA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 446, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are any pleadings filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

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WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER ASHEVILLE, NORTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 446, AFL-CIO Charging Party	Case No. WA-CA-00547

Kathleen Oddo, Esquire
For the Respondent

Tracy Levine, Esquire
Thomas Bianco, Esquire
For the General Counsel

Before: ELI NASH
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

The General Counsel of the Federal Labor Relations Authority (the Authority), by Regional Director, Washington Region, issued a complaint alleging that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to comply with an arbitrator's award. The award requires the Respondent to provide premium pay for overtime work for certain Title 38 employees.

The Respondent contends that the award may not be enforced in an unfair labor practice (ULP) proceeding because the Authority lacks jurisdiction over the subject

matter of the award. Specifically, the Respondent asserts that the Under Secretary for Health has determined that the award concerns "employee compensation" within the meaning of 38 U.S.C. § 7422(b), which precludes bargaining over or grievance procedures covering "employee compensation." Therefore, according to the Respondent, the award cannot be enforced in this ULP proceeding because the matter is excluded from the Authority's jurisdiction.

Subsequent to the filing of the complaint and answer, Counsel for the General Counsel moved for summary judgment. Counsel for the Respondent filed a response to the motion and moved to dismiss.

Treating the Respondent's request to dismiss with supporting exhibits as a cross-motion for summary judgment, and considering all the pleadings and exhibits, it appears that there are no genuine issues of material fact and that the Respondent is entitled to summary judgment as a matter of law. Accordingly, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

The Union, American Federation of Government Employees, Local 446, is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent, Veterans Affairs Medical Center, Asheville, North Carolina (VAMC Asheville). The Union and the Respondent are parties to a collective bargaining agreement (CBA) covering unit employees at VAMC Asheville.

On December 29, 1999, an arbitrator issued an award finding that the Respondent violated the CBA. The award required the Respondent to provide premium pay to certain of its registered nurses. On February 2, 2000, the Respondent filed exceptions and moved to dismiss the award, arguing that the arbitrator lacked jurisdiction over the subject matter of the award. Specifically, the Respondent asserted that an award regarding nurse compensation is contrary to 38 U.S.C. § 7422(b), which precludes bargaining over or grievance procedures covering, among other things, "the establishment, determination or adjustment of employee compensation under this title."

On April 20, 2000, the Authority dismissed the Respondent's exceptions as untimely filed. In addition, the Authority denied the Respondent's motion to dismiss, finding that the Respondent was raising issues that could have been, but were not, raised before the arbitrator.

Notwithstanding the Authority's dismissal and denial, the Respondent failed to perform the acts required by the award. On September 28, 2000, the General Counsel issued a complaint on the basis of the Respondent's failure to comply with the award.

By letter dated March 5, 2001, the Respondent's Under Secretary for Health, acting pursuant to 38 U.S.C. § 7422 (d),¹ determined that the arbitrator's decision and the subsequent ULP concern the "establishment, determination, or adjustment of employee compensation." Therefore, the Under Secretary concluded that "the issues raised in this matter are outside the scope of collective bargaining under sections 7421(a) and 7422(d) of [T]itle 38." Respondent's Exhibit A, March 5, 2001 Letter from the Under Secretary for Health, at 2.2

Discussion, Conclusions, and Recommendation

In this case, the General Counsel alleges that the Respondent has committed a ULP by failing to comply with an arbitrator's award that has become final and binding. The Respondent denies that it has committed a ULP because the subject matter of the award is within the exclusive discretion of the Secretary of Veterans Affairs.

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38 U.S.C. § 7422(d) provides:

An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

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The Under Secretary's letter, attached to the Respondent's March 15, 2001 Motion to Dismiss and Response to Motion for Summary Judgment was signed by someone other than the Under Secretary. Subsequently, by memorandum dated March 30, the Respondent verified that the signatory for the Under Secretary was authorized. The General Counsel moved that the letter and the verification should not be considered. As for the March 5 letter, both it and the March 15 Motion to Dismiss were timely submitted in response to the General Counsel's Motion for Summary Judgment. As for the verification, other than bare assertions, the General Counsel has provided no reason to question its authenticity. Accordingly, the General Counsel's motion to deny consideration of these documents is denied.

Failure to Comply with an Arbitration Award

Under § 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." 5 U.S.C. § 7122(b). The award becomes "final and binding" when there are no timely exceptions filed to the award under § 7122(a) of the Statute or when timely exceptions are denied by the Authority. *U.S. Dep't of Transp., FAA, Northwest Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA*); *U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 38 FLRA 99, 104 (1990). An agency that fails to comply with a final and binding award violates § 7116(a)(1) and (8) of the Statute. *FAA*, 55 FLRA at 296.

As a general rule, an agency cannot collaterally attack an arbitration award during the processing of a ULP complaint alleging an unlawful failure to comply with that award. *U.S. Dep't of Veterans Affairs Med. Ctr., Allen Park, Mich.*, 49 FLRA 405, 426 (1994). However, the Authority has held that claims of statutory impediments to an arbitrator's authority could be raised to defeat finality in a ULP proceeding. *Veterans Admin. Central Office, Washington, D.C.*, 27 FLRA 835, 838-40 (1987), *affirmed sub nom. AFGE v. FLRA*, 850 F.2d 782 (D.C. Cir. 1988).

Admitting that the arbitrator's award is final and binding, the Respondent nevertheless argues that 38 U.S.C. § 7422 precludes the Authority from enforcing the award. In light of the above-cited precedent, I will analyze the Respondent's statutory jurisdictional challenge to the award in this ULP proceeding.

Department of Veterans Affairs Exclusive Jurisdiction

The Authority has noted that the statutory rights of Veterans Affairs employees are governed by certain restrictions in Title 38 of the U.S. Code. *Wisc. Fed'n of Nurses & Health Prof'ls, Veterans Admin. Staff Nurses Council*, 47 FLRA 910 (1993) (*Wisc. Nurses*). The Secretary's authority to prescribe by regulation the hours and conditions of employment of bargaining unit employees is subject to their right to engage in collective bargaining in accordance with chapter 71 of title 5. 38 U.S.C. § 7422(a). However, 38 U.S.C. § 7422(b) provides that "[s]uch collective bargaining (and any grievance procedures provided under a collective bargaining agreement) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title." The determination of

whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation “shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.” 38 U.S.C. § 7422(d). Based on the language of the statute and its legislative history, the Authority has held that it lacks jurisdiction to review the Secretary’s determination as to whether a matter is excluded from collective bargaining or grievance procedures under § 7422(b) of title 38. *Wisc. Nurses*, 47 FLRA at 913-14.

Here, the Under Secretary has determined, pursuant to authority delegated by the Secretary of Veterans Affairs, that the arbitrator’s award and this ULP proceeding seeking to enforce that award concern “employee compensation.” Respondent’s Exhibit A, March 5, 2001 Letter from the Under Secretary for Health. Matters of “employee compensation” are excluded from collective bargaining and grievance procedures. 38 U.S.C. § 7422(b). The Under Secretary’s determination is not subject to review by the Authority. 38 U.S.C. § 7422(d). Therefore, I agree with the Respondent that the Authority lacks jurisdiction over the instant matter.

The General Counsel argues that the Under Secretary’s March 5, 2001 letter is irrelevant to the ULP in this case because that determination was made after the award became final and binding. This argument lacks merit. Title 38 places no time limit on when the Secretary’s determination must be made. Indeed, the Authority has remanded a case to an Administrative Law Judge to allow the Under Secretary to submit a determination as to whether the subject matter of the ULP proceeding constituted a 38 U.S.C. § 7422(b) topic and therefore not subject to review by the Authority. *Dep’t of Veterans Affairs, Veterans Affairs Med. Ctr., Washington, D.C.*, 51 FLRA 896 (1996), *remanded to*, 53 FLRA 822 (1997) (dismissing complaint on remand as outside the Authority’s jurisdiction). See also 38 U.S.C. § 7425(b) (providing that title 38 prevails over any conflicting title 5 provision).

The General Counsel’s contention that the Respondent failed to present its argument regarding § 7422(b) to the arbitrator is similarly unpersuasive. As presented in this proceeding, the Respondent’s § 7422(b) argument relates to the Authority’s jurisdiction, a matter that may be raised at any stage of the Authority’s proceedings. *Amer. Fed’n of Gov’t Employees, Council of Prison Locals, Local 171*, 52 FLRA 1484, 1489 n.7 (1997).

Recommendation

Based on the above findings and conclusions, it is recommended that the Authority issue the following order in this case:

ORDER

The allegation that the Respondent violated § 7116(a) (1) and (8) of the Statute is dismissed.

Issued, Washington, D.C. July 11, 2001

ELI NASH
Chief Administrative Law

Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. WA-CA-00547, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Tracy E. Levine, Esq.
Thomas Bianco, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
800 K Street, N.W., Suite 910
Washington, DC 20001

P 855 724 111

Kathleen Keith Oddo, Esq.
Agency Representative
Office of Regional Counsel
U.S. Department of Veterans Affairs
210 Franklin Rd., S.W.
Roanoke, VA 24011

P 855 724 112

REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

John B. Roten, Sr.
American Federation of Government
Employees, Local 446
U.S. Department of Veterans Affairs
Medical Center, Asheville
Asheville, NC 28815

Dated: July 11, 2001
Washington, DC