

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.....
DEPARTMENT OF VETERANS AFFAIRS.
DWIGHT D. EISENHOWER MEDICAL .
CENTER, LEAVENWORTH, KANSAS .

Respondent .

and .

Case No. 7-CA-10326

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, LOCAL 85. .

Charging Party .

.....
Hazel Hanley, Esq.
For the General Counsel

Richard Martinez, Trustee
For the Charging Party

Maurice D. Copp, Esq.
For the Respondent

DECISION

Statement of the Case

The unfair labor practice alleges that Department of Veterans Affairs, Dwight D. Eisenhower Medical Center, Leavenworth, Kansas (herein called Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor Relations Statute (herein called the Statute) by failing and refusing to comply with an arbitration award as required by section 7121-22 of the Statute. At the hearing, Counsel for the General Counsel moved for summary judgment.

Based on the entire record in this matter, and since it appears that no genuine issue of material facts exist, making summary judgment appropriate as a matter of law, the undersigned makes the following findings of fact, conclusions of law and recommendations.

Findings of Fact

1. At all times material herein the American Federation of Government Employees, Local 85 (herein called Local 85) is and has been a labor organization within the meaning of the Statute.

2. At all times material herein, Respondent is and has been an agency within the meaning of the Statute.

3. At all times material herein, Local 85 has been certified as the exclusive representative of certain of Respondent's employees.

4. At all times material herein, Respondent and Local 85 have been parties to a collective bargaining agreement.

5. At all times material herein, James H. Cuer, has occupied the position of Director of Respondent Center. In that position he is now, a supervisor and/or management official within the meaning of the Statute, and is also an agent of Respondent.

6. On November 20, 1990, the Authority, in 38 FLRA 232 (1990), denied Respondent's Exceptions to the Arbitrator's Award in FMCS Case No. 84K/26248, which ordered that Respondent pay Environmental Differential Pay (EDP) to unit employees of the National Cemetery and Canteen Service represented by Local 85.

7. On or about December 5, 1990, Respondent filed a Motion Requesting Reconsideration of the Authority decision in 38 FLRA 232 (1990).

8. On March 15, 1991, the Authority in 39 FLRA 1162 (1991) denied Respondent's Motion Requesting Reconsideration of the Authority decision in 38 FLRA 232 (1990).

9. On December 11, 1991, a hearing in this matter was conducted before the undersigned. At that hearing, Counsel for the General Counsel moved for summary judgment, but was required to submit its motion and a memorandum of points and authorities in support of the motion in writing. In view of the General Counsel's motion Respondent was requested to submit a motion in opposition to the General Counsel's motion and also a memorandum of points and authorities in support of its motion in opposition.

10. Respondent presented four witnesses at the hearing. All four admitted that on November 20, 1990, and at all times since, Respondent, through Cuer, has failed and refused to pay EDP to employees of the National Cemetery and employees of the Canteen Service represented by Local 85 as ordered by the arbitrator in FMCS Case No. 84K/26248.

Conclusions

A. Whether there is jurisdiction in this matter?

Respondent is correct in asserting that normally jurisdiction may be raised at any point in a proceeding and may not be conferred on an administrative body or court which otherwise lacks jurisdiction. So far the Authority has ignored Respondent's argument. It has done so most likely because, unless, as a matter of law, the subject matter of a grievance is excluded from arbitration, the Respondent cannot ". . . attack the Arbitrator's contractual jurisdiction in the unfair labor practice proceeding." Social Security Administration, 41 FLRA 755, 772 (1991). The Authority has already twice held that no statutory exclusion to arbitration exists in this particular arbitration. VAMC, Leavenworth, Kansas, 38 FLRA 232, 241-243(1990) (herein called VAMC I); VAMC, Leavenworth, Kansas, 39 FLRA 1162, 1167-1168 (1991) (herein called VAMC II).

Inasmuch as Respondent admits it has failed to pay EDP to Cemetery and Canteen unit employees, and since Respondent's asserted defenses have already been rejected by Authority precedent binding on the parties and held on the very facts of this proceeding, the General Counsel urged that as a matter of law, Respondent cannot use the unfair labor practice forum to relitigate jurisdictional issues rejected by both the arbitrator and the Authority in this matter. VAMC II. In light of Social Security Administration, supra, I agree with the General Counsel that the arbitrator's contractual jurisdiction cannot be attacked in this unfair labor practice proceeding.

Based on the foregoing, the undersigned is compelled to reject Respondent's argument concerning the lack of jurisdiction in this case.

B. Respondent did not pay EDP as ordered by the arbitrator in the first supplemental decision and award in FMCS Case No. 84K/26248, or after its

exceptions were denied by the Authority, as required by section 7121 and 7122 of the Statute.

Aside from the jurisdictional issue Respondent merely reiterates its arguments previously made to and rejected by the Authority. Thus, it is undisputed, that Respondent has not paid EDP to Cemetery or to Canteen workers who are unit employees represented by Local 85.

Clearly Respondent must comply with a final and binding arbitration award. Under section 7122 an arbitration award such as that in FMCS Case No. 84K/26248 becomes final and binding after the Authority issues a decision on filed exceptions. Section 7122(a) states as follows:

. . . the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay

See also, Social Security Administration, supra, at, 766 (analysis of when 7112(b) awards become final and binding).

In the instant case, Arbitrator William O. Eisler's First Supplemental Decision and Award in FMCS Case No. 84K/26248 became final and binding on November 20, 1990 when the Authority denied Respondent's exceptions to that award. VAMC I. On December 5, 1990, Respondent filed a Motion for Reconsideration of the Authority's decision in VAMC I, contending as follows:

. . . the Authority failed to consider VA's fundamental contention that the [A]rbitrator lacked jurisdiction over the Canteen and Cemetery employees, and thus, was legally disabled from affecting their conditions of employment in the award.

VAMC II (quoting from Respondent's Motion Requesting Reconsideration).

The Authority rejected the Respondent's contentions and denied the Respondent's Motion for Reconsideration on March 15, 1991, reasoning that:

The Agency made essentially the same argument in its exceptions to the Arbitrator's supplemental award when it asserted that the Medical Center, the Canteen and the Cemetery have separate budgets and

separate personnel offices in Washington, D.C. Further, the Agency fail[ed] to specify any particular law which the award violates in that regard. The Agency misapprehends the Arbitrator's supplemental award. The award holds that the initial award applies to all bargaining unit employees, including Canteen and Cemetery employees. There is nothing in the award which requires that Canteen and Cemetery employees must be paid out of the funds of the Medical Center and nothing in the award prevents the payment of Canteen and Cemetery employees from the funds of their respective employer organizations. The source of the backpay is an internal matter to be decided by the Agency in the same manner in which it would comply with any other backpay under the Back Pay Act.

VAMC II (emphasis supplied).

In denying Respondent's Motion for Reconsideration, the Authority noted that throughout its litigation of the EDP arbitration, the Respondent had failed to show how the Arbitrator's inclusion of Canteen and Cemetery unit employees in the coverage of the grievance was contrary to law. Id. at 1167. Furthermore, the Authority cited the Arbitrator's finding of fact that the grievance concerned employees in the bargaining unit. Id. at 1167-68. Finally, the Authority found that "[t]he Agency's arguments merely attempt to relitigate the matter before the Authority." Id. at 1168.

At the hearing in the unfair labor practice case herein, Respondent actually presented nothing new. Respondent simply reasserted the same argument found meritless in both VAMC I and VAMC II: In essence, that the Cemetery and Canteen each operate under separate management and budgets than does the Medical Center; therefore, the Arbitrator's award of EDP to Cemetery and Canteen employees is a nullity, because the Medical Center cannot go outside its budget or request the Cemetery or the Canteen Services to pay their respective employees EDP. Id. This argument has been found unsound by the Authority, which pointed out to Respondent that the payment of EDP is an internal agency matter that can be decided "by the Agency in the same manner in which it would comply with any other backpay order under the Back Pay Act." VAMC II.

The matter of responsibility for the Canteen employees has already been litigated. In Veterans Administration

Medical Center, Leavenworth Kansas, 40 FLRA 592, 610 (1991) the Authority adopted an administrative law judge's finding of fact that Respondent Medical Center was responsible for the Canteen Service). Judge Arrigo concluded that:

the Veterans Administration (now the Department of Veterans Affairs) authorized the Medical Center to act on its behalf in dealing with the agent of the certified representative to represent the interest of Canteen employees at the facility.

Accordingly'[, . . .] I find and conclude the Medical Center is a proper party respondent in these proceedings.

The Authority affirmed, that under the principle of respondeat superior, the Department of Veterans Affairs, the parent body of all the services at the Leavenworth, Kansas facility, had approved the local supplemental agreement between the Medical Center and the Union, and by so doing made the Medical Center responsible for the actions of the Canteen Service. Id. at 609 - 10. Judge Arrigo based his finding on the "Recognition and Coverage" provision of the parties' supplemental agreement, that includes the Cemetery Service as well as the Canteen Service in the workforce for which the Medical Center is responsible in dealing with the Union. Id. at 604; see also, Joint Ex. 2, Art. I.

The Respondent cannot escape its responsibility to answer to the Local 85 for the actions of the Cemetery and Canteen Services, and the Medical Center (in conjunction with the Department of Veterans Affairs) must find a way to pay Cemetery and Canteen unit employees EDP. VAMC II. Cemetery and Canteen unit employees, as a matter of Authority law, are within the grievance filed by the Union on behalf of all unit employees at the Leavenworth, Kansas facility. Id. at 1167 (Authority rejected Respondent's arguments of separate activities with separate pay systems, concluding that these arguments "merely constituted disagreement with the Arbitrator's interpretation and application of the procedural requirements of the [labor] agreement").

Since Respondent has not paid Cemetery and Canteen unit employees it is clear that it has not complied with a final and binding arbitration award under Section 7122(b).

- C. Respondent violated section 7116(a)(1) and (8) of the Statute when it failed and refused to comply with the arbitrator's first

supplemental decision and award in FMCS Case
No. 84K/26248 as required by section 7121 and
7122 of the statute.

As a matter of law, the Respondent violated the statutory mandate to pay unit employees entitled to EDP under a final and binding arbitration award. Also as a matter of law, Respondent's admitted continuing its failure and refusal to pay EDP under the final and binding arbitration award.

Accordingly, based on the undisputed facts and applicable law, the undersigned is compelled to apply the Authority's findings of fact and conclusions of law regarding the Respondent and, the parties to this long-litigated arbitration award in FMCS Case No. 84K/26248, and to hold that the Respondent's continuing failure and refusal to pay EDP to unit employees of the Cemetery and the Canteen, constitutes a failure to abide by a final and binding arbitration award as required by section 7121 and 7122, and thereby violated section 7116(a)(1) and (8) of the Statute.*

In light of the above, it is recommended that the Authority grant Counsel for the General Counsel's motion for summary judgment and issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Dwight D. Eisenhower Medical Center, Leavenworth, Kansas shall:

1. Cease and desist from:

(a) Failing and refusing to abide by the final and binding award of Arbitrator William O. Eisler in FMCS Case No. 84K/26248.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

*/ The General Counsel's uncontested Motion to correct transcript is granted and the corrections are attached as Appendix B.

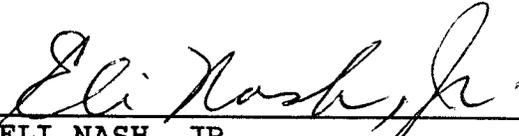
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Pay all unit employees of the Canteen Service and the Cemetery Service at the Medical Center's facility in Leavenworth, Kansas, the Environmental Differential Pay (EDP) ordered by Arbitrator William O. Eisler in his award in FMCS Case No. 84K/26248.

(b) Post on all bulletin boards of all services within the "Recognition and Coverage" provision of the Supplemental Agreement copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Dwight D. Eisenhower Medical Center, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 3, 1992.



ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with a final and binding arbitration award in FMCS Case No. 84K/26248 that awarded the Canteen and Cemetery unit employees represented by the American Federation of Government Employees, Local 85, Environment Differential Pay for exposure to airborne asbestos.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL immediately pay the unit employees of the Canteen and Cemetery Services the Environmental Differential Pay ordered in the Arbitrator's Award in FMCS Case No. 84K/26248.

(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO, 80204, and whose telephone number is: (303) 844-5224.