68 FLRA No. 47

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5058

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DECISION

February 9, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Robert T. Simmelkjaer found that the Agency violated the parties' collective-bargaining agreement by not retroactively paying qualified bargaining-unit employees mass-transit subsidies of up to $240 per month for the period from January 2012 through December 2012, and up to $245 for January and February 2013. As a remedy, he directed the Agency to reimburse affected employees for the amounts that they would have received absent the contractual violation.

The main, substantive question before us is whether the award is contrary to law because no law authorizes or requires the Agency to pay retroactive transit subsidies. Because the Federal Employees Clean Air Incentives Act (the Incentives Act)[1] and the Back Pay Act (the BPA)[2] support the award, we find that the answer is no.

[1] 5 U.S.C. § 7905.
[2] *Id.* § 5596.

II. Background and Arbitrator's Award

Under the Incentives Act, Congress authorized all federal agencies to establish transit-subsidy programs.[3] The Incentives Act provides for cash reimbursements to employees if transit passes are not "readily available for direct distribution by the agency."[4] Executive Order 13,150 requires all federal agencies in the national capital area to implement transit-subsidy programs,[5] and also requires that those agencies provide transit benefits to qualified employees in amounts equal to their commuting costs, not to exceed the maximum non-taxable amount allowed by 26 U.S.C. § 132(f)(2), which is part of the Internal Revenue Code.[6]

Before the enactment of the American Taxpayer Relief Act of 2012 (ATRA),[7] the maximum non-taxable amount allowed by § 132(f)(2)(A) in 2012 was $125 per month. On January 2, 2013, ATRA amended § 132(f)(2)(A) to retroactively increase the maximum amount of non-taxable transit benefits from $125 to $240 per month for 2012, and, as relevant here, to increase the maximum amount of non-taxable transit benefits for January and February 2013 to $245.

Approximately 6,000 Agency employees nationwide receive monthly transit subsidies. Before ATRA's enactment, the Agency provided eligible bargaining-unit employees with subsidies of up to $125 per month for mass-transit expenses incurred from January 2012 through February 2013. After ATRA's enactment, the Agency did not retroactively reimburse employees for transit expenses incurred over $125 per month in 2012, up to the maximum non-taxable amount of $240 per month, or for transit expenses over $125 incurred in January and February 2013, up to the maximum non-taxable amount of $245.

The Union filed a national, institutional grievance, alleging that the Agency violated Article 29, Section 17 of the parties' agreement and ATRA because, according to the Union, the agreement required the Agency to pay employees subsidies in the amount of their actual commuting costs, up to the maximum non-taxable amounts set forth in § 132(f)(2)(A). The grievance went to arbitration.

The Arbitrator found that Article 29, Section 17 of the parties' agreement "requires [the Agency] to provide employees 'with the maximum allowable

[3] *Id.* § 7905(b)(1).
[4] *Id.* § 7905(b)(2)(A).
[5] Exec. Order No. 13,150, § 2, 65 Fed. Reg. 24,613, 24,613 (Apr. 21, 2000).
[6] *Id.* (citing 26 U.S.C. § 132(f)(2)).
[7] American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

transportation subsidy they qualify for based on their commute.'"[8] Reading this contract language in conjunction with ATRA, the Arbitrator concluded that "the retroactive increase in the non-taxable subsidy set by . . . ATRA obligated the Agency to pay its employees retroactive transit subsidies up to the new 'non-taxable amount set by . . . § 132(f)(2)(A).'"[9] To support his interpretation of ATRA, the Arbitrator cited a report by the Joint Committee on Taxation, "finding . . . that the legislative intent of ATRA . . . was to 'make cash reimbursement for retroactive transit subsidies to employees for transit expenses incurred in 2012' and [to make] 'retroactive cash reimbursements . . . in addition to any monthly transit benefit in 2013.'"[10] Specifically, he set forth the following wording from that report:

> [E]xpenses incurred during 2012 by an employee for employer-provided . . . transit benefits may be reimbursed . . . . Further, Congress intends that reimbursements for expenses incurred for months during 2012 may be made in addition to the provision of benefits or reimbursements of up to $245 per month for expenses incurred during 2013.[11]

The Arbitrator concluded that the Agency violated the parties' agreement.[12] As a remedy, he directed the Agency to make affected employees whole for their improperly reduced transit benefits, with backpay under the BPA.

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award is not contrary to law.

As indicated, the Agency argues that the award is contrary to law.[13] The Agency contends that there is no authority for federal agencies to provide employees with retroactive cash reimbursements for transit subsidies.[14] The Agency makes two principal claims.

First, the Agency claims that ATRA, upon which the Arbitrator relied, "does not authorize . . . retroactive reimbursements" to employees of unpaid commuting costs.[15] And the Agency contends that the Arbitrator's reliance on the Joint Committee on Taxation's report "as . . . evidence suggesting that Congress intended . . . ATRA to authorize retroactive reimbursements is misplaced."[16]

Second, the Agency claims that the award requires the Agency to spend appropriated funds on expenses for which the Agency's appropriation is legally unavailable.[17] Specifically, the Agency contends that although under the Incentives Act, "Congress intended to incentivize future conduct[,] . . . [n]owhere in the . . . Act . . . does Congress contemplate that appropriated funds will be used for retroactive reimbursements of prior year costs."[18]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[19] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard.[20]

The Authority has recently resolved the question this case presents: Whether an arbitrator's award requiring an agency to pay retroactive transit subsidies is contrary to law because no law authorizes or requires the payment of such subsidies. In *U.S. Department of HHS, Washington, D.C.* (*HHS*),[21] the Authority denied an agency's contrary-to-law exceptions to an award finding that the agency violated the parties' collective-bargaining agreement in that case by not retroactively paying qualified bargaining-unit employees mass-transit subsidies. Similar to this case, the subsidies not paid in *HHS* were up to $240 per month for the period from January 2012 through December 2012, and up to $245 for the month of January 2013.[22] As a remedy, the arbitrator in *HHS* directed the Agency to reimburse affected employees for the amounts that they would have received absent the contractual violation.[23]

[8] Award at 40 (quoting Art. 29, § 17).
[9] *Id*.
[10] *Id*. at 47.
[11] *Id*. at 51 (quoting Staff of J. Comm. on Taxation, 112th Cong., General Explanation of Tax Legislation Enacted in the 112th Congress 123 (J. Comm. Print 2013)).
[12] *Id*. at 49.
[13] Exceptions at 4.
[14] *Id*. at 11-12, 21-24.
[15] *Id*. at 11.
[16] *Id*. at 15.
[17] *Id*. at 21, 24.
[18] *Id*. at 22.
[19] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[20] *SSA*, 67 FLRA 534, 538 (2014).
[21] 68 FLRA 239 (2015).
[22] *Id*. at 239.
[23] *Id*. at 240.

The Authority in *HHS* based its decision on two primary holdings. First, the Authority held that the Incentives Act provides a sufficient basis for the arbitrator's conclusion that the agency was *authorized* to pay retroactive transit subsidies.[24] Second, the Authority held that because the requirements of the BPA were met, the BPA supports the arbitrator's finding that the agency in that case was *required* to pay the grievants retroactive transit subsidies as backpay.[25]

We find the Authority's determination in *HHS* dispositive. Accordingly, based on *HHS*, we find that the Incentives Act, in conjunction with the BPA, supports the Arbitrator's direction that the Agency reimburse affected employees.

The Agency challenges the Arbitrator's reliance on ATRA.[26] The Agency argues that "the Arbitrator misinterpreted [ATRA] to authorize retroactive reimbursements when the statute does no such thing."[27] As stated previously, in conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion – not his or her underlying rationale – is consistent with the relevant legal standard.[28] As the Incentives Act and the BPA support the Arbitrator's conclusion, the Arbitrator's other rationale – even if deficient – provides no basis for finding the award deficient. Accordingly, we find it unnecessary to determine whether the Arbitrator's other reasoning is deficient.

IV. Decision

We deny the Agency's exceptions.

[24] *Id*. at 241-42.
[25] *Id.* at 243.
[26] Exceptions at 11-16.
[27] *Id*. at 12.
[28] *SSA*, 67 FLRA at 538.