

**70 FLRA No. 192**

UNITED STATES  
DEPARTMENT OF THE NAVY  
COMMANDER NAVY REGION SOUTHWEST  
SAN DIEGO, CALIFORNIA  
(Agency)

and

FRATERNAL ORDER OF POLICE  
LODGE 12  
(Union)

0-AR-5377

DECISION

December 11, 2018

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

**I. Statement of the Case**

The question before us is whether an award of attorney fees is contrary to law. Arbitrator Gary A. Anderson found that the Agency violated the parties' agreement by not providing bargaining-unit employees (employees) with adequate body-armor vests. He directed the Agency to replace any expired, damaged, or unfit vests, and also granted the Union attorney fees. The Agency filed contrary-to-law exceptions challenging only the attorney-fee part of the award. Because there is no waiver of sovereign immunity that applies to the fee part of the award in the circumstances of this case, the Arbitrator did not have the statutory authority to grant those fees. Accordingly, we set aside that part of the award.

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

The employees are police officers at the Naval Base Point Loma in San Diego, California. The parties' agreement requires the Agency to provide employees with adequate personal protective equipment; specifically, new or used body-armor vests that are clean, sanitary, in good working condition, and unexpired. The Union filed a grievance when it learned that employees had "damaged, expired, unclean[,] and/or ineffective"

vests.<sup>1</sup> The parties could not resolve the grievance, and the Union invoked arbitration.

The Arbitrator found that the Agency violated the parties' agreement because it failed to provide employees with adequate body-armor vests. As a remedy, he directed the Agency to "immediately replace any expired, damaged, or unfit vests."<sup>2</sup> The Arbitrator also granted the Union attorney fees.

The Agency filed exceptions to award on May 15, 2018. The Union did not file an opposition to the Agency's exceptions.

**III. Analysis and Conclusions: The award of attorney fees is contrary to the doctrine of sovereign immunity.**

The Agency claims that the Arbitrator did not have any "statutory authority" to grant the Union attorney fees.<sup>3</sup> Specifically, the Agency argues that there is no applicable "waiver of sovereign immunity," such as under the Back Pay Act<sup>4</sup> or the Fair Labor Standards Act<sup>5</sup>, to grant such fees in the circumstances of this case.<sup>6</sup>

When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.<sup>7</sup> In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>8</sup>

The United States, as sovereign, is immune from liability in legal proceedings except to the extent it consents.<sup>9</sup> As such, an award from an arbitrator that requires an agency to provide a monetary remedy, such as attorney fees, must be supported by a waiver of that immunity.<sup>10</sup>

<sup>1</sup> Award at 2.

<sup>2</sup> *Id.* at 16.

<sup>3</sup> Exceptions Br. at 7.

<sup>4</sup> 5 U.S.C. § 5596.

<sup>5</sup> 29 U.S.C. § 203.

<sup>6</sup> Exceptions Br. at 7-8.

<sup>7</sup> *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

<sup>8</sup> *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

<sup>9</sup> *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guayabo, P.R.*, 68 FLRA 960, 963 (2015) (*BOP, Guayabo*) (citations omitted).

<sup>10</sup> *Id.*; see also *Laborers' Int'l Union of N. Am., Local 1376*, 54 FLRA 700, 704-05 (1998) (Award of attorney fees must be pursuant to specific statutory authorization. It is not an equitable remedy.).

There is no waiver of sovereign immunity that applies to the Arbitrator's grant of attorney-fees in this case. The Arbitrator granted attorney fees based simply on the Agency's violation of the parties' agreement. The Arbitrator granted the fees "[b]ecause the violations of the [collective-bargaining agreement] were blatant and . . . such violations potentially placed the lives of . . . personnel at risk."<sup>11</sup>

The Arbitrator does not cite to any statutory authorization to grant attorney fees on such a basis, and none is otherwise apparent. And the Union in the arbitration proceeding did not argue that any such authorization exists. On this record, we find that the grant of attorney fees is contrary to the doctrine of sovereign immunity.<sup>12</sup>

#### IV. Decision

We grant the Agency's contrary-to-law exception, and set aside the attorney-fee part of the award.

#### Member Abbott, concurring:

I agree that the circumstances of this case do not establish a waiver of sovereign immunity sufficient to support an award of attorney fees.

It is worth noting, however, that the issues in this case—whether to issue security vests, who is entitled to security vests, when security vests should be replaced, and when security vests are sufficiently damaged or worn to warrant replacement, and thus repurchase—directly and excessively interfere with the Agency's rights to determine budget, internal security practices, and the methods and means of performing work.<sup>13</sup> In fact, it is difficult to imagine a scenario that more fundamentally interferes with those rights, but the Agency failed to raise those arguments in its exceptions. We are thus unable to address them.

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

<sup>12</sup> See, e.g., *BOP, Guaynabo*, 68 FLRA at 966; *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004).

<sup>13</sup> *AFGE, Local 1917*, 55 FLRA 228, 235 (1999) (proposal concerning permitted security equipment "imposes a significant burden on the [a]gency's ability to determine its internal security practices" and is nonnegotiable); *AFGE, Local 1482*, 40 FLRA 12, 16-17 (1991) (proposal concerning personal protective equipment found to "directly interfere with management's right . . . to determine its internal security practices").