65 FLRA No. 93

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
NASHUA, NEW HAMPSHIRE
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
NEW ENGLAND ENGINEERS
AND ARCHITECTS
(Union)

0-AR-4233

_____

DECISION

January 28, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Harvey M. Shrage filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency was required to pay the grievant interest on pay that it gave the grievant in order to correct an error in his pay. The Arbitrator determined that the grievant was entitled to interest under the Agency's Personnel Management System (PMS) and the Back Pay Act (BPA), 5 U.S.C. § 5596. For the reasons set forth below, we grant the Agency's contrary to law exception and set aside the Arbitrator's award because it is inconsistent with the doctrine of sovereign immunity.

II. Background and Arbitrator's Award

In 1998, the Agency promoted the grievant to a General Schedule (GS)-11, Step 1; however, based on the Agency's 1998 Special Salary Rate Table, Number 0414 for Engineers (rate table), it should have promoted the grievant to a GS-11, Step 2. Award at 2. The grievant discovered this error several years later and contacted the Agency's human resources department (department). *Id.* He informed the department that, under the rate table, he was entitled to a promotion and a correction in pay. *Id.* To comply with the rate table, the Agency promoted the grievant and corrected his pay; however, it did not pay him any interest on his backpay. *Id.*

The Union filed a grievance arguing that the Agency violated the parties' agreement by refusing to pay interest to the grievant. *Id.* at 1. The parties did not stipulate to, and the Arbitrator did not specifically frame, an issue. However, the Arbitrator stated that the "essence of the issue [was] whether the [g]rievant was entitled to interest on the amount of monies he was paid as a result of not being placed at the proper step after his . . . promotion." *Id.* at 10 n.1. The Union argued that the grievant was entitled to interest under both Chapter II, § 9 of the Agency's PMS and the BPA, which allegedly applied to the Agency through Article 37 of the parties' agreement.[1] *See* Exceptions, Attach. 4, Union's Post-Hearing Brief at 12-13.

The Arbitrator first addressed whether an Agency employee could obtain interest under Chapter II, § 9 of the Agency's PMS.[2] The

1. Article 37, § 1 of the parties' agreement provides: "In accordance with 5 USC Chapter 71, the Parties recognize the power of an appropriate authority to render a remedy in accordance with the provisions of 5 USC [§] 5596." Award at 3.

2. Chapter II, § 9 of the Agency's PMS provides, in relevant part:

> (a) Agency funds may be used to pay back pay to an [Agency] employee or former employee who, as the result of a decision or settlement under the FAA Grievance Procedure, a collective bargaining agreement, the FAA Appeals Procedure, or the Executive System Appeals Procedure is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee.
>
> . . . .
>
> (g) Agency funds may not be used to pay either interest or attorney fees as the result of a decision in the FAA Grievance Procedure, the FAA Appeals Procedure, or the Executive System Appeals Procedure.

Award at 7.

Arbitrator determined that, under § 9(a), an Agency employee could obtain backpay as a result of a "decision or settlement" arising under a collective bargaining agreement, the Federal Aviation Administration (FAA) Grievance Procedure, the FAA Appeals Procedure, or the Executive System Appeals Procedure. Award at 11. He also found that § 9(g) lists only three circumstance in which an employee could *not* receive interest on that backpay: the FAA Grievance Procedure, the FAA Appeals Procedure, or the Executive System Appeals Procedure. *Id.* at 12. Because a collective bargaining agreement is not excluded under § 9(g), the Arbitrator concluded that an employee could obtain interest under the PMS if he or she received backpay as a result of a decision or settlement under a collective bargaining agreement. *Id.*

Applying the foregoing analysis, the Arbitrator determined that the grievant was entitled to interest under the PMS. The Arbitrator found that the Agency corrected the grievant's pay in order "to comply with the [parties' agreement]"; thus, the grievant received a decision or settlement of backpay pursuant to the agreement. *Id.* at 11. Consequently, because the grievant received an award of backpay under the agreement, the PMS authorized the Agency to award interest. *Id.* at 11-12.

The Arbitrator also concluded that the grievant was entitled to interest under the BPA. *Id.* at 13-14. The Arbitrator rejected the Agency's arguments that the pay the grievant received did not satisfy several requirements of the BPA. *Id.* The Arbitrator did not explain how the BPA applies to the Agency.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law. According to the Agency, Congress has excluded the Agency from the BPA; it also asserts that, although Congress gave the Agency permission to adopt any portion of Title 5 when Congress authorized the Agency to develop the PMS, the Agency has not incorporated the BPA into the PMS. Exceptions at 12-13. Therefore, the Agency contends that interest was not permitted under the BPA. *Id.* at 13. Alternatively, the Agency contends that, even if the BPA applies, the award does not satisfy several of its requirements. *Id.* at 13-16. Similarly, the Agency contends that the award of interest does not satisfy several requirements of the PMS. *Id.* at 8-12.

The Agency also contends that the Arbitrator's award of interest under the PMS was based on a nonfact. Specifically, the Agency contends that, contrary to the Arbitrator's finding, the Agency never acted pursuant to the parties' agreement when it decided to correct the grievant's pay. *Id.* at 3-4. The Agency further alleges that the award is deficient because the Arbitrator denied the Agency a fair hearing by relying on an article of the parties' agreement -- Article 39 -- that was first raised in the Union's post-hearing brief. *Id*. at 6-8.

B. Union's Opposition

The Union disputes the Agency's assertion that the award is contrary to law. First, according to the Union, the BPA applies to the Agency as a matter of law because of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, §§ 307(a), 308(b), 114 Stat. 61 (2000) (codified as amended 49 U.S.C. § 40122(g)(2)(H) & (g)(3). Opp'n at 16-17. Moreover, the Union asserts that the BPA applies to the Agency contractually because the parties negotiated its inclusion into Article 37 of their agreement. *Id.* at 17-18. Relying on the foregoing, the Union contends the grievant could receive interest under the BPA. The Union rejects the Agency's assertion that the award does not satisfy the requirements of the PMS and the BPA. *Id.* at 13-15, 17-18.

The Union also disagrees with the Agency's assertion that the Arbitrator based his award on a nonfact or deprived the Agency of a fair hearing. *Id.* at 6-9, 10-12.

IV. The award is contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *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)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Arbitrator concluded that an award of interest was permissible under both the Agency's

PMS and the BPA. The Agency alleges that the award of interest is improper because the BPA does not apply through either the PMS or the BPA. *See* Exceptions at 12-13. We construe the Agency's assertion as a claim that the award of interest is contrary to the doctrine of sovereign immunity.

The United States, as a sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (*DOT*) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). Thus, there is no right to money damages in a suit against the United States without a waiver of sovereign immunity. *DOT*, 52 FLRA at 49. In order to waive sovereign immunity, Congress must unequivocally express its intention to do so. *Id.* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The Government's consent to a particular remedy also must be unambiguous. *DOT*, 52 FLRA at 49 (citing *Dep't of the Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995)). "As such, an award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy." *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (*Minot*) (then-Member Pope dissenting in part as to another matter) (citing *U.S. Dep't of HHS, FDA*, 60 FLRA 250, 252 (2004)). "In this regard, a collective bargaining agreement may require monetary payments to employees only where there is underlying statutory authority for the payment." *Minot*, 61 FLRA at 370 (citation omitted). Absent a waiver of sovereign immunity, an arbitrator's monetary remedy is contrary to law. *See DOT*, 52 FLRA at 49.

Based on the foregoing, we examine whether the PMS or the BPA contains a valid waiver of sovereign immunity for awards of interest.

A. The award of interest rendered pursuant to the PMS is contrary to sovereign immunity.

Congress enacted the Department of Transportation Appropriations Act of 1996, Pub.L. No. 104-50, § 347, 109 Stat. 436, 460 (1995), codified at 49 U.S.C. § 40122 (DOT Act). *See U.S. Dep't of Transp., FAA*, 65 FLRA 325, 327 (2010) (*FAA*). Congress, through the DOT Act, instructed the Agency to develop its own "personnel management system [i.e., the PMS] . . . [to] address the unique demands on the [A]gency's workforce." 49 U.S.C. § 40122(g)(1). The DOT Act states that the PMS should "provide for greater flexibility in the hiring, training, compensation, and location of personnel." *Id.* Additionally, the DOT Act states that Title 5 of the United States Code, with certain exceptions, "shall not apply" to the PMS. 49 U.S.C. § 40122(g)(2). "The BPA was not one of the exceptions specified." *FAA*, 65 FLRA at 327.

Relying on the above framework, the Agency created its PMS. The Agency decided not to make the BPA part of the PMS. *Id.* Nevertheless, the Agency drafted the PMS to state that backpay from different sources could be awarded in certain situations. *See* Award at 7 (quoting PMS, Ch. II, § 9). The PMS also states that interest on that backpay would not be permitted in several situations; backpay awarded for violations of the parties' collective bargaining agreement, however, was *not* one of those situations. *See id.* Based on the foregoing, the Arbitrator concluded the grievant could receive interest under the PMS because he received backpay for a violation of the parties' agreement.

Assuming without deciding that the Arbitrator's interpretation of the PMS was correct, nothing in the language of the DOT Act indicates that Congress waived the Agency's sovereign immunity to interest awarded as part of an award of backpay under the PMS. The DOT Act authorized the creation of the PMS. The DOT Act, however, contains no language that authorizes an employee to receive interest for an award of backpay awarded under the PMS. The only language in the DOT Act that could potentially provide for such an award under the PMS is the Act's statement that the PMS "should provide for greater flexibility in . . . *compensation*[.]" 49 U.S.C. § 40122(g)(1) (emphasis added). However, even assuming the term "compensation" encompasses backpay, this language contains no indication that it also allows *interest* for that backpay. *See id.* This provision, thus, does not unambiguously waive sovereign immunity as to interest for backpay awarded under the PMS. *See DOT*, 52 FLRA at 49 (stating that a waiver of sovereign immunity as to a particular remedy must be unambiguous). Additionally, as stated above, the BPA and its waiver of sovereign immunity as to awards of interest is not part of the PMS. *See FAA*, 65 FLRA at 327.

Based on the foregoing, the PMS does not constitute a valid waiver of sovereign immunity as to awards of interest as part of an award of backpay. Accordingly, the Arbitrator's award of interest under the PMS is deficient because it is contrary to the doctrine of sovereign immunity.

B. The award of interest rendered pursuant to the BPA is contrary to sovereign immunity.

The Agency contends that the Arbitrator's decision to award interest under the BPA is contrary to law because the BPA does not apply to the Agency. The Union asserts that the BPA applies to the Agency as a matter of law and contract. However, the Authority recently held that the BPA does not apply to the Agency as a matter of law or contract. *See FAA*, 65 FLRA at 327-28**.** Moreover, the Arbitrator did not award backpay under the BPA. Thus, as we explained in *FAA*, even if the BPA were applicable to the Agency, and the Agency's sovereign immunity to monetary damages under the BPA had been waived, the Arbitrator could not award interest under the BPA without first awarding backpay under the BPA. *See id.* at 327. Based on the foregoing, we find that the award of interest under the BPA is also contrary to sovereign immunity.

V. Decision

The Agency's contrary to law exception is granted and the award is set aside as inconsistent with sovereign immunity.[3]

3. Based on the foregoing conclusions, it is unnecessary to address the Agency's nonfact, fair hearing, and remaining contrary to law exceptions.