

65 FLRA No. 116

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 15
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SCHOOL EXPLOSIVE
ORDNANCE DISPOSAL
EGLIN AIR FORCE BASE, FLORIDA
(Agency)

0-AR-4687

DECISION

February 25, 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 an exception to an award of Arbitrator Andrew Dixon filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator found that the grievant was not entitled to a hazard pay differential for performing underwater duties because the hazard that he faced was not listed in Appendix A to 5 C.F.R. part 550, subpart I. Award at 5-6. For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievant works for the Agency as an Explosive Ordnance Disposal Technician Instructor (EOD Instructor). *Id.* at 1-2. As an EOD Instructor, the grievant, among other things, "provides diving instructions in waters that may be murky, have rapid currents, [have] high waves, and may have restricted access to the surface." *Id.* at 2.

The Union presented a grievance on the grievant's behalf, asserting that "he had been denied [a hazard] . . . pay differential for his . . . underwater

[duties], equipment and personnel transfers while at sea, and his handling of explosive devices." *See id.* The matter was unresolved and was submitted to arbitration. *Id.*

The principal issues were as follows: "[d]id the [Agency] violate Article 41[,] Section 1 of the Parties [sic] Collective Bargaining Agreement? If so, what should be the remedy?" *Id.* at 1.

The Arbitrator found that the grievant was not entitled to a hazard pay differential for performing underwater duties because the hazard that the grievant faced was not listed in Appendix A to 5 C.F.R. part 550, subpart I.¹ *Id.* at 5-6. The Arbitrator noted that Appendix A allows an employee to receive a hazard pay differential for underwater duty, such as "diving, required in scientific and engineering pursuits, or search and rescue operations, when: (a) at a depth of . . . [twenty feet] or more below the surface; or, (b) visibility is restricted; or, (c) in rapidly flowing or cold water; or, (d) vertical access to the surface is restricted[.]" Appendix A to 5 C.F.R. part 550, subpart I; *see also* Award at 5. The Arbitrator rejected the Union's interpretation of the relevant portion of Appendix A and found that, to be entitled to a hazard pay differential, an employee must not only qualify under (a) or (b) or (c) or (d), but must also be engaged in scientific and engineering pursuits or search and rescue operations while diving. *See* Award at 5. Moreover, the Arbitrator determined that, although the grievant, at times, "dive[d] at depths greater than [twenty] feet, in visibility restricted waters, or in cold or rapidly flowing waters[.]" and his vertical access to the surface was restricted during hull inspections, testimony demonstrated that "the [g]rievant's diving duties [were] not part of scientific and engineering pursuits or search and rescue operations."² *Id.* at 4, 5.

III. Positions of the Parties**A. Union's Exception**

The Union asserts that the award is contrary to law, rule, or regulation because the Arbitrator failed

1. Pertinent statutory and regulatory provisions are set forth in the attached appendix.

2. The Arbitrator also addressed whether the grievant was entitled to a hazard pay differential for working with explosive devices and for boarding or leaving vessels in adverse conditions. Award at 4, 5-6. Because the Union did not except to the Arbitrator's findings regarding these issues, they are not before us.

correctly to interpret 5 U.S.C. § 5545. Exception at 5-9. The Union claims that the award is contrary to 5 U.S.C. § 5545(d) because the clear intent of the statute is “to pay an employee when exposed to hardship or hazard without concern over the nature of the mission.” *Id.* at 5.

Also, the Union asserts that the award is contrary to law, rule, or regulation because the Arbitrator failed correctly to interpret the statute’s implementing regulations. *Id.* at 7-8. The Union claims that, under the definition of hazardous duty in 5 C.F.R. § 550.902, the grievant’s diving constitutes a hazardous duty because it could result in serious injury or death. *Id.* at 7. According to the Union, the Arbitrator conceded that the grievant dived at depths greater than twenty feet in visibility restricted or in cold or rapidly flowing waters and that, during training for hull inspections, his vertical access to the surface was restricted. *Id.* at 8. Also, the Union claims that the Arbitrator’s interpretation of the relevant language in Appendix A is irrational because the hazard at issue here “is in the nature of the dive, not the mission the employee is on” and “[t]he purpose of the [hazard pay] differential is to provide an increase in pay for the exposure to the hazard.” *See id.* 7-8. Moreover, the Union asserts that its interpretation of the regulation “is entirely consistent with the statute which makes no reference to the mission and only references the nature of the duties and if they involve physical hardship or hazard.” *Id.* at 8. Finally, the Union claims that, in accordance with 5 C.F.R. part 550, subpart I, the grievant participated in the dives only occasionally and that the hazard that the grievant faced while diving was not considered in the classification of his position.³ *Id.* at 8-9.

B. Agency’s Opposition

The Agency argues that the award is not contrary to law, rule, or regulation. *Opp’n* at 1, 5. The Agency contends that, based on testimony presented, the Arbitrator properly concluded that the grievant was not entitled to a hazard pay differential because the grievant’s duties were not listed in Appendix A of the implementing regulations. *See id.* at 2.

Also, the Agency argues that the language of the regulations is clear and unambiguous and that the

3. The Union notes that, at arbitration, the Agency argued that the hazards faced by the grievant were included in the classification of his position and that the Arbitrator did not reach this issue in his award. Exception at 8.

Union, in its exception, asserts that the regulations’ plain language should be ignored. *Id.* at 2, 3. Moreover, the Agency contends that the plain language of the regulations does not conflict with 5 U.S.C. § 5545(d). *Id.* at 3, 5. The Agency argues that “[n]othing in the [statute’s] language limits [the Office of Personnel Management (OPM)] from considering the reason that duties are being performed when determining [whether the duty is] hazard[ous].” *Id.* at 5.

The Agency contends that the Union’s assertion that “the grievant’s diving duty *per se* meets the definition of hazardous duty set forth in 5 C.F.R. [§] 550.902, and that alone causes the grievant to be entitled to [a hazard pay differential]” is without merit. *Id.* at 3-4. According to the Agency, OPM, with the authority granted to it by 5 U.S.C. § 5545, “established the pay schedule set forth in Appendix A of 5 C.F.R. [p]art 550, [s]ubpart I, which provides for [a hazard] pay [differential] when diving is ‘required in scientific and engineering pursuits, or search and rescue operations’ and certain conditions are present.” *Id.* at 4; *see also id.* at 2. Moreover, the Agency argues that the definition of hazardous duty contained in 5 C.F.R. § 550.902 does not confer a right or obligation on employees to receive a hazard pay differential. *Id.* at 4.

Finally, the Agency contends that, with regard to various hazardous duties listed in Appendix A, the mission is directly tied to the requirement for a hazard pay differential. *Id.* According to the Agency, “it make[s] sense that dives of [twenty] feet or more might be more hazardous in a search and rescue situation than they would be in a controlled training environment.” *Id.* at 5.

IV. Analysis and Conclusion

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 threshold requirements for an employee's entitlement to a hazard pay differential originate from a statutory mandate, as well as government regulation. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 65 FLRA 267, 270 (2010) (*Fed. Corr. Complex, Tucson*); *U.S. Dep't of the Army, Alaska*, 54 FLRA 1117, 1122 (1998); see also 5 U.S.C. § 5545 & 5 C.F.R. part 550, subpart I. As relevant here, a grievant must satisfy three requirements before he or she is entitled to a hazard pay differential: (1) the hazard or physical hardship must not have been considered in the classification of his position pursuant to 5 U.S.C. § 5545(d); (2) the hazard or physical hardship must be listed in Appendix A to 5 C.F.R. part 500; and (3) he or she must be performing a hazardous duty within the definition of 5 C.F.R. § 550.902. *Fed. Corr. Complex, Tucson*, 65 FLRA at 270; *U.S. Dep't of the Army, Alaska*, 54 FLRA at 1122; *U.S. Dep't of the Navy, Glenview Naval Air Station, Glenview, Ill.*, 48 FLRA 1420, 1429-30 (1994).

Hazard pay differentials are based on a schedule established by OPM and set forth in Appendix A to 5 C.F.R. part 550, subpart I. *NTEU, NTEU Chapter 51*, 40 FLRA 614, 621 (1991); 5 C.F.R. § 550.903(a) (noting that “[a] schedule of hazard pay differentials, the hazardous duties or duties involving physical hardship for which they are payable, and the period during which they are payable is set out as appendix A to this subpart and incorporated in and made a part of this section”). 5 C.F.R. § 550.904 states, in pertinent part, that “[a]n agency shall pay the hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart.” *Id.* The Authority has found that, in order for an employee to receive a hazard pay differential, the hazardous duties that the employee performs must be included in Appendix A. See *VAMC, Leavenworth, Kan.*, 35 FLRA 14, 17 (1990).

The Union's claim that the award is contrary to 5 U.S.C. § 5545(d) is without merit. Although that provision provides for the establishment and payment of differentials for certain duties, it does not address or require the payment of a hazard differential for the underwater duty involved in this case. See *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist. Office*, 43 FLRA 761, 764 (1991) (*U.S. Dep't of the Interior*) (rejecting the union's contention that the award conflicted with 5 U.S.C. § 5545(d) because the statute did not address or require the payment of a hazard differential for the firefighting duties involved in the case).

Consequently, the Union's claim provides no basis for finding the award deficient.

Similarly, the Union's assertion that the award conflicts with the implementing regulations is meritless. The Arbitrator determined that Appendix A only specifies diving as a hazardous duty when it is “required in scientific and engineering pursuits, or search and rescue operations[.]” Award at 5. The Arbitrator found that “the [g]rievant's diving duties [were] not part of scientific and engineering pursuits or search and rescue operations.” *Id.* at 4, 5. Consequently, because the hazard that the grievant faced was not listed in Appendix A, the Arbitrator concluded that he was not entitled to a hazard pay differential. *Id.* at 5-6.

Although the Union's interpretation of these regulations differs from the Arbitrator's interpretation, the Union's assertions do not prove that the Arbitrator's interpretation conflicts with the plain wording of the regulations or is otherwise impermissible. See *U.S. Dep't of the Interior*, 43 FLRA at 764 (determining that, under § 7122(a) of the Statute, an award is deficient if the arbitrator's interpretation of a regulation conflicts with the plain wording of that regulation or is otherwise impermissible). Moreover, given the Arbitrator's underlying factual findings, which are undisputed and to which we defer, his legal conclusion that the grievant was precluded from obtaining a hazard pay differential because the underwater duty he performed was not listed in Appendix A to 5 C.F.R. part 550 is consistent with the applicable regulations. Finally, even assuming that the grievant participated in dives only occasionally and that the hazard that the grievant faced while diving was not considered in the classification of his position, the grievant would not be entitled to a hazard pay differential because the test, as noted above, mandates that the hazard faced by a grievant be included in Appendix A. See *Fed. Corr. Complex, Tucson*, 65 FLRA at 270; *U.S. Dep't of the Army, Alaska*, 54 FLRA at 1122; *VAMC, Leavenworth, Kan.*, 35 FLRA at 17 (upholding the arbitrator's determination that there was no entitlement to hazard pay because Appendix A did not list the item for which the hazard pay was sought). Consequently, the Union has failed to demonstrate that the award is deficient as contrary to 5 C.F.R. part 550, subpart I and Appendix A.

Accordingly, we deny the Union's exception.

V. Decision

The Union's exception is denied.

APPENDIX

5 U.S.C. § 5545(d), titled “Night, standby, irregular, and hazardous duty differential[.]” states, in pertinent part:

The Office shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard

5 C.F.R. § 550.902, titled “Definitions[.]” states, in pertinent part:

Hazardous duty means duty performed under circumstances in which an accident could result in serious injury or death

5 C.F.R. § 550.903, titled “Establishment of hazard pay differentials[.]” states, in pertinent part:

(a) A schedule of hazard pay differentials, the hazardous duties or duties involving physical hardship for which they are payable, and the period during which they are payable is set out as appendix A to this subpart and incorporated in and made a part of this section.

5 C.F.R. § 550.904, titled “Authorization of hazard pay differential[.]” states, in pertinent part:

(a) An agency shall pay the hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart. However, hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position, without regard to whether the hazardous duty or physical hardship is grade controlling

Appendix A to Part 550, Subpart I, titled “Schedule of Pay Differentials Authorized for Hazardous Duty Under Subpart I[.]” states, in pertinent part:

Underwater Duty:

(2) Diving. Diving, including SCUBA (self-contained underwater breathing apparatus) diving, required in scientific and engineering pursuits, or search and rescue operations, when:

- (a) at a depth of . . . [twenty feet] or more below the surface; or,
- (b) visibility is restricted; or,
- (c) in rapidly flowing or cold water; or,
- (d) vertical access to the surface is restricted by ice, rock, or other structure