

67 FLRA No. 48

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1622
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
ARMY AND AIR FORCE EXCHANGE SERVICE
FORT MEADE EXCHANGE SHOPPETTE
FORT MEADE, MARYLAND
(Agency)

0-AR-4909

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DECISION

January 15, 2014

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

I. Statement of the Case

Arbitrator Roger P. Kaplan found that employees who work in a grocery are not entitled to environmental-differential pay (EDP) for their brief, occasional exposure to the grocery's freezers. The question before us is whether the Arbitrator's finding is contrary to government-wide regulations governing the payment of EDP. As the work situations for which EDP is payable is left to local determination, including arbitration, and the Union has provided no basis for finding that the award is inconsistent with the cited regulations, the answer is no.

II. Background and Arbitrator's Award

The Agency operates a grocery that has a walk-in freezer and "under-counter" freezers.¹ The Union filed a grievance alleging that the Agency violated law and the parties' agreement by failing to pay EDP to the prevailing-rate, non-appropriated-fund employees who stock the freezers.

The grievance went to arbitration, where the Arbitrator framed the issues, in pertinent part, as whether the Agency violated Articles 16 and 35 of the parties'

collective-bargaining agreement, "and/or applicable regulations," when the Agency failed to pay EDP to the employees.² Article 16 of the agreement provides, in pertinent part, that employees are "entitled to [EDP] in accordance with [Federal Personnel Manual] Supplement 532-2"³ – an Office of Personnel Management (OPM) manual that has been abolished but that the parties stipulated has been replaced by OPM's Non-Appropriated Fund Operating Manual (the NAF Manual). (The pertinent wording of the NAF Manual and Article 35 of the parties' agreement is set forth below.)

The Arbitrator found that affected employees spot clean the walk-in freezer approximately once a week. He also found that the grocery receives a delivery of frozen food once a week, and that the employees unload the truck, place the frozen food outside the walk-in freezer while the order is verified, and then use a dolly to move some of the frozen food into the freezer. The Arbitrator determined that it takes approximately fifteen to thirty minutes, once a week, to stock the walk-in freezer, and that individual employees work in the freezer for a total of approximately five to fifteen minutes that are divided into "very short periods of exposure"⁴ – specifically, "increments of one . . . or at most two . . . minutes."⁵ Further, the Arbitrator found that employees enter the walk-in freezer to remove stock to place in the under-counter freezers, but that these instances are "extremely brief."⁶

The Arbitrator stated that it was the Union's burden to prove, by a preponderance of the evidence, that the Agency violated an obligation to pay EDP. The Arbitrator also stated that the "thrust of the law and provisions of the [a]greement regarding [EDP] . . . is that [EDP] must be paid in compensation for genuine discomfort and harsh conditions."⁷ The Arbitrator found that, unlike employees who "work on overhead lines in a combination of wind, rain[,] and cold for hours on end," the employees at issue here "enter and exit a walk-in freezer for a matter of seconds."⁸

The Arbitrator addressed Article 35, Section 10 of the parties' agreement, which provides, in pertinent part, that "[n]o employee shall be required to work in areas where it has been determined that conditions exist which could be hazardous or detrimental to health without proper, personal protective equipment."⁹ The

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.* at 12.

⁵ *Id.* at 9.

⁶ *Id.*

⁷ *Id.* at 13.

⁸ *Id.* at 14.

⁹ *Id.* at 3.

¹ Award at 7.

Arbitrator found that the Union “did not demonstrate that the one[-] . . . or two[-] . . . minute periods spent in the freezer, one day a week, for no more than a total of [five to thirty] minutes . . . constituted a condition that was hazardous or detrimental to health.”¹⁰

The Arbitrator then addressed the terms of the NAF Manual, which provides, in pertinent part, that “[a]n agency shall pay an environmental differential in [A]ppendix J [of the NAF Manual (Appendix J)] . . . when the . . . employee is performing assigned duties which expose him or her to an unusually severe hazard, physical hardship, or working condition listed in [A]ppendix J.”¹¹ Appendix J, in turn, authorizes a 4% pay differential for “cold work,” which (as defined in greater detail in section III below) involves “[w]orking in cold storage or other climate-controlled areas where the employee is subjected to temperatures at or below freezing.”¹²

Interpreting these provisions, the Arbitrator stated that “[t]he use of the word ‘working’ conveys an implication of some period beyond an instant.”¹³ The Arbitrator found the Manual “ambiguous and/or inconclusive as to whether a very short increment of time spent depositing frozen foods in a freezer constitutes working in the sort of hostile or dangerous environment contemplated by the regulations.”¹⁴ In this connection, he found that the Manual “does not speak directly to the concept of de minimis exposures such as the one[-] . . . or two[-] . . . minute periods spent in the freezer, one day a week, for no more than a total of [five to thirty] minutes.”¹⁵ And, given that silence, the Arbitrator stated that “it is up to the trier of fact to determine what is hazardous or detrimental to health.”¹⁶

The Arbitrator then determined that the Union “did not sustain its burden to prove that the EDP provisions were designed to apply to employees whose exposure to cold conditions was for periods of very short duration and that constituted a miniscule percentage of their overall time on the job.”¹⁷ In this regard, the Arbitrator stated that the Union “failed to demonstrate that de minimis exposures are covered and/or that the employees . . . were exposed to conditions that were hazardous or detrimental to health within the applicable definitions.”¹⁸ Accordingly, the Arbitrator concluded that

the Agency “did not violate the [a]greement or the law,” and he denied the grievance.¹⁹

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

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

The Union argues that the award is contrary to law.²⁰ Specifically, the Union claims that the Arbitrator incorrectly found that the employees were not exposed to hazardous or detrimental conditions within the meaning of relevant regulations, including 5 C.F.R. § 532.511.²¹ Rather, the Union claims, the employees are entitled to EDP under the “cold[-]work” provision of 5 C.F.R. Part 532, Subpart E, Appendix A (Appendix A), and identical wording in Appendix J.²²

According to the Union, the Arbitrator erred in finding a de minimis exception to the EDP provisions set forth in 5 C.F.R. Part 532,²³ because those provisions set forth a “comprehensive scheme” for determining entitlement to EDP, and it would undermine that scheme to add a de minimis exception.²⁴ Specifically, the Union contends that OPM’s regulations set a specific threshold – thirty-two degrees Fahrenheit – for entitlement to payment for cold work, but do not set a time-of-exposure threshold.²⁵ Rather, the Union claims, OPM’s regulations require payment for cold work on an actual-exposure basis – not an hours-in-pay status²⁶ – and that actual exposure “‘begins with the *first instance* of exposure’ and continues for ‘a minimum of one hour’ for each instance and fifteen[-]minute increments thereafter for prolonged exposure.”²⁷ For support, the Union cites 5 C.F.R. § 532.511(b)(2)²⁸ and Subchapter S8, Sections 7(f) and 8-7(j) of the NAF Manual, including a chart in Section 8-7(j) that sets forth examples that provide one hour of compensation for periods of exposure as brief as five minutes.²⁹ According to the Union, the Arbitrator “failed to comment on” that chart.³⁰ Finally, the Union contends that the parties’ agreement incorporates the EDP provisions of Part 532 and the NAF Manual.³¹ As a

¹⁰ *Id.* at 14-15.

¹¹ *Id.* at 15-16; *see also* Exceptions, Attach., Subchapter S8, NAF Pay Admin. (Subchapter S8), § S8-7(f)(1).

¹² Award at 15; *see also* Subchapter S8, App. J. (App. J).

¹³ Award at 16.

¹⁴ *Id.*

¹⁵ *Id.* at 16-17.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 17-18.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 18.

²⁰ Exceptions Br. at 8.

²¹ *Id.*

²² *Id.* at 9.

²³ *Id.* at 3.

²⁴ *Id.* at 12.

²⁵ *Id.* at 14.

²⁶ *Id.* at 14-15.

²⁷ *Id.* at 15 (quoting 5 C.F.R. § 532.511(b)(2)).

²⁸ *See id.*

²⁹ *See id.* at 14-15.

³⁰ *Id.* at 17.

³¹ *Id.* at 8-9.

result, the Union claims that the employees were also entitled to EDP under the parties' agreement.³²

OPM has statutory authority to regulate pay differentials "for duty involving unusually severe working conditions or unusually severe hazards."³³ Under this authority, OPM has defined an "[e]nvironmental differential" as "a differential paid for a duty involving unusually severe hazards or working conditions,"³⁴ and has provided as follows regarding "[e]nvironmental differentials":

(a) *Entitlements to environmental differential pay.* (1) In accordance with [5 U.S.C. § 5343(c)(4)], an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by [OPM].

(2) Each installation or activity must evaluate its situations against the guidelines issued by [OPM] to determine whether the local situation is covered by one or more of the defined categories.

(b) . . . (2) An employee entitled to an environmental differential on an actual[-]exposure basis shall be paid a minimum of one hour's differential pay for the exposure Entitlement begins with the first instance of exposure and ends one hour later, except that when exposure continues beyond the hour, it shall be considered ended at the end of the quarter hour in which exposure actually terminated.

. . . .

(d) The schedule of environmental differentials is set out as [A]ppendix A . . . and is incorporated in and made a part of this section.³⁵

Appendix A "lists the environmental differentials *authorized* for exposure to various degrees of hazards, physical hardships, and working conditions of an unusual nature."³⁶ Similarly, Subchapter S8, Section S8-2(26) of the NAF Manual defines "[e]nvironmental differential" as "additional pay that has been *authorized*

. . . for a duty involving unusually severe hazards or unusually severe working conditions."³⁷ And both Appendix A and Appendix J define the category of work at issue here – "[c]old work" – as:

a. Working in cold storage or other climate-controlled areas where the employee is subjected to temperatures at or below freezing ([zero] degrees Celsius ([thirty-two] degrees Fahrenheit)).

b. Working in cold storage or other climate-controlled areas where the employee is subjected to temperatures at or below freezing ([zero] degrees Celsius ([thirty-two] degrees Fahrenheit)) where such exposure is not practically eliminated by the mechanical equipment or protective devices being used.³⁸

None of the provisions set forth above states that, as a matter of law, the brief, occasional exposures to freezers that the Arbitrator found here necessarily are "cold work" that requires the payment of EDP.³⁹ Although 5 C.F.R. § 532.511(b)(2) and Subchapter S8, Section S8-7(f)(2) of the NAF Manual provide that "[a]n employee entitled to an environmental differential on an actual[-]exposure basis shall be paid a minimum of one hour's differential pay for the exposure,"⁴⁰ this wording presumes that the employee is already "entitled" to an environmental differential,⁴¹ and does not specify how long the exposure must be in order for the employee to have such an entitlement.

Although the Union argues that allowing a de minimis exception to EDP payment would contravene the intent of OPM's regulations, OPM has determined that the standards for entitlement may vary, depending on the circumstances of individual workplaces. In this connection, 5 C.F.R. § 532.511(a)(2) expressly leaves it up to "[e]ach installation or activity [to] evaluate its situations against the guidelines issued by [OPM] to determine whether the local situation is covered by one or more of the" categories in Appendix A – including cold work.⁴² And Subchapter S8, § S8-7(g)(3) of the NAF Manual provides: "Nothing in this section shall preclude negotiations through the collective[-]bargaining process for: (a) Determining the . . . application of [A]ppendix J

³² *Id.* at 10.

³³ 5 U.S.C. § 5343(c)(4).

³⁴ 5 C.F.R. § 532.501.

³⁵ *Id.* § 532.511.

³⁶ App. A (emphasis added).

³⁷ Subchapter S8, § S8-2(26) (emphasis added).

³⁸ App. A; App. J.

³⁹ App. A; App. J.

⁴⁰ 5 C.F.R. § 532.511(b)(2); Subchapter S8, § S8-7(f)(2).

⁴¹ 5 C.F.R. § 532.511(b)(2); Subchapter S8, § S8-7(f)(2).

⁴² 5 C.F.R. § 532.511(a)(2).

categories to local work situations.”⁴³ Consistent with these principles, the Authority has held that the specific work situations for which EDP is payable are left to local determination⁴⁴ – including the collective-bargaining process⁴⁵ and arbitration.⁴⁶

The parties authorized the Arbitrator to determine whether the Agency was required to pay EDP for the employees’ specific work situations. The Arbitrator found that the employees have only brief, occasional exposures to the freezers, which were not “hazardous or detrimental to [the employees’] health.”⁴⁷ None of the regulations that the Union cites demonstrates that the Arbitrator erred in this regard. And, although the Union claims that a chart in Subchapter S8, Section S8-7(j) of the NAF Manual indicates that agencies may pay EDP for “exposures as limited as . . . five minutes,”⁴⁸ that chart does not specify that agencies must compensate employees for one-to-two-minute, occasional exposure to freezers.

Accordingly, the Union has not demonstrated that the award is contrary to the cited regulations, and we deny the Union’s exceptions.

IV. Decision

We deny the Union’s exceptions.

⁴³ Subchapter S8, § S8-7(g)(3).

⁴⁴ See *IAMAW, Dist. Lodge 725, Local Lodge 726*, 60 FLRA 196, 199 (2004); *U.S. Dep’t of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1067 (2001) (*Corpus Christi*); *U.S. Dep’t of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.*, 43 FLRA 1074, 1082-83 (1992) (*Lexington*); *VA Med. Ctr., Fort Howard*, 5 FLRA 250, 253 (1981).

⁴⁵ *Lexington*, 43 FLRA at 1083.

⁴⁶ *Corpus Christi*, 56 FLRA at 1067.

⁴⁷ Award at 17.

⁴⁸ Exceptions at 17 (citing Subchapter S8, § S8-7(j)(2)).