68 FLRA No. 76

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 2219
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY CORPS OF ENGINEERS
LITTLE ROCK DISTRICT
LITTLE ROCK, ARKANSAS
(Agency)

0-AR-5053

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DECISION

April 15, 2015

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

I. Statement of the Case

Between December 2010 and April 2012, the Agency prohibited employees who worked under a compressed work schedule (compressed schedule) from receiving Sunday premium pay in excess of eight hours. Arbitrator David E. Walker found that the Agency's action violated the parties' collective-bargaining agreement and "statutory law."[1] As a remedy, the Arbitrator directed the Agency to pay employees who worked on Sunday as part of their regular, compressed schedules an amount equal to 25% of the employees' hourly rates for each hour of Sunday work. However, the Arbitrator denied the Union's request for attorney fees under the Back Pay Act (BPA).[2] There are three questions before us.

The first and second questions are whether the award of Sunday premium pay is contrary to: (1) the provision in the Supplemental Appropriations Act of 1982 (SAA)[3] that provides that the Department of Defense (DOD) Wage Fixing Authority will determine the wages of the employees at issue in this case without regard to any other provision of law limiting the amounts payable to prevailing-rate employees; or (2) the provision in DOD Instruction (DODI) 5120.39 that provides that the DOD Wage Fixing Authority will approve salaries, wages, and compensation policies for certain classes of employees, including the employees at issue in this case. Because 5 U.S.C. § 6128(c) requires agencies to provide Sunday premium pay for employees on compressed schedules, and neither the SAA nor DODI 5120.39 excuses the Agency from complying with § 6128(c), we find that the answer to the first two questions is no.

The third question is whether the Arbitrator's denial of attorney fees is contrary to the BPA. Because that denial does not meet the BPA's requirement of "a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement,"[4] we find that the answer is yes. And because the award and the record do not contain the findings necessary to enable us to assess the Arbitrator's legal conclusion, we remand the attorney-fees issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

II. Background and Arbitrator's Award

Under the SAA and DODI 5120.39, the DOD Civilian Personnel Management Service (CPM) periodically sets the wage and premium-pay rates for the bargaining-unit employees at issue in this case. When CPM revises those rates, it issues a new rate schedule, and the rate schedule relevant here is the Southwest Power Rate Schedule.

The 2010 Southwest Power Rate Schedule provided for Sunday premium pay at 25% of the base hourly rate for each hour worked, but limited it to eight hours per Sunday. In 2012, the Union questioned the legal authority for limiting Sunday premium pay, and filed a grievance concerning that limitation. That same year, the Union and the Agency entered into a memorandum of agreement (MOA) that amended the 2010 Southwest Power Rate Schedule and exempted employees working under a compressed schedule from the eight-hour Sunday-premium-pay cap. Also in 2012, in response to the grievance, the Agency initially conceded that the limitation should not have been enforced for employees on compressed schedules and that such employees were entitled to compensation for lost Sunday premium pay. But in 2013, the Agency reversed its position and found that it had correctly applied the cap to limit the Sunday premium pay of employees on compressed schedules. The Union responded by invoking arbitration on the grievance, which had not yet been resolved at that point.

[1] Award at 9.
[2] 5 U.S.C. § 5596.
[3] Supplemental Appropriations Act, Pub. L. No. 97-257, 96 Stat. 818, 832 (1982); 5 U.S.C. § 5343 note.
[4] *U.S. Dep't of Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 48 FLRA 1281, 1291 (1994) (*Austin*).

At arbitration, the Union argued that employees who worked under compressed schedules are entitled to Sunday premium pay without an eight-hour cap, regardless of the Southwest Power Rate Schedule that was effective from 2010 until 2012. For support, the Union cited 5 U.S.C. § 6128(c), which provides, in pertinent part:

> Notwithstanding [§] 5544(a) or [§] 5546(a) of this title, or any other applicable provision of law, in the case of any full-time employee on a compressed schedule who performs work (other than overtime work) on a tour of duty for any workday a part of which is performed on a Sunday, such employee is entitled to pay for work performed during the entire tour of duty at the rate of such employee's basic pay, plus premium pay at a rate equal to 25[%] of such basic pay rate.[5]

The Agency argued that the 2010 Southwest Power Rate Schedule limiting Sunday premium pay was proper under the SAA and DODI 5120.39. The SAA provides, in pertinent part:

> Without regard to any other provision of law limiting the amounts payable to prevailing[-]wage[-]rate employees, United States Army Corps of Engineers employees paid from Corps of Engineers Special Power Rate Schedules shall be paid . . . wages as determined by the [DOD] Wage Fixing Authority to be consistent with wages of the Department of Energy and the Department of Interior employees performing similar work in a corresponding area.[6]

DODI 5120.39 provides that the DOD Wage Fixing Authority will approve salaries, wages, and compensation policies for certain classes of employees, including those at issue in this dispute.

The Arbitrator determined that the Agency's reliance on the SAA and DODI 5120.39 to justify the eight-hour cap on Sunday premium pay did not account for § 6128(c)'s requirements. He noted that the DOD Wage Fixing Authority can set compensation rates in accord with the SAA and § 6128(c), but indicated that, in this case, the DOD Wage Fixing Authority failed to do so because it disregarded § 6128(c)'s Sunday-premium-pay requirements for employees on compressed schedules.

The Arbitrator concluded that the 2010 Southwest Power Rate Schedule's cap on Sunday premium pay for employees working compressed schedules violated both § 6128(c) and the portion of the CBA that provides for compressed work schedules. Accordingly, the Arbitrator directed the Agency to pay employees who worked on Sunday as part of their regular, compressed schedule between December 2010 and April 2012 an amount equal to 25% of the employees' hourly rate for each hour of Sunday work not previously compensated with premium pay.

The Union requested attorney fees, but the Arbitrator denied that request, because he found that fees were "not in the interest of justice considering the ordinary professional relationship of a labor union and its counsel, as well as the good faith of the Agency in addressing an untenable situation not of its own making."[7]

The Agency filed exceptions to the Arbitrator's award of Sunday premium pay, and the Union filed exceptions to the Arbitrator's denial of attorney fees. The Agency and the Union also filed oppositions to each other's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to the SAA or DODI 5120.39.

The Agency argues that the Arbitrator's award is contrary to law and regulation, specifically the SAA and DODI 5120.39.[8] Section 7122(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.[9] For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations.[10]

When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[11] In applying the

[5] 5 U.S.C. § 6128(c).
[6] Supplemental Appropriations Act, 96 Stat. at 832.
[7] Award at 10.
[8] Agency's Exceptions Form at 5.
[9] 5 U.S.C. § 7122(a)(1).
[10] *USDA, Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1128 (2010) (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216 (1996)).
[11] *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)).

standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[12] And when evaluating an exception asserting that an award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[13] Further, when assessing whether an arbitrator's award is contrary to law, rule, or regulation, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that those findings are "nonfacts."[14]

The Agency contends that when Congress enacted the SAA, Congress intended that the employees at issue in this case would be paid differently than other prevailing-rate employees, who receive the wage paid to the majority of workers within a particular area.[15] Specifically, the Agency argues that the SAA states that the DOD Wage Fixing Authority will determine the employees' wages without regard to any other provision of law.[16] The Agency further argues that DODI 5120.39 gives the DOD Wage Fixing Authority the authority to "approve [the employees'] salaries[,] wages[,] and compensation policies,"[17] and that this indicates that the DOD Wage Fixing Authority has the power to set differentials for Sunday premium pay.[18]

Here, the Arbitrator found that the DOD Wage Fixing Authority could continue setting compensation rates in accordance with the SAA without violating the Sunday-premium-pay requirements of § 6128(c).[19] Although the Agency argues that, under the SAA and DODI 5120.39, the DOD Wage Fixing Authority sets wages without regard to *any* other provision of law,[20] the SAA's plain wording states that the DOD Wage Fixing Authority sets wages "[w]ithout regard to any other provision of law *limiting* the amounts payable to prevailing[-]wage[-]rate employees."[21] Section 6128(c) is not a provision "limiting" the amounts payable to prevailing-wage-rate employees;[22] rather, it requires agencies, "[n]otwithstanding . . . any other applicable provision of law," *to increase* the pay of full-time employees on a compressed schedule for "any workday a part of which is performed on a Sunday" to include premium pay.[23] So the SAA does not allow the Agency to set compensation "[w]ithout regard to [§ 6128(c)]."[24]

The Agency claims that the Authority's decision in *U.S. Department of the Army, U.S. Army Corps of Engineers, North Pacific Division* (*North Pacific*)[25] supports its interpretation of the SAA[26] and that *North Pacific* is "especially on point."[27] *North Pacific* involved whether a collective-bargaining agreement entitled the employees at issue in that case to any Sunday premium pay after their latest DOD Wage Fixing Authority wage schedule discontinued Sunday premium pay.[28] The union in that case argued that discontinuance of Sunday premium pay violated the parties' agreement and that the new wage was not a law or government-wide regulation.[29] The Authority held that the arbitrator's award, which directed the agency to reinstate Sunday premium pay and to pay employees backpay,[30] was contrary to the SAA.[31] The Agency argues that *North Pacific* held that "requiring the [g]overnment to pay Sunday premium pay contrary to what is outlined in the wage schedule created by the [DOD] Wage Fixing Authority is inconsistent with the law."[32] However, the union in *North Pacific* did not raise an argument regarding § 6128(c), so the Authority did not interpret that provision.[33] Here, by contrast, the Union argued (and the Arbitrator found) that the DOD Wage Fixing Authority's Southwest Power Rate Schedule violated § 6128(c)'s Sunday-premium-pay requirements. Because *North Pacific* did not discuss § 6128(c), it is not controlling here.[34]

For the foregoing reasons, we find that the award is not contrary to the SAA.

With regard to DODI 5120.39, that Agency regulation gives the DOD Wage Fixing Authority the power to "[a]pprove salaries, wages, and compensation policies" for the employees at issue in this case.[35] But nothing in DODI 5120.39 empowers the DOD Wage

[12] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[13] *NTEU, Chapter 215*, 67 FLRA 183, 185 (2014).
[14] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[15] Agency's Exceptions Form at 6.
[16] *Id.*
[17] *Id.* at 8.
[18] *Id.*
[19] Award at 8.
[20] Agency's Exceptions Form at 6.
[21] Supplemental Appropriations Act, 96 Stat. at 832 (emphasis added).
[22] *Id.*
[23] 5 U.S.C. § 6128(c).
[24] Supplemental Appropriations Act, 96 Stat. at 832.
[25] 52 FLRA 670 (1996).
[26] Agency's Exceptions Form at 6.
[27] *Id.*
[28] *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, N. Pac. Div.*, 52 FLRA 670, 670-71 (1996) (*North Pacific*).
[29] *Id.*
[30] *Id.* at 672.
[31] *Id.* at 675.
[32] Agency's Exceptions Form at 6.
[33] *North Pacific*, 52 FLRA at 675.
[34] *See U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 598 (because certain court decisions did not discuss regulation at issue, those decisions were not controlling), *recons. denied*, 59 FLRA 803 (2004).
[35] Agency's Exceptions, Attach., DODI 5120.39 at 5.

Fixing Authority to ignore the applicable Sunday-premium-pay requirements of § 6128(c) for employees on a compressed schedule. Therefore, we find that the award is not contrary to DODI 5120.39.

B. The Arbitrator's denial of attorney fees is contrary to the BPA.

The Union argues that the Arbitrator's denial of attorney fees does not meet the BPA's requirements,[36] including "the requirement of a fully articulated[,] reasoned decision setting forth specific findings on each pertinent statutory requirement."[37] For support, the Union cites the Authority's "law" on this issue.[38] The Agency argues in its opposition that the Union's argument does not conform to any of the specific bases, set forth in the Authority's *Guide to Arbitration Under the Statute*, for filing an exception to an arbitrator's award.[39] However, as the Union cites the BPA, discusses the BPA's "statutory requirement[s],"[40] and addresses Authority "law,"[41] we find that the Union's argument is sufficient to raise a contrary-to-law exception.

In order to award attorney fees, an arbitrator must award backpay under the BPA.[42] Further, the arbitrator must resolve the request for fees in accordance with the standards under 5 U.S.C. § 7701(g)(1).[43] The prerequisites for an award of attorney fees under § 7701(g)(1) are as follows: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee.[44] The standards under § 7701(g) further require "a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement."[45]

When arbitrators do not set forth specific findings supporting their determinations on each pertinent statutory requirement for attorney fees – and the award and the record do not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions – the Authority will remand the attorney-fees issue to the parties, absent settlement, for resubmission to the arbitrator so that the arbitrator can make the requisite findings.[46]

Here, the Arbitrator awarded backpay, but he denied the Union's request for attorney fees, stating only that "[a]ttorney[] fees are denied as not in the interest of justice considering the ordinary professional relationship of a labor union and its counsel, as well as the good faith of the Agency in addressing an untenable situation not of its own making."[47] The Arbitrator did not make any findings addressing the pertinent statutory requirements for attorney fees, and neither the award nor the record contains the findings necessary for us to assess the Arbitrator's legal conclusions. Consistent with the principles set forth above, we find that the Arbitrator's denial of attorney fees is contrary to the BPA, and we remand the attorney-fees issue to the parties for resubmission to the Arbitrator, absent settlement.

The Union also argues that the denial of attorney fees is deficient on additional grounds.[48] Because we have found the denial of attorney fees contrary to the BPA, we find it unnecessary to address the Union's additional arguments.[49]

IV. Decision

We deny the Agency's exceptions, grant the Union's contrary-to-law exception, and remand the attorney-fees issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

[36] Union's Exceptions at 2-3.
[37] *Id.* at 2.
[38] *Id.* at 4 (citations omitted).
[39] Agency's Opp'n at 4.
[40] Union's Exceptions at 2.
[41] *Id.* at 4.
[42] *E.g.*, *NAGE, Local R14-52*, 45 FLRA 830, 833 (1992).
[43] *E.g.*, *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010).
[44] *Austin*, 48 FLRA at 1291.
[45] *Id.*
[46] *NTEU*, 66 FLRA 577, 582 (2012); *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998).
[47] Award at 10.
[48] *See* Union's Exceptions at 2.
[49] *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 399 (2014) (finding that because the arbitrator's denial of attorney fees was contrary to government-wide regulation, it was unnecessary to address other exceptions concerning attorney fees).