73 FLRA No. 89

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
ROBLEY REX MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1133
(Union)

0-AR-5794

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DECISION

March 9, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Mark C. Travis issued an award finding housekeepers at the Agency's medical center (the grievants) are entitled to environmental-differential pay (EDP) because they work in close proximity to low-hazard microorganisms. The Agency filed exceptions to the award. For the following reasons, we set aside the award because it is contrary to 5 C.F.R. Part 532, Subpart E, Appendix A (Appendix A).

II. Background and Arbitrator's Award

The Union filed a grievance seeking either high-hazard EDP (at a pay-differential rate of 8%) or low-hazard EDP (at a pay-differential rate of 4%) for the grievants. The Union alleged the grievants are continuously exposed, through both direct and indirect contact, to hazardous microorganisms in performing their duties. The grievance went to arbitration, where the Arbitrator framed the issue as whether the Agency violated the parties' agreement when it denied the grievants EDP and, "if so, what is the appropriate remedy?"[1]

With regard to high-hazard EDP, the Arbitrator noted the grievants are exposed to microorganisms in various ways, and that there was some evidence of "gaps in the training" the Agency provided.[2] However, he found "no clear evidence" those gaps resulted in any harmful exposures,[3] and that "[t]he exhibits introduced by the Agency show comprehensive training materials and attendance records."[4] In addition, the Arbitrator determined that the grievants' personal protective equipment (PPE) practically eliminated the potential for injury and that there is "hardly any record of harmful exposures" at the Agency's facilities.[5] Thus, the Arbitrator concluded the grievants were not eligible for high-hazard EDP.

With regard to low-hazard EDP, the Arbitrator noted that Appendix A has two separate categories for exposure to low-hazard microorganisms. He found that, under the first category, EDP entitlement does not depend on whether safety equipment has practically eliminated the potential for injury (the practical-elimination requirement).[6] Thus, he rejected the Agency's reliance on its established "safety precautions."[7] He determined that the only requirement for EDP is that the grievants "work with or in close proximity to micro[]organisms pathogenic to man."[8] Finding this requirement met, the Arbitrator found the grievants entitled to low-hazard EDP and awarded them backpay with interest.

The Agency filed exceptions to the award on February 3, 2022, and the Union filed an opposition on March 7, 2022.

III. Analysis and Conclusion: The award is contrary to Appendix A.

The Agency argues the award is contrary to law – specifically, Appendix A – because the Arbitrator erred in finding there is no practical-elimination requirement for low-hazard EDP.[9] The Agency claims the grievants cannot recover low-hazard EDP because the Arbitrator found "the unrefuted evidence from witnesses was that the PPE provided fully protects and practically eliminates the potential for exposure . . . ."[10]

[1] Award at 6. The parties' agreement incorporates the statutory requirements of Appendix A by reference, *id.* at 2, and there is no dispute that they apply here.
[2] *Id.* at 28.
[3] *Id.*
[4] *Id.* at 28-29.
[5] *Id.* at 29.
[6] *Id.* at 30 (citing App. A).
[7] *Id.*
[8] *Id.*
[9] Exceptions Br. at 14-15.
[10] *Id.* at 17.

The Authority reviews questions of law raised by the exceptions de novo.[11] In applying the standard of de novo review, the Authority determines whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.[12] In making this assessment, the Authority defers to the arbitrator's factual findings unless the excepting party establishes that they are nonfacts.[13]

Appendix A, Part II, Paragraph 7.a. – upon which the Arbitrator relied – was effective November 1, 1970, and permits payment of low-hazard EDP for:

> Working with or in close proximity to micro[]organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material.[14]

The very next paragraph – Paragraph 7.b. – was effective March 13, 1977.[15] It provides for low-hazard EDP in the same circumstances at Paragraph 7.a., but adds the practical-elimination requirement.[16]

Courts have set forth the practical-elimination requirement as part of the test for entitlement to both high- and low-hazard EDP for microorganism exposure.[17] As discussed above, it is clear that entitlement to *high*-hazard EDP requires, among other things, that the practical-elimination requirement is met.[18] As one court has stated, with regard to *low*-hazard EDP:

> To construe a pre-1977 low[-]hazard category as authorizing EDP where the potential for injury has been practically eliminated would be to elevate the low[-]hazard category above that of the high hazard, and to permit a finding that low[-]hazard conditions were "unusually severe" when, under the same circumstances, a high[-]hazard condition could not be so found. That view would impermissibly extend EDP to situations involving no practical potential for injury and thus no compensable hazard whatsoever, in direct conflict with the statutory provision requiring "unusually severe" hazards.[19]

Therefore, the practical-elimination requirement applies not only to high-hazard EDP, but also to low-hazard EDP. The Arbitrator did not cite any legal authority that supported his contrary conclusion.[20]

In addition, in his high-hazard-EDP analysis, the Arbitrator found the grievants' PPE practically eliminates the potential for injury and that there are no deficiencies in the Agency's training. There are no exceptions to those findings, and they support his conclusion that the practical-elimination requirement was met for high-hazard EDP.

The Union argues that, in his low-hazard-EDP analysis, the Arbitrator found the Agency did *not* meet the practical-elimination requirement.[21] This argument misconstrues the award. The Arbitrator summarized the Agency's various arguments and found them "not well-taken."[22] However, he then stated that "the issue of safety precautions" was "*not a required element*" of the low-hazard EDP analysis – *not* that the Agency had failed to meet the practical-elimination requirement.[23] Thus, we reject the Union's argument as based on a misreading of the award.[24]

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[11] *U.S. Dep't of HUD*, 73 FLRA 287, 288 (2022) (*HUD*) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021)).
[12] *Id.*
[13] *Id.*
[14] App. A, para. 7.a.
[15] App. A, para. 7.b.
[16] *Id.* (adding requirement that "the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury").
[17] *Adams v. United States*, 152 Fed. Cl. 350, 356 (2021) (setting forth the requirements for both high- and low-hazard EDP entitlement as including a requirement that "safety precautions 'have not practically eliminated' the risk of infection and 'personal injury[]'" (quoting App. A)), *aff'd*, *Adams v. United States*, No. 2021-1662, 2023 WL 1976728, at *6 (Fed. Cir. Feb. 14, 2023) (*Adams 2023*); *Adams v. United States*, 151 Fed. Cl. 522, 528 (2020) (same).
[18] App. A, para. 7.a.
[19] *Bendure v. United States*, 695 F.2d 1383, 1386 (Fed. Cir. 1982).
[20] Award at 30-31.
[21] Opp'n Br. at 15-17.
[22] Award at 30.
[23] *Id.* (emphasis added).
[24] *See, e.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (denying exceptions that were based on a mischaracterization of the award).

Further, the Arbitrator and the Union do not cite – and we have not found – any legal support for the notion that the Agency could meet the practical-elimination requirement for *high*-hazard EDP without also doing so for *low*-hazard EDP. In fact, courts have analogized microorganism exposure to toxic-chemical exposure, for which a "key difference" between the high- and low-risk categories is that "the employee in the low[-risk category] can be many degrees removed from the toxic agent."[25] Consequently, for microorganism exposure, courts have distinguished the high- and low-hazard EDP categories based on whether the employee's contact with microorganisms is direct or indirect.[26] No basis is argued or apparent for finding an agency could meet the practical-elimination requirement where exposure is *direct*, while failing to meet that requirement where exposure is merely *indirect*. We find the Arbitrator's determination that the practical-elimination requirement was met under the high-hazard EDP category also supports a conclusion that the requirement was met under the low-hazard EDP category. As such, the grievants were not entitled to low-hazard EDP.

For these reasons, we conclude the Arbitrator's finding of entitlement to low-hazard EDP is inconsistent with Appendix A, and we set aside the award as contrary to law on that basis.[27]

IV. Decision

We set aside the award.

[25] *Adams 2023*, 2023 WL 1976728, at *6 (quoting *Adair v. United States*, 497 F.3d 1244, 1257 (Fed. Cir. 2007)).
[26] *Id.*

[27] The Agency also argues the award is contrary to 5 C.F.R. § 532.511(a)(1), Exceptions Br. at 17-19; is based on a nonfact, *id.* at 19-21; fails to draw its essence from the parties' agreement, *id.* at 24-25; is contrary to public policy, *id.* at 25; and is incomplete, ambiguous, or contradictory, *id.* at 21-24. Because we find the award contrary to Appendix A, it is unnecessary to address the Agency's remaining exceptions. *See, e.g.*, *HUD*, 73 FLRA at 290 n.30.