73 FLRA No. 182

UNITED STATED
DEPARTMENT OF THE ARMY
UNITED STATES ARMY GARRISON
DIRECTORATE OF EMERGENCY SERVICES
FORT HUACHUCA, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1662
(Union)

0-AR-5907

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DECISION

July 24, 2024

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

I. Statement of the Case

This decision involves exceptions to an award issued by Arbitrator Dean A. Martin (the Arbitrator). In that award, the Arbitrator found the Agency's reassignment of firefighters violated the parties' collective-bargaining agreement – and another arbitrator's previous interpretation of the agreement – and constituted a prohibited personnel practice under 5 U.S.C. § 2302. The Arbitrator awarded various remedies, including compensatory damages for firefighters who incurred expenses as a result of the Agency's violations. The Arbitrator directed the Union to compile monetary data regarding the expenses and loss by the Union and affected firefighters, and to provide that data to the Agency for review and comment before submitting it to him.

The Agency filed contrary-to-law and exceeded-authority exceptions to the award. For the reasons explained below, we partially dismiss and partially deny the exceptions.

II. Background and Arbitrator's Award

In July 2021, to balance a staffing shortage at one of its three fire stations, the Agency reassigned a firefighter (the original firefighter) from one fire station to another. The Union filed a grievance, alleging the Agency violated Article 35 of the parties' agreement because it did not consider seniority in conducting the reassignment. The matter proceeded to arbitration before an arbitrator (the previous arbitrator) who issued a November 17, 2021 award and a December 8, 2021 clarification of that award (collectively, the first clarified award). In the first clarified award, the previous arbitrator found the Agency violated the parties' agreement by reassigning the original firefighter without considering seniority. The previous arbitrator directed the Agency to return the original firefighter to his original station, and stated that future firefighter reassignments "shall be consistent with [the first clarified award] and determined by seniority as appropriate."[1]

The Agency initially returned the original firefighter to his original position. However, in March 2022, the Agency implemented "reassignments impacting approximately 90% of the firefighters," including the original firefighter.[2]

The Union filed another grievance, which went to arbitration before the Arbitrator. He framed the issues as: "Whether the Agency violated Article 35.2.b.3 of the parties[' agreement] and/or the [first clarified award] . . . when it implemented a mass reassignment of firefighters in March 2022, and, if by doing so, commit[ted] a prohibited personnel practice in violation of federal[-]sector labor-management laws."[3]

The Arbitrator found the Agency violated Article 35 and the first clarified award by reassigning the firefighters in March 2022 without considering seniority. The Arbitrator also found the Agency conducted those reassignments in retaliation for the Union filing the grievance that resulted in the first clarified award. The Arbitrator concluded the retaliation was a prohibited personnel practice, in violation of 5 U.S.C. § 2302.[4] He also determined the second reassignment of the original firefighter violated the first clarified award.

The Arbitrator noted the Union asked him to "sustain the grievance in its entirety and order the Agency to reverse its 2022 staffing actions by and through all requested remedies in accordance with the [g]rievance,

[1] Exceptions, Enclosure 5, First Clarified Award at 3.
[2] Award at 6.
[3] *Id.* at 10. Article 35.2.b.3 pertinently states that "[s]taffing of fire stations will be on a volunteer basis" but that "[w]hen a bargaining[-]unit firefighter is compelled to work at a specific fire station and the requirement creates disparity between employees, all things being equal, seniority . . . will be the determining factor." Exceptions, Enclosure 2, Collective-Bargaining Agreement at 78.
[4] 5 U.S.C. § 2302 (defining and prohibiting violations of merit systems principles known as "prohibited personnel practice[s]").

prior [a]rbitration findings, and all remedies consistent with correcting prohibited personnel actions to make the employees whole again."[5] The Arbitrator also noted the Union's requested remedies included "compensatory damages . . . for firefighters who had incurred expenses that [they] would have otherwise not incurred if the Agency had complied appropriately with" the first clarified award.[6] The Arbitrator granted the Union's requested remedies "in accordance with law and the interest of justice."[7] He directed the Union "to compile monetary data in support of its requested remed[ies] in accordance with applicable law and the interest of justice; compensation for the expenses and loss by the Union and affected members in accordance with 5 U.S.C. [§] 1214, and other provisions of law."[8] Further, he directed the Union to provide the compiled data to the Agency "for review and comment prior to submission to the Arbitrator."[9]

On July 31, 2023, the Agency filed exceptions to the award, and on August 29, 2023, the Union filed an opposition.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's exceptions.

The Agency argues the award is contrary to 5 U.S.C. § 2302 because the Arbitrator found a violation for a group – the Union – rather than an individual employee, as that statute contemplates.[10] The Agency also argues the Arbitrator exceeded his authority because 5 U.S.C. §§ 1214(g)(2) and 1221(g)(1)(A)(ii) authorize the Merit Systems Protection Board – but not arbitrators – to award compensatory damages resulting from the commission of a prohibited personnel practice.[11]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[12] At arbitration, the Union (1) argued the Agency committed a prohibited personnel practice under 5 U.S.C. § 2302, and (2) requested compensatory damages.[13] The Agency argued, to the Arbitrator, that the first clarified award "addressed an individual employee grievance and not a Union grievance; therefore, the decision in that case only applied to the employee involved and no others."[14] However, nothing in the record demonstrates that the Agency argued it would be contrary to 5 U.S.C. § 2302 for the Arbitrator to find a prohibited personnel practice; in fact, there is no evidence that the Agency addressed 5 U.S.C. § 2302 at all. Further, there is no evidence that the Agency either cited 5 U.S.C. §§ 1214 and 1221, or argued the Arbitrator lacked authority to award compensatory damages. Because the Agency could have raised these arguments at arbitration, but did not do so, we dismiss the Agency's contrary-to-law exception involving 5 U.S.C. § 2302 and its exceeded-authority exception.[15]

The Agency also claims the award is contrary to law because there is no statutory waiver of sovereign immunity to authorize the compensatory-damages remedy.[16] There is no record evidence that the Agency raised its sovereign-immunity claim at arbitration. Nevertheless, the Authority has held that parties may raise sovereign-immunity claims at "at any time."[17] Therefore, we address the Agency's claim below.

IV. Analysis and Conclusions

The Agency argues the award is contrary to law.[18] 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.[19] 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.[20] In conducting that assessment, the Authority defers to the arbitrator's factual

[5] Award at 14.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 14-15; *see also* 5 U.S.C. § 1214(g) (authorizing the Merit Systems Protection Board to order "corrective action[s]" to remedy prohibited personnel practices, including (1) "as nearly as possible," placing the affected individual "in the position the individual would have been in had the prohibited personnel practice not occurred; and (2) reimbursement for attorney's fees, back pay and related benefits, . . . any other reasonable and foreseeable consequential damages, and compensatory damages (including interest . . . and costs)").
[9] Award at 15.
[10] Exceptions Br. at 5 (citing 5 U.S.C. § 2302(a)(2)(A) (defining a prohibited personnel practice as involving an individual employee or applicant)).
[11] *Id.* at 6 (arguing the Arbitrator disregarded a specific limitation placed on his authority).
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 861 (2024) (*FCC Lompoc*).
[13] Exceptions, Enclosure 6 (Union Post-Hr'g Br.) at 20-22; *see also* Award at 7-9.
[14] Award at 9-10; *see also* Exceptions, Enclosure 7 (Agency Post-Hr'g Br.) at 3.
[15] *See, e.g., FCC Lompoc*, 73 FLRA at 861-62 (dismissing exceptions that excepting party could have raised, but failed to raise, at arbitration).
[16] Exceptions Br. at 4.
[17] *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 632 (2023).
[18] Exceptions Br. at 4-6.
[19] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 788, 790 (2024).
[20] *Id.*

findings unless the excepting party demonstrates the award is based on a nonfact.[21]

First, as noted above, the Agency asserts the award is contrary to law because there is no statutory waiver of sovereign immunity to authorize the compensatory-damages remedy.[22] The United States is immune from liability for money damages under the doctrine of sovereign immunity.[23] Sovereign immunity can be waived by statute, but a waiver will be found only if "unequivocally expressed in statutory text."[24] Thus, an arbitration award directing an agency to provide monetary damages to an employee must be supported by statutory authority to impose such a remedy.[25]

The Arbitrator cited 5 U.S.C. § 1214 to support the compensatory-damages remedy.[26] Under 5 U.S.C. § 1214, compensatory damages are permitted when there is a finding of a prohibited personnel practice.[27] As discussed above, the Arbitrator found a prohibited personnel practice under 5 U.S.C. § 2302, and the Agency is barred from challenging that finding on exceptions. Consequently, 5 U.S.C. § 1214 waives sovereign immunity for the Arbitrator's compensatory-damages remedy, and the Agency's sovereign-immunity claim provides no basis for setting aside that remedy.[28]

Second, the Agency argues the compensatory-damages remedy is contrary to law because the Arbitrator did not support it with specific findings.[29] Citing *U.S. Department of Commerce, Patent & Trademark Office* (*PTO*),[30] the Agency argues that compensatory-damages awards must be based on objective evidence of both the nature and the amount of damages.[31]

In *PTO*, the Authority stated that compensatory-damages awards must be based on objective evidence.[32] In that case, an arbitrator awarded $5,000 in compensatory damages to a specific grievant,[33] but failed to make the necessary and specific findings to support that award.[34] Here, by contrast, the Arbitrator did not award any specific amounts of compensatory damages to specific employees. Rather, he directed the Union to compile monetary data and submit it to the Agency for review and comment before submitting it to the Arbitrator.[35] As such, this case has not yet reached the stage where the Arbitrator is required to set forth the necessary and specific findings to support individual awards of compensatory damages. Therefore, the Agency's argument provides no basis for setting aside the award as contrary to law.[36]

We deny these contrary-to-law exceptions.

V. Decision

We partially dismiss and partially deny the Agency exceptions.

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[21] *Id.*
[22] Exceptions Br. at 4.
[23] *SSA, Off. of Disability Adjudication & Rev., Region 1*, 65 FLRA 334, 337 (2010) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)).
[24] *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 (2020) (Member DuBester concurring on other grounds) (quoting *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004) (*HHS*)).
[25] *Id.* (citing *HHS*, 60 FLRA at 252).
[26] Award at 14.
[27] 5 U.S.C. § 1214(g); *see also Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (indicating Congress unequivocally waived sovereign immunity for money damages under 5 U.S.C. § 1214(g)).
[28] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 73 FLRA 77, 79 (2022) (Member Kiko dissenting in part on other grounds) (denying sovereign-immunity claim based on Fair Labor Standards Act (FLSA) where excepting party failed to raise FLSA argument before arbitrator).
[29] Exceptions Br. at 5-6.
[30] 52 FLRA 358 (1996).
[31] Exceptions Br. at 5.
[32] 52 FLRA at 373.
[33] *Id.* at 361.
[34] *See id.* at 372-74 (discussing the findings necessary to support an award of compensatory damages under the Civil Rights Act of 1991, and finding the arbitrator's findings insufficient).
[35] Award at 14-15.
[36] *Cf. U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 596 n.35 (2020) (Member DuBester concurring) (denying exception to backpay award because "[i]dentifying which employees were" entitled to backpay was "a compliance matter," and stating that the Back Pay Act's requirements were "satisfied by the [a]rbitrator's sufficiently specific identification of the 'category of employees' entitled to backpay") (quoting *AFGE, Loc. 1034*, 68 FLRA 718, 720 (2015) (Member DuBester dissenting in part on other grounds)).