64 FLRA No. 94

UNITED STATES
DEPARTMENT OF THE NAVY
NAVY PUBLIC WORKS CENTER
NAVAL FACILITIES ENGINEERING
COMMAND MIDWEST
GREAT LAKES, ILLINOIS
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R7-51
(Union)

0-AR-4376

DECISION

February 26, 2010

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 exceptions to an award of Arbitrator Cyrus A. Alexander filed by the Agency under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator granted the grievance in part, awarding the affected employees, who had been exposed to Asbestos Containing Material (ACM): (1) annual exams at the Agency's expense and (2) if an employee separates from the Agency, the difference in the premium paid for an exam while employed at the Agency and the actual cost of the exam to the employee. For the reasons that follow, we grant the Agency's exception and set aside the award.

II. Background and Arbitrator's Award

The grievants are six Agency employees, who were assigned to the High Voltage Shop of the Utilities Department to remove and install new cables and equipment in an area known as "the vault." Award at 2-3. The Agency knew that the vault area "contain[ed] [ACM] and peeling lead paint." *Id.* at 3. The Agency ordered testing, which confirmed the presence of ACM. *Id.*

The Shop Foreman directed the employees to remove the cables and ACM. *Id.* at 3-4. The Foreman told the employees that only one cable out of several was ACM and that the other material was not ACM. *Id.* at 3. Four of the employees worked two days, including some overtime; one of the employees worked one day, plus overtime; and one of the employees worked one day removing the material and ACM. Exceptions, Attach. 3 at 1-2. Two of the employees wore protective clothing and respirators when removing the cable identified by the Foreman as ACM; however, they wore only dust masks when removing other cables and materials in the surrounding area. Award at 3-4. After the cable with known ACM was removed, none of the employees wore full protective equipment because they had been informed by the Foreman that the remaining material was not ACM. *Id.*

As a result of an anonymous phone call, an employer safety specialist terminated the project due to the danger that ACM was present. *Id.* at 4. The Occupational Safety and Health Administration issued fourteen specific unsafe or unhealthy working condition violations related to the work that the employees had performed. *Id.*

Each of the affected employees (hereinafter grievants) was enrolled in the Agency's medical program for potential ACM exposure, given an annual review, and counseled by the Agency's Mental Health Department regarding the incident. *Id.* Further, both the Foreman and the second line supervisor were disciplined and removed from their duties. *Id.*

The Union filed a grievance on behalf of the employees. The parties were able to reach agreement on most issues, but asked the Arbitrator to determine whether two remedies requested by the Union — "(1) Lifetime Medical Insurance Coverage for Physical or Mental Illness for Employee and/or Dependants Exposed to Asbestos; and (2) Yearly Monitoring or More Within One (1) Year by a Personal Physician, If Requested, At No Cost to the Employee in Addition to an Annual Asbestos Surveillance Program. Family Examinations Are to Be Included" — had a basis in law and, therefore, stated a claim upon which relief was available. Award at 2; Exceptions at 3.

After briefing by both parties, the Arbitrator concluded that it is "unequivocal that ACM was present" in the vault area and that the full extent of the ACM, although known by the Agency, was not communicated

to the employees. Award at 5. The Arbitrator concluded that all of the employees had been exposed to ACM. *Id.* The Arbitrator held that he could not determine what amount of exposure to ACM would result in disease, but that "prudence" requires that the employees be given annual exams at no expense as long as they remain employed by the Agency. *Id.* at 5-6. Further, the Arbitrator determined that, if an employee leaves the Agency prior to age 65 (when Medicare applies), the employee should obtain his or her own health insurance to pay for any examination for asbestosis, but that, if "the premium paid for the exam [was] greater than his present premium, he should be awarded the difference by the [Agency]." *Id.* at 6. Finally, the Arbitrator held that, because it was improbable that the grievants had exposed their family members to ACM, no family coverage would be provided. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law and should be set aside because it lacks statutory authority for the required remedy. Exceptions at 3-8. The Agency argues that it is prohibited from "obligating funds unless those funds have affirmatively been authorized by statute for that purpose." *Id.* at 6 (citing *U.S. v. MacCollom*, 426 U.S. 317, 321 (1976)) (emphasis in original).

The Agency notes that all of the grievants are current federal employees except for one who is retired. *Id.* at 6. The Agency states that the grievants who are current federal employees are covered by both the Federal Employees' Compensation Act (FECA), which provides medical care costs and disability payments for injured employees, and the Federal Employee Health Benefits (FEHB), which provides health insurance for federal employees. *Id.; see also* 5 U.S.C. § 8101 *et seq.*; 5 U.S.C. §§ 8901-8913. Further, the Agency notes that the grievant who is retired also would be covered by FECA because his qualifying injury or illness occurred during active federal employment. *Id.* This employee also could receive federal health insurance through a system similar to the FEHB. *Id.* at 7. The Agency further asserts that, in the event that FECA does not apply, the grievants could bring an action under the Federal Tort Claims Act (FTCA). *Id.* (citing 28 U.S.C. § 2671 *et seq.*).

The Agency contends that none of these statutes provides for the remedies requested by the grievants and awarded by the Arbitrator. *Id.* According to the Agency, where such a statutory framework does not provide for the remedies sought, an Arbitrator may not read them into the statute. *Id.* The Agency also argues that the Authority previously has considered insurance similar to the remedies awarded by the Arbitrator and found it to be "in direct conflict with the applicable law." *Id.* (citing *IBEW, AFL-CIO Local 1245*, 31 FLRA 1002 (1988)).

In addition, the Agency alleges that the Anti-Deficiency Act prohibits it from committing to current or future payments when the funds are not already appropriated or available for that purpose. *Id.* at 8 (citing 31 U.S.C. §§ 1301, 1341, and 1517). The Agency contends that the Authority, in examining the impact of proposed liability upon an Agency and the effect of the Anti-Deficiency Act, has held that there must be "independent statutory authorization, separate and apart from the duty to bargain imposed by the Statute . . . for the expenditures required[.]" *Id.* at 8 (citing *ACT, P.R. Army Chapter*, 62 FLRA 144 (2007); *ACT, P.R. Army Chapter*, 60 FLRA 1000 (2005)).

B. Union's Opposition

The Union asserts that the Agency's exception involves arguments that the Agency previously raised before the Arbitrator. Opposition at 1. The Union further contends that coverage under FECA, FEHB, or FTCA does not preclude a remedy awarded at arbitration. *Id.* at 2. Also, the Union alleges that the cases relied upon by the Agency involve Authority decisions related to proposals in bargaining disputes, not to exceptions to arbitration awards. *Id.*

IV. Analysis and Conclusions

A. The award is contrary to law.

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 and 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 Agency contends that the award is contrary to law because it awards the grievants payment for medical costs related to their exposure to ACM and is therefore contrary to the FECA. Exceptions at 6-7. The Authority previously addressed this issue in *NTEU, NTEU Chapter 51*, 40 FLRA 614 (1991) (*NTEU*). *See also U.S. Dep't of the Treasury, Internal Revenue Serv., Phila. Serv. Ctr., Phila., Pa,* 41 FLRA 710 (1991).

In *NTEU*, the Arbitrator determined that the grievants had been exposed to potentially toxic fumes in their work area and that the Agency had failed to provide a safe workplace and maintain safe and healthful working conditions. Accordingly, he ordered the Agency, among other things, to: (1) reimburse the employees for out-of-pocket medical care costs for illnesses associated with their exposure; and (2) pay the reasonable cost of medical examinations to determine whether they sustained damage due to the fumes. *NTEU*, 40 FLRA at 618.

The Authority determined that the grievants were covered by the FECA. *See id.* at 630. The Authority then reversed the Arbitrator's award as to remedies, finding that "the particular items for which the Arbitrator ordered payment or reimbursement are within the exclusive jurisdiction of the FECA and its implementing regulations[.]" *Id.*; *see also* 5 U.S.C. § 8116(c) ("The liability of the United States...under this subchapter...with respect to the injury or death of an employee is exclusive[.]").

Like the grievants in *NTEU*, the grievants here are covered by the FECA. [1] Accordingly, the remedy of payment for medical costs incurred by employees in this case as a result of their exposure to ACM is exclusively covered by the FECA.

As the Authority stated in *NTEU*, we "recognize that exposure to hazardous substances is a serious matter. Our finding . . . does not ignore the potential adverse consequences flowing from [such] exposure. . . . Employees are not left without a remedy if they believe they have incurred an occupational illness. The provisions of the FECA [, however,] constitute the mechanism for seeking such redress." 40 FLRA at 632. [2] Moreover, our finding should not be interpreted as holding that the Arbitrator lacked authority to hear the issues raised in the grievance or that the issues were outside the scope of the grievance procedure. Rather, we simply find that the remedy awarded by the Arbitrator conflicts with law.

Accordingly, we grant the Agency's exception and find that the award is contrary to law.

V. Decision

The award is set aside. [3]

1. At the time *NTEU* was decided, 20 C.F.R. § 10.5(a)(16) provided that an "[o]ccupational disease or illness" includes, among other things, "exposure to hazardous elements such as, but not limited to, toxins, poisons, [and] fumes[.]" The regulations now determine illness or injury based on the length of exposure. *See* 20 C.F.R. § 10.5(q) (defining occupational disease or illness as "a condition produced by the work environment over a period longer than a single workday or shift"); 20 C.F.R. § 10.5(ee) (defining traumatic injury as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift"). The grievants here satisfy the time requirements specified in the regulations. *See supra* page 2. As such, they are covered under FECA and its implementing regulations and the principle underlying *NTEU* applies. *See S.T.*, _ E.C.A.B. _ (Docket No. 08-1675, issued May 4, 2009) (holding that claims regarding occupational exposure to asbestos are addressed under the FECA); *D.B.*, _ E.C.A.B _ (Docket No. 08-1199, issued March 3, 2009) (same).

2. *See also* 20 C.F.R., Chapter I, Subchapter B, Pt. 10 *et seq.*

3. Accordingly, we need not address the Agency's remaining exceptions.