65 FLRA No. 69

SOCIAL SECURITY ADMINISTRATION
OFFICE OF
DISABILITY ADJUDICATION AND REVIEW
REGION 1
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1164
(Union)

0-AR-4370

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DECISION

December 16, 2010

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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 Sharon Henderson Ellis 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 Union filed a grievance alleging that the Agency changed flexiplace benefits for senior case technicians (SCTs) without satisfying its bargaining obligations. The Arbitrator sustained the grievance, directed the Agency to bargain, and awarded monetary compensation to affected SCTs for commuting expenses.

For the reasons that follow, we grant the exceptions in part, set aside the award in part, and deny the exceptions in part.

II. Background and Arbitrator's Award

The Agency employs SCTs to organize and sequence information in its disability-claims case folders – a process referred to as "pulling cases." Award at 4. According to the parties' Flexiplace Agreement (Agreement), SCTs would be authorized to "pull cases" at an Alternate Duty Station (ADS) at least one day per week, unless supervisors determined that "insufficient work[,]" *id.* at 3, existed for such assignments. *Id.* at 3-4 (quoting Agreement, §§ 2, 4, 16).[1] As part of a flexiplace assignment, an SCT would take hard-copy, case-related documents to an ADS for "pulling." *Id.* at 4. Upon returning to a regular duty station, the SCT would bring back the cases that she or he had "pulled." *Id.* When the Agency began transitioning to electronic, paperless files (e-files), the parties adopted a memorandum of understanding (MOU) that explained the manner in which the Flexiplace Agreement could be changed, if necessary, to accommodate e-files.[2] *See id.* at 3-4, 10-11.

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1. In relevant part, Section 2 of the Agreement provides:

> All employees who meet the . . . criteria [set forth in the Agreement] are eligible to participate in the Flexiplace Program. Eligible full-time employees will be authorized at least one day per week to work at an ADS. . . .

Award at 3 (quoting Agreement, § 2).

In pertinent part, Section 4 of the Agreement provides:

> If . . . [an] immediate supervisor determines that there is insufficient work for an employee to work at the ADS . . . , the employee will be informed in writing that his/her participation in Flexiplace is temporarily suspended until work is available.

Id. (quoting Agreement, § 4).

In addition, Section 16 of Agreement provides:

> The Agency reserves the right to temporarily suspend the Flexiplace Program . . . where operational exigencies require a return to the traditional 5-day workweek. . . . Prior to [the] extension of the suspension beyond one pay period, the Union will be notified, and the Agency agrees to fulfill its obligations in accordance with [the Statute].

Id. at 3-4 (quoting Agreement, § 16).

2. Section 1 of the MOU states, in pertinent part:

> Should management propose changes to existing Flexiplace Agreements, appropriate notice and opportunity to bargain will be provided to the Union in accordance with . . . [the] National Agreement and [the Statute].

See Award at 4-5, 13 (quoting MOU, § 1).

The Agency gradually converted more cases from paper files to e-files, which left increasingly fewer paper files available for pulling cases at an ADS. Because the Agency "deci[ded] that it could not take the security risk of providing SC[T]s [with] the [remote network] access" that the Agency believed was required to pull cases involving e-files at an ADS, "SCTs could not continue to perform work from home in any significant amounts[.]" *Id.* at 11. In light of the scarcity of portable, hard-copy files that required pulling, the Agency maintained that, even if SCTs no longer had any opportunities to work at an ADS, the Agency had done everything that the Agreement and MOU required of it. *See id.* at 6-7. Consequently, the Union filed a grievance alleging that the Agency violated the Agreement and MOU by curtailing SCTs' flexiplace benefits, without providing notice or an opportunity to bargain over the benefits change itself or the e-filing transition's impact on those benefits. *See id.* at 11; *see also* Exceptions, Attach., Letter from Union V.P. to Acting Chief A.L.J. (Mar. 9, 2007). When the grievance was unresolved, the parties proceeded to arbitration, where the Arbitrator framed the following issues for resolution: "Did the Agency violate the law and[/]or negotiated agreements or the parties' National Agreement when it altered or ended [f]lexiplace benefits for SCTs? If so, what shall be the remedy?" Award at 1.

The Arbitrator found that, in changing flexiplace for SCTs, the Agency had violated a "bargaining obligation . . . [that] is, itself, a product of negotiation." *Id.* at 13 (citing MOU, § 1; Agreement, § 16).[3] She determined that "minimally[,] Section 2 of the [Agreement] was changed" and, under Section 1 of the MOU, "that change in the [Agreement] required the Agency to give notice to, and bargain with, the Union." *Id.* at 19. Although she rejected the Union's request for restoration of the status quo ante because it "would prove too disruptive[,]" the Arbitrator directed the Agency to "meet . . . with the Union to negotiate about the change and/or impact of the electronic folder process on SCTs . . . ." *Id.* at 22, 23.

The Arbitrator emphasized that she was not "suggest[ing] that the Agency cannot continue to move forward in its quest to make the disability claims process a mostly electronic one." *Id.* at 21. Rather, she stated that she was directing the Agency to "attempt to do now what it did not do at the time [of its transition to e-filing,] when changes [to flexiplace] first appeared" – to "negotiate in good faith about the impact of the [e-filing transition on] the [f]lexiplace benefit for SCTs[,]" as required by the MOU. *Id.* at 21, 23. Therefore, the Arbitrator "require[d] the Agency to explore the wide range of work assignment[s] and technological options that the Agency has at its disposal and to bargain with the Union about that very issue." *Id.* at 23. The Arbitrator concluded her award by reiterating that "the Agency shall meet at reasonable times and places . . . to negotiate about the change and/or impact of the electronic folder process on SCTs[,]" and she directed that "SCTs shall also be reimbursed for reasonable parking and commuting expenses they incurred [due to missed flexiplace days.]" *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award violates its right to assign work because, by directing the Agency to bargain over "that very issue[,]" the award would require it to "bargain substantively over [a] 5 U.S.C. [§] 7106(a)(2)(B)" matter, in violation of law. *Id.* at 6-7. The Agency also contends that the award violates its right under § 7106(b)(1) of the Statute to elect not to bargain over the technology of performing work. *Id.* at 9-10. In this regard, the Agency recognizes that it may elect to negotiate such matters but asserts that it has not elected to do so. *Id.* at 9. In addition, the Agency asserts that "substantive negotiations over the technology of performing the Agency's work could also improperly infringe on management's right to determine internal security practices[.]" *Id.* at 10 n.2 (citing 5 U.S.C. § 7106(a)(1)).

Finally, the Agency argues that, by ordering the Agency to reimburse SCTs for lost parking and commuting expenses, the award violates the doctrine of sovereign immunity because, according to the Agency, neither the Back Pay Act nor any other statute authorizes money reimbursements for "personal commuting expenses." *Id.* at 11-12 (citing *Immigration & Naturalization Serv., L.A. Dist., L.A., Cal.*, 52 FLRA 103, 105-06 (1996); *U.S. Customs Serv., Chicago-O'Hare*, 23 FLRA 366, 367 (1986) (*Chicago-O'Hare*)).

3. The Arbitrator reiterated this point later in the award: "Bargaining . . . in advance of known impending change . . . is, in this case, a negotiated agreement. . . . [T]he fact is inescapable that the Agency violated its own negotiated promise(s) to bargain when it changed the [f]lexiplace benefit . . . ." Award at 21.

B. Union's Opposition

The Union asserts that the award merely requires the Agency "to go to the bargaining table" and that, because the award does not mandate any particular outcome for the parties' negotiations, the Authority's consideration of the exceptions would constitute an impermissible advisory opinion on the legality of "[w]hat might eventually happen at the bargaining table[.]" Opp'n at 9-10 (citing 5 C.F.R. § 2429.10).[4] The Union also asserts that the Arbitrator directed the Agency to bargain to fulfill a contractual obligation, not a statutory one; thus, according to the Union, the Agency "cannot legitimately claim that the award [concerning contractual bargaining obligations] violates management rights." *Id.* at 1, 6 (citing *U.S. Dep't of Def., Nat'l Guard Bureau Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934 (2002); *Soc. Sec. Admin., Balt., Md.*, 55 FLRA 1063 (1999); *AFGE, Local 3937*, 49 FLRA 785 (1994)). Finally, the Union contends that the Agency's arguments regarding sovereign immunity should be dismissed because, although the Agency was on notice that the Union was requesting remedies including commuting expenses, the Agency did not argue before the Arbitrator that sovereign immunity prevented her from awarding reimbursement for such expenses. *See id.* at 2, 10 (citing 5 C.F.R. § 2429.5).

IV. Preliminary Matter

The Authority has stated that an opinion as to matters that might occur in the future constitutes an advisory opinion. *See, e.g., AFGE, Local 1864*, 45 FLRA 691, 694-95 (1992). However, the Authority has considered exceptions to an arbitral direction to bargain where the agency challenged the legality of the direction itself and "not hypothetical events that might occur in the future[.]" *AFGE, Council 215*, 60 FLRA 461, 463-64 (2004). Here, the Agency does not assert that the results of bargaining would be contrary to law; the Agency objects to the direction to bargain itself. Specifically, the Agency contends that the award requires it to bargain over the substance of its rights under the Statute. As the Agency's exceptions concern a live legal dispute about its rights, and not hypothetical future events, the Authority would not be issuing an advisory opinion by evaluating the exceptions. *See AFGE, Council 215*, 60 FLRA at 463-64. As such, we consider the exceptions below.

4. Section 2429.10 of the Authority's Regulations states, in pertinent part, that "[t]he Authority . . . will not issue advisory opinions."

V. Analysis and Conclusions

A. The award does not violate management's rights under the Statute.

The Agency claims that the award is contrary to law because the Arbitrator directed it to bargain substantively over work assignments and the technology of performing work. The Authority reviews questions of law 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 determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

When evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole. *See, e.g., AFGE, Local 2328*, 62 FLRA 63, 65 (2007) (consistency with law "clear from the record as a whole"); *AFGE, Local 3911*, 56 FLRA 480, 481 n.5 (2000) (determining relevant contract provision from "award as a whole"); *U.S. Dep't of Energy, Oak Ridge Operations Office, Oak Ridge, Tenn.*, 55 FLRA 1293, 1296 (2000) (reading "award as a whole" and finding agency "misconstrued the award"); *U.S. Dep't of Veterans Affairs, Med. Ctr., Fort Wayne, Ind.*, 39 FLRA 717, 721 (1991) (arbitrator's finding "apparent[] from a reading of the award as a whole"). In this regard, the Authority interprets the language of an award in context, without undue focus on isolated statements. *See, e.g., U.S. Dep't of Def., Def. Contract Audit Agency, Central Region, Irving, Tex.*, 60 FLRA 28, 29 (2004); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 850 (2000); *NTEU, Chapter 168*, 52 FLRA 1354, 1364 (1997); *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 52 FLRA 622, 628 n.5 (1996).

Based on the award and the record as a whole, we reject the Agency's claim that the award requires it to bargain over the substance of its rights to assign work and to determine the technology of performing work. In this regard, the Arbitrator found that the Agency's transition to e-filing did not "exonerate management from the obligation to bargain *the impact* of the change." Award at 12. To support that conclusion, the Arbitrator quoted from an Authority decision regarding impact-and-implementation bargaining. *Id.* at 13 (quoting *U.S. Dep't of HHS,*

SSA, Balt., Md., 41 FLRA 1309, 1317 (1991)). In addition, the Arbitrator stated that the Agency had violated the MOU by "mak[ing] significant changes in [f]lexiplace [benefits] . . . without first . . . negotiating *either* the change, *or* the impact of the change, on unit employees." *Id.* at 21 (emphases added). Consequently, the Arbitrator directed the Agency to "negotiate in good faith about the *impact of the change* to the [f]lexiplace benefit for SCTs." *Id*. at 23 (emphasis added). The Arbitrator concluded her award by reiterating that "the Agency shall meet at reasonable times and places . . . to negotiate about the change and/*or impact* of the electronic folder process on SCTs[.]" *Id.* (emphasis added).

The Agency correctly points out that, in addition to the foregoing, the award requires the Agency "to explore the wide range of work assignment[s] and technological options that the Agency has at its disposal and to bargain with the Union about that very issue." *Id.* at 23. In particular, the Agency focuses on the meaning of the phrase "that very issue." However, as used in the award, the meaning of "that very issue" is ambiguous. For example, the "issue" to which the phrase refers could be the "explor[ation]" of the parties' "options," or the "range" of options available for restoring flexiplace benefits. *Id.* In addition, the direction requires only that the Agency bargain "*about* that very issue"; it does not require the Agency to bargain *about the substance* of "that very issue." *Id.* (emphasis added). Accordingly, the Agency has not demonstrated that the aforementioned sections of the award require bargaining over more than the impact and implementation of the Agency's transition to e-filing, with particular attention to the impact on flexiplace benefits for SCTs.[5]

As the Agency does not allege that the Arbitrator's direction to engage in impact-and-implementation bargaining is contrary to law, we deny the Agency's exceptions regarding § 7106(a)(2)(B) and (b)(1) of the Statute.[6]

B. The award of commuting expenses violates the doctrine of sovereign immunity.

The Agency argues that the award of commuting expenses violates the doctrine of sovereign immunity. Exceptions at 11. The Union does not dispute that argument, but contends that the Agency's sovereign-immunity challenge should not be considered because it was not advanced before the Arbitrator. Opp'n at 2, 10-12 (citing 5 C.F.R. § 2429.5). Contrary to the Union's contention, however, "a claim of federal sovereign immunity can be raised by an agency at any time." *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005) (citing *Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995) (*Army*), *vacating in part* 48 FLRA 6 (1993)). Accordingly, we find that the Agency's sovereign-immunity exception has been properly raised for consideration, and, therefore, we consider it below.

The United States is immune from liability for money damages under the doctrine of sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Because the award of "reimbursement" for "mileage and parking" expenses "to employees adversely affected by [f]lexiplace reduction[s,]" Award at 22-23, provides payment of a sum of money for the breach of the MOU, the remedy constitutes monetary damages. *See Army*, 56 F.3d at 276. A waiver of sovereign immunity will be found only if "unequivocally expressed in statutory text . . . and will not be implied[.]" *Lane v. Pena*, 518 U.S. at 192; *see also Army*, 56 F.3d at 277; *U.S. Dep't of Health & Human Serv., Food & Drug Admin.*, 60 FLRA 250, 252 (2004) (*Food & Drug Admin.*). Thus, the award of money damages for commuting expenses is only lawful if it is based upon an explicit waiver of sovereign immunity. *See Food & Drug Admin.*, 60 FLRA at 252.

The Agency claims that there is no statutory waiver of sovereign immunity to authorize payment for personal commuting expenses under the Back Pay Act, 5 U.S.C. § 5596, or any other statute. Under the Back Pay Act, an award of backpay is authorized only when an arbitrator finds, as relevant here, that an unjustified or unwarranted personnel action directly resulted in the withdrawal or reduction of a grievant's pay, allowances, or differentials. *See U.S. Dep't of Justice, Immigration & Naturalization Serv., San Diego, Cal.*, 51 FLRA 1094, 1097 (1996). The

5. When the Arbitrator describes the Agency's obligation to bargain over workplace changes or the impact of those changes, her use of the disjunctive word "or" indicates that the Agency may satisfy its obligation by negotiating over the impact of the changes alone. *See* Award at 21, 23.

6. To the extent that the Agency intended the reference in its exceptions to internal security practices to constitute an independent exception to the award, because we find that the award does not require substantive bargaining over the technology of performing work, we need not address whether an award requiring substantive bargaining over the technology of performing work would also violate the Agency's right to determine its internal security practices.

Authority has previously held that ordinary personal commuting expenses do not constitute pay, allowances, or differentials under the Back Pay Act. *See U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1222 (1998) (citing *Chicago-O'Hare*, 23 FLRA at 367-68). Moreover, the Authority has recognized that ordinary home-to-work mileage and parking costs constitute noncompensable personal commuting expenses. *See NTEU*, 30 FLRA 677, 678-79 (1987). Applying this precedent, we find that the Back Pay Act does not authorize reimbursement for SCTs' mileage and parking costs, and – as the Union does not cite another statutory waiver of sovereign immunity to support the monetary award – we set aside the portion of the award that directs payment to SCTs for personal commuting expenses.

VI. Decision

The Agency's sovereign-immunity exception is granted, and the award of personal commuting expenses is set aside. The Agency's remaining exceptions are denied.