

66 FLRA No. 101

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 953
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
PINE BLUFF ARSENAL
PINE BLUFF, ARKANSAS
(Agency)

0-AR-4760

—
DECISION

March 12, 2012

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

The Arbitrator found that the grievants were not entitled to hazard pay differential (HPD) under applicable government-wide regulations.

For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency reassigned the grievants from their positions as General Schedule (GS) security guards to positions as Wage Grade (WG) industrial workers. They retained their GS grade and pay for two years after the reassignment. Award at 4-5. As industrial workers, the grievants worked with white phosphorus and black powder to manufacture military ammunition. *Id.* at 4, 5, 10. When the Agency first assigned the grievants to the industrial worker positions, the Agency paid them HPD.

But the Agency later informed the grievants that it mistakenly paid them HPD and discontinued the payments. *Id.* at 5.

The Union filed a grievance alleging that the Agency wrongly denied the grievants HPD. *Id.* The parties did not resolve the grievance and proceeded to arbitration. As relevant here, the Arbitrator framed the issue as: "Did the Agency violate the [parties' agreement] by not paying [HPD] to the grievants? If so, what shall the remedy be?" *Id.* at 4.

The Arbitrator found that the Union failed to establish that the grievants were entitled to HPD under 5 C.F.R. § 550.904 (§ 550.904) and Appendix A to Subpart I of 5 C.F.R. Part 550 (Appendix A to Part 550), the regulations he found applicable to workers paid as GS employees.¹ *Id.* The Arbitrator determined that, under § 550.904 and Appendix A to Part 550, the Agency must pay HPD to GS employees who work with or are in close proximity to explosives and incendiary material if those materials are "unstable" and "highly sensitive." *Id.* at 5. But he found that "the Union did not prove" that white phosphorous and black powder, as used by the grievants, are unstable and highly sensitive materials. *Id.* at 10. The Arbitrator credited the testimony of two Agency witnesses on this point, *id.* at 9-10, and noted that the Union offered no witnesses to dispute the Agency witnesses' testimony, *id.* at 10. Therefore, the Arbitrator concluded, the grievants were not entitled to HPD, and the Agency did not violate the parties' agreement, § 550.904, or Appendix A to Part 550 when it discontinued their HPD payments. *Id.* at 11.

The Arbitrator also found that the grievants were not entitled to additional pay in the form of environmental differential pay (EDP). The Arbitrator determined that only WG employees are entitled to EDP. He found that the grievants were not entitled to EDP because of their GS status for pay and grade retention purposes. *Id.* at 9.

¹ 5 C.F.R. § 550.904, "Authorization of hazard pay differential," states, in pertinent part:

(a) An agency shall pay the hazard pay differential listed in [A]ppendix A of this subpart to an employee who is assigned to and performs any duty specified in [A]ppendix A of this subpart

Appendix A to Part 550, states, in pertinent part:

Exposure to Hazardous Agents, work with or in close proximity to:

(1) *Explosive or incendiary materials.*
Explosive or incendiary materials which are unstable and highly sensitive.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award is contrary to law; specifically, Authority precedent, Appendix A to Part 550, and Appendix A to Subpart E of Part 532. (Appendix A to Part 532).² Exceptions at 5, 6.

The Union argues that the award is contrary to law because the Union's evidence met the legal standards, established by Authority precedent, for determining whether white phosphorus and black powder are "unstable and highly sensitive" within the meaning of Appendix A to Part 500. *Id.* at 3-4 (citing *U.S. Dep't of Labor*, 19 FLRA 300 (1985) (*DOL*); *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 2 FLRA 958 (1980) (*Oklahoma City*)). The Union contends that it produced evidence of "extreme measures" that the Agency took in the transportation and handling of these materials. *Id.* at 3. Therefore, the Union argues, "the Arbitrator's ruling that there was absolutely no evidence that the materials were unstable and highly sensitive goes against established law." *Id.* at 4.

In addition, the Union claims, the Arbitrator misinterpreted Appendix A to Part 550.³ *Id.* at 6. Specifically, the Union asserts, this regulation does not require an employee to prove that an explosive or incendiary material is also unstable or highly sensitive. *Id.* The Union contends that the award is deficient because the Arbitrator improperly required the Union to prove that the grievants worked with or were in close proximity to explosive and incendiary materials *and* that those materials were also unstable and highly sensitive. *Id.* In the Union's view, explosive and incendiary materials are inherently unstable and highly sensitive. *Id.*

Further, the Union asserts, the award is contrary to the plain language of Appendix A to Part 532, which identifies black powder as a "highly sensitive explosive"

² Appendix A to Subpart E of Part 532, "Schedule of Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusual Nature," Part II "Payment on Basis of Hours in Pay Status," provides, in pertinent part:

2. *Explosives and incendiary material--high degree hazard.* Working with or in close proximity to explosives and incendiary material

Examples

– Working with, or in close proximity to . . . sensitive explosives . . . such as . . . black powder

³ *Supra* note 1. The Union appears to have inadvertently cited "5 U.S.C. § 550" rather than 5 C.F.R. Part 550. Exceptions at 6. There is no 5 U.S.C. § 550.

that would entitle WG employees to receive EDP. *Id.* at 5-6.

B. Agency's Opposition

The Agency asserts that the Union fails to identify any law, rule, or regulation the award violates. Opp'n at 3. As to the Union's claim that the award is contrary to Authority precedent, the Agency asserts that the Union cites Authority decisions that merely uphold arbitrators' factual findings, but do not establish the legal requirements for finding materials unstable and highly sensitive. *Id.* at 4-5.

In addition, the Agency contends that the Union's assertion that the Arbitrator misinterpreted Appendix A to Part 550 is unsupported. The Agency asserts that Appendix A to Part 550 and Authority precedent are clear that HPD may only be paid when explosive or incendiary materials are found to be unstable and highly sensitive. *Id.* at 5-6 (citations omitted).

Further, the Agency argues, the Union's reliance on Appendix A to Part 532 is misplaced. According to the Agency, that appendix applies to EDP for WG employees. In contrast, this matter concerns HPD for GS employees, which is governed by Appendix A to Part 550. *Id.* at 5.

IV. Analysis and Conclusion

The Union argues that the award is contrary to Authority precedent, Appendix A to Part 550, and Appendix A to Part 532. Exceptions at 5, 6.

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 & 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.*, unless the appealing party establishes that those factual findings are deficient as nonfacts, *see, e.g., AFGF, Local 1164*, 66 FLRA 74, 78 (2011) (*Local 1164*); *Soc. Sec. Admin.*, 65 FLRA 523, 526 (2011) (*SSA*).

The threshold requirements for an employee's entitlement to HPD originate from a statutory mandate as well as government-wide regulations. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson*,

Ariz., 65 FLRA 267, 270 (2010) (*FCC Tucson*); *U.S. Dep't of the Army, Alaska*, 54 FLRA 1117, 1122 (1998) (*Army*); see 5 U.S.C. § 5545; 5 C.F.R. part 550, subpart I. As relevant here, 5 U.S.C. § 5545(d)⁴ and its implementing regulations contained in Appendix A to Part 550 govern HPD for GS employees. *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 53 FLRA 46, 53 (1997); *NTEU, NTEU Chapter 51*, 40 FLRA 614, 621 (1991); *Veterans Admin. Med. Ctr., Leavenworth, Kan.*, 35 FLRA 14, 17 (1990). Grievants must satisfy three requirements before they are entitled to HPD: (1) the hazard or physical hardship must not have been considered in the classification of the position pursuant to 5 U.S.C. § 5545(d); (2) the hazard or physical hardship must be listed in Appendix A to Part 500; and (3) the grievants must be performing a hazardous duty within the definition of 5 C.F.R. § 550.902. *Army*, 54 FLRA at 1122.

The Union only contests the Arbitrator's conclusion with respect to the second requirement – i.e., that the hazard or physical hardship be listed in Appendix A to Part 500. Exceptions at 2-4, 6. To award HPD under this category, an arbitrator must find that the grievants worked with, or in close proximity to, explosive or incendiary materials that are “unstable and highly sensitive.” See *Army*, 54 FLRA at 1123. The Arbitrator found that the grievants did not and, accordingly, that they were not entitled to HPD. Award at 10-11.

Based on his factual findings, the Arbitrator's conclusion that the grievants were not entitled to HPD is consistent with law. The Arbitrator credited the testimony of two Agency witnesses who stated that black powder and white phosphorous, as used by the grievants, were not unstable or highly sensitive. Award at 9-10. The Arbitrator also noted that the Union offered no witnesses to dispute the Agency witnesses' testimony. *Id.* at 10. Based on the evidence at the hearing, the Arbitrator made factual findings concerning black powder and white phosphorous, as used by the grievants, and concluded that those materials were not “unstable and highly sensitive,” and therefore that the grievants were not legally entitled to HPD under Appendix A to Part 550. *Id.* at 10-11.

Without claiming that the Arbitrator's factual findings are nonfacts, the Union argues that the award is inconsistent with Authority decisions in which it asserts the Authority has previously found that black powder and white phosphorus are “unstable and highly sensitive”

under Appendix A to Part 550. Exceptions at 2, 3-4 (citing *DOL*, 19 FLRA 300; *Oklahoma City*, 2 FLRA 958). But contrary to the Union's assertion, in *DOL* the Authority found that the arbitrator's factual findings supported his legal conclusion that the material at issue was “unstable and highly sensitive” under Appendix A to Part 550. 19 FLRA at 302-03. And in *Oklahoma City*, the Authority remanded the case to the Arbitrator because it was unclear whether he applied the correct legal standard in determining that the disputed work was hazardous. 2 FLRA at 962. Thus, these cases merely stand for the proposition that the Authority defers to arbitrators' factual findings in determining whether their awards are consistent with law and, as such, these cases do not establish that the award in this case is contrary to Authority precedent.

In addition, the Union contends that the award is contrary to law because the Arbitrator improperly required the Union to prove that the grievants worked with, or were in close proximity to, explosive and incendiary materials *and* that those materials were also unstable and highly sensitive. Exceptions at 6. In the Union's view, explosive and incendiary materials are inherently unstable and highly sensitive. *Id.*

The Union's contention is not persuasive. The plain language of Appendix A to Part 550 authorizes HPD for employees who “work[] with, or in close proximity to . . . [e]xplosive or incendiary materials *which are unstable and highly sensitive.*” Appendix A to Part 550 (emphasis added); see 5 C.F.R. § 550.904.⁵ The Union's claim, that inclusion of the words “unstable and highly sensitive” adds nothing to the regulation's meaning beyond what is already inherent in the regulation's reference to “explosive or incendiary materials,” drains the words “unstable and highly sensitive” of all independent meaning. This is contrary to the “fundamental principle of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute . . . so that no part will be inoperative or superfluous, void, or insignificant.” *U.S. Gov't Printing Office, Wash., D.C.*, 57 FLRA 299, 302 (2001) (quoting *Indianapolis Power & Light Co. v. Interstate Commerce Comm'n*, 687 F.2d 1098, 1101 (7th Cir. 1982) (quoting 2A Sutherland, Stat. Const., § 46.06)); see *Ass'n. of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 242 (2000) (finding that principles of statutory construction apply to regulations).

Moreover, the Arbitrator's interpretation of Appendix A to Part 550 is consistent with Authority precedent. That precedent holds that, to award HPD under this category, an arbitrator must find both that

⁴ 5 U.S.C. § 5545(d) provides for hazardous duty differentials and states, in pertinent part: “The Office [of Personnel Management] shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard”

⁵ See *supra* note 1.

the grievants worked with, or in close proximity to, explosive or incendiary materials *and* that these materials are unstable and highly sensitive. *See Army*, 54 FLRA at 1123. As the award is consistent with the language of Appendix A to Part 550 and Authority precedent, the Union's claim does not establish that the award is deficient.

Further, the Union argues that the award is contrary to Appendix A to Part 532.⁶ As the Union acknowledges, Exceptions at 5, this regulation is applicable only to WG employees. Deferring to the Arbitrator's undisputed factual finding that the grievants were in GS status for pay and retention purposes, Award at 9, the Union fails to establish that the award is contrary to Appendix A to Part 532.

Accordingly, for the foregoing reasons, we deny the Union's exceptions.

V. Decision

The Union's exceptions are denied.

⁶ *See supra* note 2.