66 FLRA No. 55

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL AIR STATION
WHITING FIELD
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1960
(Union)

0-AR-4728

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DECISION

October 31, 2011

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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 Jeanne Charles Wood 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 found that the Agency violated the parties' agreement by failing to authorize uniform allowances for its employees in accordance with applicable regulations. For the reasons that follow, we modify the award to set aside the portion that orders the Agency to pay $800 for the annual uniform allowance to all affected employees for FY 2007 and FY 2008, and we deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

Prior to the events that gave rise to the grievance, the Union was the certified exclusive representative of a unit of nonprofessional employees, including police officers, at the Agency. Award at 3. In 2006, the Navy conducted a reorganization that realigned a number of regions, including the region of which the Agency was a part, under the Command Navy Region Southeast (CNRSE). *Id*.

As relevant here, in 2007, CNRSE filed a petition with the Authority seeking to consolidate a number of bargaining units, including the unit represented by the Union. *Id.* at 4; *see also* Exceptions at 2, Encl. 4. The Authority granted the consolidation petition in 2008, and certified the national Union, the American Federation of Government Employees (AFGE), as the exclusive representative of the consolidated unit. Award at 4, 10; *see* Exceptions at 2, Encl. 4. It was agreed that the parties' existing agreement would remain in effect until a new, consolidated agreement could be negotiated between CNRSE and AFGE. Award at 5 n.2; *see id.* at 8, 10.

In the midst of the 2006 reorganization, the Office of Personnel Management (OPM) established new regulations regarding the initial and annual uniform allowances for employees who are required to wear uniforms in the performance of their duties. *Id.* at 4. In this regard, OPM raised: (1) the maximum amount for the initial uniform allowance from $400 to $1,800, effective February 11, 2007; and (2) the maximum amount for the annual uniform allowance from $400 to $800, effective May 29, 2007. *Id.* OPM's regulations directed agencies to establish policies to administer the uniform allowance program. *Id.*

The police officers at issue here are required to wear uniforms in the performance of their duties. *See id.* at 5, 19-20. The Union filed a grievance on their behalf, alleging that the Agency had violated the parties' agreement by failing to comply with the new OPM regulations. *Id*. at 5. When the parties could not resolve their dispute, they submitted the matter to arbitration. *Id.* The Arbitrator framed the issues as: (1) "Whether the grievance was improperly filed against [the Agency] instead of against . . . CNRSE" and; (2) "Did the Agency violate Article 36, Section 36.02 of the parties' . . . agreement? If so, what shall the remedy be?"[1] *Id.* at 2.

As to the first issue, the Arbitrator concluded that the grievance was procedurally arbitrable, finding that the Union had standing to file the grievance and that the grievance was arbitrable even though it had been filed with the Agency instead of CNRSE. *Id.* at 16-19. In so finding, the Arbitrator rejected the Agency's contention that, under Article 40, Section 40.01 of the parties' agreement,[2] the agreement had terminated because the Union was no longer the employees' exclusive

[1] Article 36, Section 36.02 provides: "If the EMPLOYERS require[] unit employees to wear uniform[s,] EMPLOYERS will authorize uniform allowance[s] in accordance with applicable regulations." Award at 2.

[2] Article 40, Section 40.01 provides, in relevant part: "[I]t is provided that this Agreement shall terminate at any time it is determined that the UNION is no longer entitled to exclusive recognition under the [Statute]." Award at 2.

representative. In this connection, she noted that the parties had agreed that the former agreement would stay in effect until a new agreement between AFGE and CNRSE went into effect. *Id.* at 18.

As to the merits, the Arbitrator determined that the Agency violated Article 36, Section 36.02 of the parties' agreement by failing to put into place policies or procedures to administer the uniform allowance program, as required by the new OPM regulations. *Id.* at 19-20. As a remedy, she ordered the Agency to issue retroactive payments to employees in accordance with the new OPM regulations. As relevant here, the Arbitrator ordered the Agency to pay $800 for the annual uniform allowance to all affected employees from May 2007 through April 2010. *Id*. at 22.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator's determination on the first issue is contrary to law because the Union had no standing to file the grievance and proceed to arbitration. Exceptions at 5-6. In addition, the Agency contends that this determination fails to draw its essence from the plain language of Article 40.01 of the parties' agreement because, under that provision, the agreement terminated when the Union ceased to be the employees' exclusive representative. *Id.* at 6-7.

With respect to the merits, the Agency argues that the Arbitrator's remedy of retroactive payments of $800 for the annual uniform allowance to all affected employees for fiscal year (FY) 2007 through April 2010 is contrary to law and Agency regulation because it exceeds $400 for FY 2007 and FY 2008. *Id.* at 7-8. The Agency argues that, although the new OPM regulations increased the annual uniform allowance rate to $800, the Agency did not issue a regulation in accordance with 10 U.S.C. § 1593,[3] increasing the maximum annual uniform allowance amount from $400 to $800, until FY 2009 when the Department of Defense (DOD) issued DOD Instruction 1400.25.[4] *Id.* at 9; *see also* Exceptions, Encl. 7. The Agency argues that, prior to the issuance of this Instruction, 10 U.S.C. § 1593 "capped the payment of an annual uniform allowance for DOD employees at $400 annually," and, as such, the award is contrary to 10 U.S.C. § 1593 and DOD Instruction 1400.25. *Id.* at 9. In addition, the Agency argues that compliance with the award violates the Anti-Deficiency Act, 31 U.S.C. § 1341, because it orders the Agency to pay for an expenditure that exceeds the amount in an appropriation. *Id*.

[3] 5 U.S.C. § 1593 is set forth, in pertinent part, in section IV.B., *infra.*

[4] DOD Instruction 1400.25 is set forth, in pertinent part, in section IV.B., *infra*.

B. Union's Opposition

As to the first issue, the Union asserts that the Agency chose to continue to follow the parties' existing local agreement until AFGE and CNRSE could negotiate a new agreement. Opp'n at 2. As the Union was the exclusive representative under that agreement, the Union asserts that it had standing to file the grievance. *Id*.

As to the merits, the Union argues that the Agency "knowingly entered into an agreement [with the Union] in January 2007 [that] greatly increased the cost and maintenance of uniforms," but failed to implement OPM's new regulations in May 2007, which allowed for an increase in the maximum uniform allowances. *Id*. at 3. Therefore, the Union argues, the Agency's reliance on 10 U.S.C. § 1593 and the Anti-Deficiency Act is meritless because the Agency entered into an agreement with the Union to increase the uniform allowances, but failed to issue regulations implementing OPM's new standards. *Id*.

IV. Analysis and Conclusions

A. The Arbitrator's procedural arbitrability determination is not deficient.

The Arbitrator's determination that the Union had standing to file the grievance concerns the grievance's procedural arbitrability. *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1007 (2011) (*Naval Air Station*). The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *AFGE, Local 3615*, 65 FLRA 647, 649 (2011) (denying essence exception that directly challenged procedural arbitrability determination). However, a procedural arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law. *Naval Air Station*, 65 FLRA at 1006. In order for a procedural arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure. *Id.* at 1007.

The Agency's claim that the Arbitrator's procedural arbitrability determination is contrary to law does not provide a basis for finding the award deficient. In this regard, the Agency has failed to identify any statutory procedural requirements that apply to the parties' negotiated grievance procedure with which the Arbitrator's award conflicts. *See id.* Accordingly, the Agency's claim fails to establish that the Arbitrator's determination is deficient.

In addition, as the Agency's essence exception directly challenges the Arbitrator's procedural arbitrability determination, it also fails to establish that the Arbitrator's determination is deficient. *AFGE, Local 3615*, 65 FLRA at 649.

Accordingly, we deny the Agency's procedural arbitrability exceptions.

B. The award is contrary to law in part.

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.*

The Agency contends that the award is contrary to 10 U.S.C. § 1593 because it requires the Agency to expend funds on annual uniform allowances for FY 2007 and FY 2008 in excess of $400, the amount authorized by the 10 U.S.C. § 1593.[5] Where an award involves expenditures of federal funds that exceed statutory authority, the doctrine of sovereign immunity applies. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189 (2009). In this regard, "an award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy." *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (*Minot*) (then-Member Pope dissenting in part as to another matter) (citing *U.S. Dep't of HHS, FDA*, 60 FLRA 250, 252 (2004)). Based on the foregoing, we examine whether the award violates 10 U.S.C. § 1593, which provides the statutory authority for a monetary award against the Agency in this case.

Finding that the Agency had violated the new OPM regulations, the Arbitrator ordered the Agency to issue retroactive payments to employees for the annual uniform allowances in the amount of $800 for FY 2007 through April 2010. Award at 22. However, 10 U.S.C. § 1593 provides that "the amount of allowance paid, and the cost of uniforms provided, . . . may not exceed $400 per year (or such higher maximum amount as the Secretary of Defense may by regulation prescribe)." That is, this statutory authority prevents the Agency from paying more than $400 for annual allowances unless DOD has issued a regulation authorizing a higher amount.

It is undisputed that, on March 12, 2009, DOD issued DOD Instruction 1400.25, in accordance with 10 U.S.C. § 1593, and increased the annual uniform allowance amount to $800. *See* Exceptions, Encl. 7 at 2. The Instruction states that it "is effective immediately and will cover all payments for [FY] 2009 and thereafter." *Id.* at 3. The award, however, requires the Agency to pay for annual uniform allowances in the amount of $800 for FY 2007 and FY 2008, before DOD approved the higher amount. As such, it is inconsistent with 10 U.S.C. § 1593 and is not supported by statutory authority. *SSA*, 63 FLRA 313, 314 (2009) (finding that sovereign immunity requires an arbitrator's monetary award to be supported by statutory authority). Therefore, we find that the portion of the award that orders the Agency to pay $800 for the annual uniform allowance to all affected employees for FY 2007 and FY 2008 is contrary to law, and set it aside.[6]

V. Decision

The portion of the award that orders the Agency to pay $800 for the annual uniform allowance to all affected employees for FY 2007 and FY 2008 is set aside, and the Agency's remaining exceptions are denied.

[5] The Agency does not challenge the award as it applies to the initial uniform allowance amount and the annual uniform allowance amount for FY 2009. *See* Exceptions at 8-9.

[6] Having found the award deficient on this ground, it is unnecessary to resolve whether the award also violates the Anti-Deficiency Act, 31 U.S.C. § 1341.