68 FLRA No. 38

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
WASHINGTON, D.C.
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5024

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DECISION

January 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Suzanne R. Butler found that the Agency violated the parties' collective-bargaining agreement by not retroactively paying qualified bargaining-unit employees mass-transit subsidies of up to $240 per month for the period from January 2012 through December 2012, and up to $245 for the month of January 2013. As a remedy, she directed the Agency to reimburse affected employees for the amounts that they would have received absent the contractual violation.

The main, substantive question before us is whether the award is contrary to various provisions of law because no law authorizes or requires the Agency to pay retroactive transit subsidies. Because the Federal Employees Clean Air Incentives Act (the Incentives Act)[1] and the Back Pay Act (the BPA)[2] support the award, we find that the answer is no.

II. Background and Arbitrator's Award

Under the Incentives Act, Congress authorized all federal agencies to establish transit-subsidy programs.[3] The Incentives Act provides for cash reimbursements to employees if transit passes are not "readily available for direct distribution by the agency."[4] Executive Order 13,150 requires all federal agencies in the national capital area to implement transit-subsidy programs,[5] and also requires that those agencies provide transit benefits to qualified employees in amounts equal to their commuting costs, not to exceed the maximum non-taxable amount allowed by 26 U.S.C. § 132(f)(2), which is part of the Internal Revenue Code.[6]

Before the enactment of the American Taxpayer Relief Act of 2012 (ATRA),[7] the maximum non-taxable amount allowed by § 132(f)(2)(A) in 2012 was $125 per month. On January 2, 2013, ATRA amended § 132(f)(2)(A) to retroactively increase the maximum amount of non-taxable transit benefits from $125 to $240 per month for 2012, and, as relevant here, increased the maximum amount of non-taxable transit benefits for January 2013 to $245.

Also before ATRA's enactment, the Agency provided eligible bargaining-unit employees with subsidies of up to $125 per month for mass-transit expenses incurred from January 2012 through January 2013. After ATRA's enactment, the Agency did not retroactively reimburse employees for transit expenses incurred over $125 per month in 2012, up to the maximum non-taxable amount of $240 per month, or for transit expenses over $125 incurred in January 2013, up to the maximum non-taxable amount of $245.

The Union filed a national, institutional grievance, alleging (as relevant here) that the Agency violated Article 53 of the parties' agreement and ATRA because, according to the Union, the agreement required the Agency to pay employees subsidies in the amount of their actual commuting costs incurred, up to the maximum non-taxable amounts set in § 132(f)(2)(A). The grievance went to arbitration.

The Arbitrator found that in Article 53, Section 2 of the parties' agreement, the Agency committed to "offer a monthly benefit to employees equal to their actual qualifying monthly commuting costs, but not to exceed the maximum amount authorized by applicable laws, [e]xecutive [o]rders[,] and regulations governing public[-]transportation benefits for federal employees."[8] As relevant here, she reasoned that, once ATRA amended § 132(f)(2)(A) to retroactively increase the maximum non-taxable subsidy amounts, the Agency was obligated to reimburse employees who had incurred

[1] 5 U.S.C. § 7905.
[2] *Id.* § 5596.
[3] *Id.* § 7905(b)(1).
[4] *Id.* § 7905(b)(2)(A).
[5] Exec. Order No. 13,150, § 2, 65 Fed. Reg. 24,613, 24,613 (Apr. 21, 2000).
[6] *Id.* (citing 26 U.S.C. § 132(f)(2)).
[7] American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).
[8] Award at 20 (quoting Art. 53, § 2).

eligible transit expenses above the previous, maximum non-taxable amount of $125. To support her interpretation of ATRA, the Arbitrator cited a report by the Joint Committee on Taxation that "sets forth a general explanation of tax legislation enacted in the [112th] Congress."[9] Specifically, she set forth the following wording from that report:

> [E]xpenses incurred during 2012 by an employee for employer-provided . . . transit benefits may be reimbursed . . . . Further, Congress intends that reimbursements for expenses incurred for months during 2012 may be made in addition to the provision of benefits or reimbursements of up to $245 per month for expenses incurred during 2013.[10]

At arbitration, the Agency argued that § 132(f)(2)(A) pertains only to the tax treatment of transit benefits and does not dictate the maximum amount of subsidies that must be paid under the parties' agreement. The Arbitrator determined that the Agency's argument did not comport with: (1) the wording of the agreement; (2) the Agency's prior practice of increasing or reducing the benefit based on the maximum amount allowable by §132(f)(2)(A); or (3) the parties' bargaining history.

The Agency also argued before the Arbitrator that federal appropriations law prohibits payment in one fiscal year for expenditures incurred in a previous fiscal year, absent explicit appropriations authority. But the Arbitrator found explicit appropriations authority in the parties' agreement, ATRA, and the BPA. In the latter regard, the Arbitrator stated that the BPA does not limit the fiscal year in which payments under the BPA are authorized.

Additionally, the Agency argued that it lacked authority under § 203 of ATRA, the Purpose Statute,[11] the bona-fide-needs rule (described in Section IV. below),[12] and the Antideficiency Act[13] to make retroactive payments. In response, the Arbitrator stated that "[t]o say that applicable law(s) a, b, and c do not expressly authorize said retroactive payments does not prove that there are no other applicable laws, rules[,] or regulations that do authorize them."[14] She also stated that "to say that applicable law(s) a, b, and c do not *expressly* authorize retroactive payments for prior fiscal years does not prove that they do not *impliedly* authorize them."[15]

Further, the Arbitrator noted that in *U.S. Department of HHS* (*HHS*),[16] the Authority held that an arbitration award ordering an agency to pay retroactive transit subsidies was not contrary to the BPA and, in so holding, found that transit benefits are pay, allowances, or differentials within the meaning of the BPA.[17] Additionally, the Arbitrator found that cash reimbursements for improperly denied transit subsidies are consistent with, and authorized by, the BPA.[18]

The Arbitrator concluded that the Agency violated the parties' agreement,[19] and she sustained the grievance in pertinent part. As a remedy, she directed the Agency to make affected employees whole, including interest, by establishing a claims process through which individual employees may certify eligible expenses incurred and receive cash reimbursements.

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar certain Agency arguments.

The Agency argues that cash reimbursements for transit expenses are not authorized by law and that, consequently, the award is contrary to law.[20] The Union contends that the Authority should dismiss these arguments under § 2429.5 of the Authority's Regulations because the Agency failed to raise them before the Arbitrator.[21]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[22] At arbitration, the Agency argued that it had no authority to make retroactive payments under applicable law.[23] Thus, we find that §§ 2425.4(c) and 2429.5 do not bar the Agency's arguments.

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[9] *Id.* at 13.
[10] *Id.* at 22 (emphasis omitted) (quoting Staff of J. Comm. on Taxation, 112th Cong., General Explanation of Tax Legislation Enacted in the 112th Congress 123 (J. Comm. Print 2013)).
[11] 31 U.S.C. 1301(a).
[12] *Id.* § 1502(a).
[13] *Id.* §§ 1341-42.
[14] Award at 25.
[15] *Id.*
[16] 54 FLRA 1210 (1998).
[17] Award at 27 (citing *HHS*, 54 FLRA at 1217-23).
[18] *Id.* (citing 5 U.S.C. § 5596).
[19] *Id.* at 24.
[20] Exceptions at 9-12.
[21] Opp'n at 6-7.
[22] 5 C.F.R. §§ 2425.4(c), 2429.5.
[23] Award at 18.

IV. Analysis and Conclusion: The award is not contrary to law.

As stated previously, the Agency argues that the award is contrary to law.[24] According to the Agency, the award "misinterprets the Appropriations Clause" of the U.S. Constitution (the Appropriations Clause)[25] and the rule that payment of money from the U.S. Treasury must be authorized by a statute.[26] In this connection, the Agency contends that there is no authority for federal agencies to provide employees with retroactive cash reimbursements for transit subsidies.[27] The Agency discusses three statutory provisions in this regard.

First, the Agency claims that § 132(f)(2)(A), as amended by ATRA, governs the calculation of federal income taxes, but "does not provide legal authority for any federal agency to provide public[-]transportation subsidies to its employees."[28] And the Agency contends that the Joint Committee on Taxation's report "does not constitute congressional authority to spend funds from the U.S. Treasury."[29]

Second, the Agency contends that, under the Incentives Act, "agencies have very limited authority to use their appropriations to make cash payments to their employees, and that is when a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the agency."[30]

Third, the Agency claims that the BPA provides no authority for retroactive cash reimbursements "because it is not applicable to this situation."[31] In this regard, the Agency asserts that it is undisputed that from January 2012 to January 2013, the Agency had no authority to pay over $125 per month.[32] Thus, the Agency claims, "there was no violation of Article 53 that . . . resulted in withdrawal or reduction of pay or benefits at that time that would have invoked the [BPA]."[33] According to the Agency, the BPA "could only be invoked later[,] once it was found by an appropriate authority that an unjustified or unwarranted personnel action occurred; however, the Agency was never authorized to issue retroactive cash reimbursements."[34] The Agency also argues that, because the BPA does not apply, and no other statute waives the government's sovereign immunity in this case, the award of retroactive cash reimbursements is contrary to the doctrine that the federal government is immune from suits for money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity).[35]

Additionally, the Agency challenges the Arbitrator's assertion that the parties' agreement provides explicit authorization authority for retroactive cash reimbursements.[36] In particular, the Agency contends that, under the Appropriations Clause and the Purpose Statute, only a statute – not a collective-bargaining agreement – can authorize the payment of funds from the U.S. Treasury.[37]

Finally, citing the Antideficiency Act, the Purpose Statute, and the bona-fide-needs rule, the Agency asserts that appropriations, or funds available for obligation, during one fiscal year may not be used to cover obligations incurred in previous or subsequent fiscal years.[38] According to the Agency, the Arbitrator erred in finding that the Agency was "contractually mandated to pay the reimbursements in [f]iscal [y]ear 2013 regardless of in which particular fiscal year the expenses arose."[39] The Agency alleges that, under the Arbitrator's reasoning, "Congress, by enacting the amendment to [§ 132(f)(2)(A)], legally committed the United States to make cash payments to all federal employees to cover the additional amount of expenses [that] they may exclude from their taxable income" – an alleged result that the Agency contends is "illogical" and "contrary to law."[40]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[41] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard.[42]

Any disbursement of appropriated funds must be authorized by statute.[43] In this regard, the Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made

[24] Exceptions at 1.
[25] U.S. Const. art. I, § 9, cl. 7.
[26] Exceptions at 8.
[27] *Id.* at 9.
[28] *Id.* at 6.
[29] *Id.* at 8.
[30] *Id.* at 7.
[31] *Id.* at 11.
[32] *Id.*
[33] *Id.* at 11-12.
[34] *Id.* at 12.
[35] *Id.* at 13.
[36] *Id.* at 10.
[37] *Id.*
[38] *Id.* at 9.
[39] *Id.* at 10-11 (internal quotation marks omitted).
[40] *Id.* at 11.
[41] *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)).
[42] *SSA*, 67 FLRA 534, 538 (2014).
[43] *Ass'n of Civilian Technicians, P.R. Army Chapter*, 58 FLRA 318, 321 (2003) (then-Member Pope concurring).

by Law."[44] And the Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[45]

Further, the bona-fide-needs rule provides that federal agencies may obligate annual and multi-year appropriations only to meet legitimate or bona fide needs that arise during the time when the appropriations are available for obligation.[46] And the Antideficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation.[47]

In *HHS*, the Authority held that the Incentives Act "constitutes explicit [c]ongressional authorization for agencies to provide funds for transit subsidies."[48] In this connection, the Authority stated that the Incentives Act "permits agencies to subsidize personal commuting expenses," and that "[o]ptions under the subsidy program include transit passes, *including cash reimbursements*."[49] These holdings are consistent with multiple Comptroller General decisions that have found that the Incentives Act authorizes agencies to provide employees transit subsidies and reimbursements for commuting via public transportation.[50]

Moreover, although the Incentives Act states that cash reimbursements are authorized only when vouchers or similar items that may be exchanged for transit passes are not "readily available,"[51] the Authority has held that cash reimbursements are permissible to remedy "subsidies already foregone."[52] And there is no prohibition on agencies using money in one fiscal year to reimburse employees for transit subsidies that were unpaid in a previous fiscal year. In this regard, the Comptroller General has stated, as relevant here:

> Not uncommonly, Congress will authorize . . . spending for a particular purpose in laws other than the agency's appropriation. . . . An example of an authorization is [the Incentives Act]. Because agencies generally may not use their appropriations to reimburse federal employees for their costs of commuting to work, Congress, by separate statute, has authorized agencies to use appropriated funds to reimburse federal employees for certain commuting expenses under a transit[-]benefit program. *Having enacted such . . . authorizations, Congress need not enact the same or similar language as part of each agency's annual appropriation.*[53]

Thus, under Comptroller General precedent, the Incentives Act itself provides the necessary authorization for the Agency to pay transit expenses on an ongoing basis, and it was unnecessary for the Arbitrator to rely on any other authority for finding such authorization. We note that decisions of the Comptroller General are not binding on the Authority,[54] but that the Authority has stated that those opinions serve as "expert opinion[s] that should be prudently considered."[55] There is no apparent basis for declining to rely on the Comptroller General's opinion on this issue, particularly as it is consistent with the Arbitrator's award and not challenged by the parties. Thus, we find that the Incentives Act provides a sufficient basis for the Arbitrator's conclusion that the Agency was authorized to pay retroactive transit subsidies.

[44] U.S. Const. art. I, § 9, cl. 7; *see also OPM v. Richmond*, 496 U.S. 414, 416 (1990) ("[P]ayments of money from the [f]ederal [t]reasury are limited to those authorized by statute."); *Downs v. OPM*, 69 F.3d 1141, 1143 (Fed. Cir. 1995) ("The United States Constitution limits payments of monies from the [f]ederal [t]reasury to those authorized by statute."); *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977) ("Government agencies may only enter into obligations to pay money if they have been granted such authority by Congress.").

[45] 31 U.S.C. § 1301(a).

[46] *See id.* § 1502(a).

[47] *Id.* § 1341(a)(1)(A)-(B).

[48] 54 FLRA at 1222.

[49] *Id.* at 1222-23 (emphasis added).

[50] *In re Nat'l Indian Gaming Comm'n–Reimbursing Bicyclists as Part of the Agency's Transp. Fringe Benefit Program*, B-318325, 2009 U.S. Comp. Gen. LEXIS 152, at *4 (Comp. Gen. Aug. 12, 2009) (5 U.S.C. § 7905 authorizes agencies to establish transit-subsidy programs that include options such as "transit passes or cash reimbursements for transit passes"); *In re Army–Mass Transit Benefits, Aberdeen Proving Ground*, B-316381, 2008 U.S. Comp. Gen. LEXIS 157, at *3 (Comp. Gen. July 18, 2008) (Incentives Act permits agencies to reimburse employees for public-transit commuting expenses); *In re DHS–Use of Mgmt. Directorate Appropriations to Pay Costs of Component Agencies*, B-307382, 2006 U.S. Comp. Gen. LEXIS 138, at *11 (Comp. Gen. Sept. 5, 2006) (federal agencies have specific authority to provide employee transit subsidies under 5 U.S.C. § 7905).

[51] 5 U.S.C. § 7905(b)(2)(A); *see also U.S. DOL*, 61 FLRA 64, 66 (2005) (*DOL*) (Chairman Cabaniss concurring).

[52] *DOL*, 61 FLRA at 66.

[53] *Antideficiency Act–Applicability to Statutory Prohibitions on the Use of Appropriations*, B-317450, 2009 U.S. Comp. Gen. LEXIS 155, *8-9 (Comp. Gen. Mar. 23, 2009) (emphasis added) (citations omitted).

[54] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014).

[55] *Id.*

With regard to whether the Agency was *required* to provide transit subsidies, the Arbitrator found that the Agency was contractually obligated to do so.[56] Under the BPA, an award of backpay is authorized when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.[57] A violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action under the BPA.[58] Here, the Arbitrator found such a violation,[59] and the Agency has not argued that this finding fails to draw its essence from the agreement. Thus, the first requirement of the BPA is met.

With regard to the second BPA requirement, the Arbitrator found that "impacted employees were adversely affected by" the contract violation "in that the Agency failed to reimburse said employees for qualifying transit expenses as required by" Article 53 of the parties' agreement.[60] And, as the Arbitrator noted,[61] in *HHS*, the Authority held that transit subsidies are pay, allowances, or differentials within the meaning of – and thus recoverable under – the BPA.[62] Accordingly, the second requirement of the BPA is met, and the BPA supports the Arbitrator's finding that the Agency is required to pay the grievants backpay.

Further, the Agency argues that the award is contrary to the doctrine of sovereign immunity.[63] But the BPA is a waiver of sovereign immunity,[64] and as the award satisfies the requirements of the BPA, it is not contrary to the doctrine of sovereign immunity.

For the foregoing reasons, we find that the Incentives Act, in conjunction with the BPA, supports the Arbitrator's direction that the Agency reimburse affected employees.

The Agency challenges the Arbitrator's reliance on § 132(f)(2)(A), as amended by ATRA,[65] and her statement that the parties' agreement provides explicit authorization for retroactive transit subsidies.[66] As stated previously, in conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard.[67] As the Incentives Act and the BPA support the Arbitrator's conclusion, the Arbitrator's other reasoning – even if deficient – provides no basis for finding the award deficient. Accordingly, we find it unnecessary to determine whether the Arbitrator's other reasoning is deficient.

V. Decision

We deny the Agency's exceptions.

[56] Award at 24-25.
[57] *E.g.*, *U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014).
[58] *Id.*
[59] Award at 24-25.
[60] *Id.* at 27.
[61] *Id.*
[62] 54 FLRA at 1222-23.
[63] Exceptions at 12.
[64] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).
[65] Exceptions at 6-8.
[66] *Id.* at 10.
[67] *SSA*, 67 FLRA at 538.