**73 FLRA No. 118**

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MARION VETERANS ADMINISTRATION
MEDICAL CENTER
MARION, ILLINOIS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2483
(Union)

0-AR-5852

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DECISION

July 13, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

## I. Statement of the Case

Arbitrator Danielle L. Carne found that the Agency violated the parties' collective-bargaining agreement by failing to pay the grievants environmental-differential pay (EDP) due to their exposure to a high-degree hazard consisting of micro-organisms. The Agency filed exceptions contending that the award is contrary to law and government-wide regulations. For the reasons explained below, we deny the exceptions.

## II. Background and Arbitrator's Award

The grievants are housekeepers and plumbers at the Agency's healthcare facilities. The Union filed a grievance seeking EDP for the grievants due to alleged hazards associated with their duties. The Agency denied the grievance, which advanced to arbitration. The Arbitrator framed the issues as: (1) whether the Agency violated Article 29 of the parties' agreement (Article 29), applicable laws, and government-wide rules and regulations by failing to pay the grievants EDP; and (2) what is an appropriate remedy for any violations.

The Arbitrator found that Article 29 required the Agency to pay EDP in accordance with the *Code of Federal Regulations*. In addition, the Arbitrator determined that 5 C.F.R. § 532.511 (§ 532.511) entitled employees to EDP for "expos[ure] to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management [(OPM)]."[1] The Arbitrator found that the category applicable to this dispute was set forth in title 5, part 532, subpart E, appendix A of the *Code of Federal Regulations* (Appendix A). Under Appendix A's "high[-]degree[-]hazard" category for micro-organisms (Category 6),[2] the Arbitrator noted that employees were entitled to 8% EDP if they were

> [w]orking with or in close proximity to micro-organisms[,] which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease. These are work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines . . . [,] and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury.[3]

Examining Category 6's description more closely, the Arbitrator determined that this dispute did not involve a situation where "safety measures d[id] not exist,"[4] because the grievants were "protected by highly developed safety protocols."[5] Rather, the Arbitrator concluded that the grievants' entitlement to EDP depended on whether the Agency's "developed" safety measures had "practically eliminated the potential for such personal injury," as Category 6 specified.[6] Therefore, the Arbitrator examined the grievants' work environments to determine the potential for personal injury within Category 6's terms.

First, the Arbitrator found that the grievants have a "heightened chance of contracting an incurable disease such as HIV from a needlestick or some other type of incident involving the transmission of blood."[7] Further, the Arbitrator determined that Agency-provided training and personal protective equipment could not practically eliminate that "ongoing and permanent" risk.[8] Second, the Arbitrator found that the grievants have "nearly *constant* encounters with" feces and urine that may be mixed with

[1] Award at 4 (quoting 5 C.F.R. § 532.511(a)(1)).
[2] *Id.* at 5 (quoting Appendix A, pt. 2, category 6).
[3] *Id.* at 4-5 (quoting Appendix A, pt. 2, category 6).
[4] *Id.* at 49 (quoting Appendix A, pt. 2, category 6).
[5] *Id.* at 50.
[6] *Id.* at 51 (quoting Appendix A, pt. 2, category 6).
[7] *Id.* at 55.
[8] *Id.* at 56.

trace amounts of blood.[9] These substances may unexpectedly splash into the grievants' eyes, noses, or mouths – for example, while mopping floors or cleaning toilets – and, according to the Arbitrator, even the most careful employees cannot prevent such occurrences. Third, the Arbitrator described "many incidents" in which the grievants could "'slip and fall' directly into" containers with "significant amounts of biological materials," such as biohazardous-liquid-waste containers that the grievants had to collect and transport outside.[10] Fourth, the Arbitrator found that patients' behaviors sometimes endanger the grievants. As examples, the Arbitrator stated that some patients have "throw[n] things" – like the contents of intravenous lines or catheter bags – and other patients have cleaned colostomy bags in their room sinks.[11] As a result, the grievants must "use their *bodies* to [clean] these contaminated items," thereby making the grievants the "literal barriers" to protect others from potentially injurious micro-organisms.[12]

Due to exposure to these "pervasive[]" hazards,[13] the Arbitrator found that the grievants worked with, or in close proximity to, potentially injurious micro-organisms on a "daily, hourly basis."[14] Moreover, the Arbitrator concluded that the Agency's safety measures had not "practically eliminated" the potential for the types of personal injury that Category 6 described.[15] The Arbitrator decided that these "conditions, according to the definition provided in Appendix A, warrant the payment of EDP,"[16] and the Agency violated Article 29 by failing to compensate the grievants accordingly. To remedy these violations, as relevant here, the Arbitrator directed the Agency to pay the grievants 8% EDP retroactively and prospectively.

The Agency filed exceptions to the award on December 16, 2022, and the Union filed an opposition on January 9, 2023.

## III. Analysis and Conclusions: The award is not contrary to law or government-wide regulations.

The Agency argues that the award is contrary to § 532.511,[17] Appendix A,[18] and the Occupational Safety and Health Act of 1970, as amended (OSH Act)[19] – for reasons that are explained further below.

As the Arbitrator noted, § 532.511 states that an employee is entitled to EDP for "expos[ure] to a working condition or hazard that falls within one of the categories approved by [OPM]."[20] The Agency observes that § 532.511 does not identify a specific number of hazardous exposures – or other "data-driven standard" – that necessitates the payment of EDP.[21] As such, the Agency argues that, because the Arbitrator did not find that any of the Agency's safety measures were lacking, the Agency should not be liable for EDP.[22] However, the Agency does not cite any authority to support its interpretation of § 532.511. Moreover, the regulation does not say that EDP is payable only when an Agency's safety measures are deficient. Rather, the regulation says that an entitlement to EDP depends on exposure to a working condition or hazard within an OPM-approved category,[23] and the Arbitrator found that the grievants' exposure satisfied the terms of such a category – Category 6.[24] Thus, the Agency has not established that the award is contrary to § 532.511.

Next, the Agency argues that the award conflicts with Appendix A because the Arbitrator held that the "mere possibility of a hazardous[-]exposure incident [was] sufficient to warrant EDP."[25] To the contrary, the Arbitrator determined that the grievants were entitled to EDP because their exposure to potentially injurious micro-organisms was "pervasive[]"[26] – occurring on a "daily, hourly basis" – and that the Agency's developed safety measures had not practically eliminated the risk of personal injury, as Category 6 specified.[27] Therefore, we reject the Agency's argument that the Arbitrator awarded EDP based on the mere possibility of hazardous exposures.

Also regarding Appendix A, the Agency argues that personal protective equipment and training "practically eliminated" the grievants' risk of exposure to

[9] *Id.* at 57.
[10] *Id.* at 58.
[11] *Id.* at 60.
[12] *Id.* at 76.
[13] *Id.* at 68; *see also id.* at 73 ("pervasiveness of danger").
[14] *Id.* at 79.
[15] *Id.*; *see also id.* at 55 ("[T]here are many aspects of the record that establish that the risk of personal injury has *not* been sufficiently eliminated as to spare the [Agency] from the obligation to pay EDP . . . ."), 59 (noting Agency's "inability to 'practically eliminate' the risk of personal injury to the [g]rievants").
[16] *Id.* at 76.
[17] Exceptions Br. at 3-4.
[18] *Id.* at 4-8.
[19] *Id.* at 8-9; *see* 29 U.S.C. §§ 651-678 (OSH Act).
[20] 5 C.F.R. § 532.511(a)(1).
[21] Exceptions Br. at 4.
[22] *Id.*
[23] 5 C.F.R. § 532.511(a)(1).
[24] Award at 79.
[25] Exceptions Br. at 5.
[26] Award at 68; *see also id.* at 73 ("pervasiveness of danger").
[27] *Id.* at 79.

potentially injurious micro-organisms.[28] As a result, the Agency argues, the Arbitrator should have denied EDP, just as arbitrators in five other Agency-cited cases denied EDP to the employees in those cases.[29] However, the circumstances of the hazardous exposures in those five other cases were unique to them.[30] More importantly, the arbitrators in those cases made findings that: (1) the employees were not exposed to hazardous conditions;[31] or (2) the agencies had practically eliminated the risks of injury to those employees.[32] Here, the Arbitrator found that the Agency had *not* practically eliminated the risks to the grievants.[33] The Agency's disagreement with the Arbitrator's evaluation of evidence does not establish that the award is contrary to Appendix A.[34]

Last, the Agency argues that the award is contrary to the OSH Act.[35] According to the Agency, its personal protective equipment, training, and safety protocols comply with the OSH Act, so the Arbitrator should not have awarded EDP.[36] However, even assuming that the Agency's safety measures comply with the OSH Act, the Agency does not identify any legal authority that precludes an award of EDP under such circumstances. Consequently, this argument provides no basis for setting aside the award.

For the foregoing reasons, we deny the Agency's exceptions.

## IV. Decision

We deny the Agency's exceptions.

[28] Exceptions Br. at 5.

[29] *Id.* at 6-8 (citing *AFGE, Loc. 2338*, 71 FLRA 1131 (2020) (*Loc. 2338*) (Member Abbott dissenting in part), *recons. denied*, 72 FLRA 77 (2021) (Member Abbott concurring); *AFGE, Loc. 1622*, 67 FLRA 186 (2014) (*Loc. 1622*); *NAGE, Loc. R5-184*, 67 FLRA 32 (2012) (*NAGE*); *U.S. Dep't of the Navy, Navy Pub. Works Ctr., San Diego, Cal.*, 49 FLRA 553 (1994) (*Navy*); *AFGE, Loc. 910*, FMCS Case No. 170830-54224 (Sept. 26, 2018) (O'Brien, Arb.) (*Loc. 910*)).

[30] *E.g.*, *Loc. 1622*, 67 FLRA at 187-89 (parties disputed whether employees were entitled to EDP due to cold work).

[31] Exceptions Br. at 7 (acknowledging that arbitrator in *Loc. 1622* found that employees were not exposed to hazardous conditions), 8 (discussing *Loc. 910*, where arbitrator stated that grievants were not "exposed to an unusually severe hazard, physical hardship, or a working condition," FMCS Case No. 170830-54224 at 25-26).

[32] *Id.* at 6 (discussing *Navy*, where arbitrator found that safety measures "practically eliminated the potential for personal injury," 49 FLRA at 556, and *NAGE*, where arbitrator made a similar finding), 7 (acknowledging that arbitrator in *Loc. 2338* found that potential for personal injury was practically eliminated).

[33] Award at 59, 79; *see also id.* at 55 ("[T]he risk of personal injury has *not* been sufficiently eliminated.").

[34] *See, e.g.*, *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 444 (2021) (Chairman DuBester concurring) (denying contrary-to-law challenge to arbitrator's conclusion that agency did not practically eliminate potential for injury because party merely disagreed with arbitrator's evaluation of evidence); *U.S. Dep't of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124, 128 (2021) (Member Abbott concurring; Chairman DuBester dissenting on other grounds) (same); *U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 595 (2020) (Member DuBester concurring) (same).

[35] Exceptions Br. at 8-9.

[36] *See id.* at 9.