73 FLRA No. 72

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION OF
PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-5772

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DECISION

December 8, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Kiko dissenting)

I. Statement of the Case

This case involves a collective-bargaining agreement that provides for the reimbursement of some eye exams and prescription glasses or contacts. The Agency discontinued reimbursements, asserting that they were contrary to law. Arbitrator Garvin Lee Oliver found that the Agency could lawfully pay the reimbursements, and, as such, the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute (the Statute).[1]

The Agency argues on exceptions that the award is contrary to law. We remand this dispute to the parties for resubmission to the Arbitrator, absent settlement, to make additional findings that address the pertinent legal standards.

II. Background and Arbitrator's Award

The Union represents administrative law judges (ALJs) who must view computer or video screens (screens) to perform virtually all of their work. More than twenty years ago, in connection with the ALJs' screen-intensive work, the parties negotiated a reimbursement program for some eye exams and prescription glasses or contacts (the program). Through successive collective-bargaining agreements, the parties maintained the program.

During negotiations for a new term agreement, the Agency proposed eliminating the program, and the parties tentatively agreed to that proposal. However, before the parties had finalized a new term agreement, the Agency imposed a revised, partial "contract" that eliminated the program.[2]

The Union successfully challenged the Agency's imposition of the partial "contract." At the conclusion of those challenges, two arbitrators – in awards that are not under review here – directed the Agency to rescind the unilaterally imposed partial "contract." After receiving the first of those awards, the Agency notified the Union that the Agency would rescind the partial "contract," and reimplement the previous agreement that included the program (the reimplemented agreement).

Subsequently, five ALJs requested reimbursement for eye exams and prescription glasses or contacts, but the Agency did not pay those reimbursements. As a result, the Union filed the grievance at issue in this case. The grievance asserted that, by failing to reimburse ALJs under the program, the Agency violated the reimplemented agreement and committed unfair labor practices (ULPs). The Agency denied the grievance and, for the first time, asserted that it could not lawfully expend appropriated funds to pay for the program. However, the Agency offered the Union post-change, impact-and-implementation bargaining over the program's discontinuation. The grievance advanced to arbitration.

The Arbitrator framed the issues before him as involving: whether the program was contrary to law, such that the Agency was justified in refusing to fund it; or whether the Agency violated the reimplemented agreement or the Statute by discontinuing the program.

In order to be entitled to reimbursement under the program, an ALJ must "obtain[] a prescription from a licensed optical practitioner (e.g., optometrist or ophthalmologist) indicating that the [ALJ] needs special eyeglasses/contact lenses (including disposable lenses) in order to operate [screens] without eyestrain or because of other optical-related problems."[3] In addition, an ALJ's licensed optical practitioner "must certify on [a

[1] 5 U.S.C. §§ 7101-7135.
[2] Award at 5.
[3] *Id.* at 9 (quoting Reimplemented Collective-Bargaining Agreement (CBA) Art. 23, § 8(B)).

contractually prescribed] form that the eyeglasses/contact lenses (including disposable lenses) are for [screen] use," and "any prescription should only be for [screen] use."[4] The ALJ would then submit the completed form to Agency management for reimbursement.[5]

The Arbitrator determined that two provisions of law could authorize spending appropriated funds on the program – 5 U.S.C. § 7903 (§ 7903) and 29 U.S.C. § 668 (§ 668). Section 7903 states, in pertinent part, that "[a]ppropriations . . . are available for the purchase and maintenance of special . . . equipment for the protection of personnel in the performance of their assigned tasks."[6] Section 668 requires, in relevant part, that every agency head "establish and maintain an effective and comprehensive occupational safety and health program."[7] The Arbitrator decided that both §§ 7903 and 668 authorize the Agency to spend appropriated funds in this case because the program "expressly requires an eye doctor to certify that the eyewear and examination were needed for safety."[8] Thus, the Arbitrator concluded that the program "specifically satisfies the Agency's duty to provide safe and healthy places and conditions of employment and to acquire funds for equipment necessary to protect employees" under §§ 7903 and 668.[9]

The Arbitrator held that the program was a mandatory subject of bargaining, so the Agency's failure to bargain before "implement[ing] . . . any change" to the program was a ULP.[10] The Arbitrator also held that the Agency committed a ULP by repudiating the reimplemented agreement. As remedies, the Arbitrator directed the Agency to comply with the program in the reimplemented agreement, pay all eligible claims under the program, cease and desist violating the Statute, and post and email a notice concerning the Agency's ULPs.

The Agency filed exceptions to the award on November 4, 2021, and the Union filed an opposition on December 6, 2021.

III. Analysis and Conclusion: We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

The Agency argues that it may not lawfully spend appropriated funds unless it has statutory authorization to do so.[11] According to the Agency, the Arbitrator's findings that the Agency could lawfully reimburse employees under §§ 7903 and 668 is contrary to law because it conflicts with Comptroller General[12] and Authority[13] precedent interpreting those provisions.

Comptroller General decisions are not binding on the Authority.[14] Although a "Comptroller General opinion serves as an expert opinion that should be prudently considered," it is "not one to which the Authority must defer."[15] Nevertheless, in cases where the parties and the arbitrator have examined Comptroller General precedent to address legal questions raised by a grievance, the Authority has assumed the applicability of that precedent when assessing contrary-to-law exceptions to the resulting arbitral award.[16] Because both parties relied on Comptroller General precedent in their arguments at arbitration[17] and in their filings with the Authority,[18] we assume the applicability of that precedent here.[19]

[4] *Id.* at 2-3 (quoting CBA Art. 23, § 8(B)).
[5] The program entitled ALJs to reimbursement for "100% of the eye examination in an amount not to exceed $65," and, for prescription glasses or contacts, reimbursement for "cost[s] up to $200." *Id.* (quoting CBA Art. 23, § 8(B)-(C)).
[6] 5 U.S.C. § 7903.
[7] 29 U.S.C. § 668(a).
[8] Award at 9.
[9] *Id.*
[10] *Id.*
[11] Exceptions Br. at 7-12.
[12] *Id.* at 13-15 (citing *Dep't of the Army, Ohio River Div., Corps of Eng'rs – NFFE, Loc. No. 892*, B-213415, 63 Comp. Gen. 278 (1984), 1984 WL 43506).
[13] *Id.* at 17-20 (citing *NTEU*, 49 FLRA 973 (1994) (*NTEU*)); *id.* at 20 (citing *POPA*, 56 FLRA 69 (2000) (Chairman Wasserman dissenting)). When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. 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. In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are deficient as nonfacts. *E.g.*, *AFGE, Loc. 2145*, 71 FLRA 818, 819 (2020).
[14] *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 979 (2015) (*Weather Serv.*), *recons. denied*, 69 FLRA 256 (2016); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*).
[15] *Weather Serv.*, 68 FLRA at 979.
[16] *Id.* (citing *NOAA*, 67 FLRA at 358).
[17] *E.g.*, Exceptions, Attach., Ex. 7, Agency's Arb. Br. at 8 (citing Comptroller General precedent); Exceptions. Attach., Ex. 9, Union's Arb. Reply Br. at 9 (same).
[18] *E.g.*, Exceptions Br. at 16 & n.6 (citing Comptroller General precedent); Opp'n Br. at 14 (same).
[19] *See Weather Serv.*, 68 FLRA at 979-80 (assuming applicability of Comptroller General precedent in resolving contrary-to-law exception).

We begin our analysis with § 7903. The Comptroller General has found that, in order for § 7903 to authorize spending on an item, "(1) the item must be 'special' and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide . . . ; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee[;] and (3) the employee must be engaged in hazardous duty."[20]

The Arbitrator's findings do not address these specific § 7903 requirements. First, although the program requires an ALJ to "obtain[] a prescription . . . indicating that the [ALJ] needs *special* eyeglasses/contact lenses . . . in order to operate [screens] without eyestrain or because of *other optical-related problems*,"[21] the Arbitrator did not make any findings applying these terms. For example, the Arbitrator did not specify *how* the eyeglasses or contacts for which ALJs sought reimbursement were "special"[22] – i.e., how they differed from those that would be worn for ordinary vision correction.

Second, although the Arbitrator found generally that the Agency had a "duty to provide safe and healthy places and conditions of employment,"[23] the Arbitrator did not make specific findings about whether the program is "essential to the safe and successful accomplishment of the [Agency's] work, and not solely for the protection of the employee[s]."[24]

Third, the Arbitrator did not make findings concerning whether ALJs are engaged in "hazardous duty."[25] The Union contends that ALJs are engaged in hazardous duty because their work falls within the scope of 29 C.F.R. § 1910.133(a) – an occupational safety and health regulation (the regulation).[26] The regulation states, in pertinent part, that an "employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from . . . potentially injurious light radiation."[27] However, the Arbitrator made no findings regarding whether, for example, ALJs' glasses or contacts under the program are equipped with filter lenses that have an appropriate shade number,[28] or whether any ALJs are exposed to "injurious light radiation" within the meaning of the regulation.[29] As such, the record before us does not permit us to assess whether 29 C.F.R. § 1910.133(a) applies.

In sum, the current record does not permit us to determine whether the award conflicts with § 7903, as the Comptroller General and the Authority have applied that provision.

Further, the Arbitrator found that the Agency could lawfully reimburse ALJs for their eye exams because the program "expressly requires an eye doctor to certify that the eyewear and examination were needed for safety,"[30] but the Arbitrator did not cite any legal authority that would authorize reimbursements for eye exams. In *NTEU*, the Authority found that 5 U.S.C. § 7901 – which authorizes agency health-service programs in certain circumstances – was a potential source of authorization to pay for such exams.[31] However, the Authority also found that § 7901 did not authorize reimbursement for private, routine eye exams for employees who did not require eye-protection equipment under § 7903 to safely perform their jobs.[32] Accordingly, further findings are required to identify the source of legal authority under which the Arbitrator found that the Agency could reimburse ALJs for eye exams.

Next, we turn to § 668. Under this provision, an agency may pay for protective equipment if the agency determines that it is necessary under the Occupational Safety and Health Act (OSHA)[33] and its implementing regulations.[34] The only OSHA regulation that the Union cites as authorizing the Agency to fund the program is the regulation already discussed in connection with § 7903 – 29 C.F.R. § 1910.133(a). For the reasons explained above, we are unable to determine whether that regulation

[20] *Purchase of Cold Weather Clothing, Rock Island Dist., U.S. Army Corps of Eng'rs*, B-289683, 2002 WL 31521355, at *3 (Comp. Gen. Oct. 7, 2002) (*Rock Island*).
[21] Award at 9 (emphases added) (quoting CBA Art. 23, § 8(B)).
[22] *Rock Island*, 2002 WL 31521355, at *3 (noting that, to be reimbursable under § 7903, "the item must be 'special' and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide").
[23] Award at 9.
[24] *Rock Island*, 2002 WL 31521355, at *3; *see AFGE, Council 214*, 53 FLRA 131, 137 (1997) ("The test for determining whether an item will primarily benefit the [g]overnment is to examine whether the item . . . is essential to the transaction of official business from the [a]gency's standpoint.").
[25] *Rock Island*, 2002 WL 31521355, at *3.
[26] Opp'n Br. at 9 (citing 29 C.F.R. § 1910.133(a)(1)).
[27] 29 C.F.R. § 1910.133(a)(1).
[28] *See NTEU*, 49 FLRA at 977-78 ("[A]lthough the applicable regulation provides that agencies may protect employees' eyes from the hazards associated with glare, the [negotiated] provision is silent regarding the provision of tinted lenses or some other way of addressing the glare that may be associated with [screens].").
[29] 29 C.F.R. § 1910.133(a)(5).
[30] Award at 9.
[31] 49 FLRA at 980.
[32] *Id.* at 979-80.
[33] 29 U.S.C. § 668(a).
[34] *Rock Island*, 2002 WL 31521355, at *4.

applies here.[35] Additionally, further arbitral findings may reveal another basis for concluding that § 668 supports paying reimbursements under the program. In this regard, because § 668 applies only where an "authorized official of an agency . . . make[s] a determination that certain" protective equipment is "required pursuant to OSHA regulations,"[36] any further findings concerning § 668 must address that criterion.

For the foregoing reasons, we are unable to determine whether the award is contrary to §§ 7903 and 668. Accordingly, we remand this dispute to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with the legal standards discussed above.[37]

The Agency also argues that the Arbitrator's remedies are contrary to law and that the Arbitrator exceeded his authority by awarding them.[38] Because the Arbitrator's findings on remand may moot those arguments, we find that it would be premature to resolve them at this time.[39]

IV. Decision

We remand this dispute to the parties for resubmission to the Arbitrator, absent settlement, for further findings on the lawfulness of reimbursements under the program.

[35] Apart from its arguments about specific statutory authorization, the Union asserts that the program's longevity establishes that "the Agency has not suddenly realized that the [program] is illegal." Opp'n Br. at 6. However, the fact that parties "have agreed to a provision in the past does not provide any basis for finding [that] the provision" is lawful. *NTEU*, 61 FLRA 554, 557 (2006) (citing *NATCA, Rochester Loc.*, 56 FLRA 288, 291-92 (2000)). Thus, we reject the Union's assertion to the contrary.

[36] *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 972-73 (2015) (*Whiteman AFB*) (Member Pizzella dissenting).

[37] We disagree with the dissent's conclusion that "[r]emanding is futile because the Arbitrator *cannot* make any findings that would" demonstrate that the program is lawful. Dissent at 8 (emphasis added). As an initial matter, none of the authorities that the dissent cites supports a conclusion that the types of reimbursement at issue here are necessarily unlawful, without regard to the particular facts and circumstances involved. Further, in concluding that the award is deficient, the dissent relies on the *absence* of certain evidence and findings. *See id.* at 9 ("'special' is undefined"); *id.* ("nothing in the record establishes that disposable lenses may function as special safety equipment"). The absence of necessary findings is precisely why we are remanding, consistent with a long line of Authority precedent *See*, *e.g.*, *Whiteman AFB*, 68 FLRA at 972; *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 272, 275 (2015) ("When the Authority is unable to determine whether an award is contrary to law, the Authority remands the award for further findings by the arbitrator."); *Dep't of the Army, 6th Infantry Div., Fort Richardson, Alaska*, 35 FLRA 42, 46 (1990) (remanding award where arbitrator "provide[d] no reasons" for his decision to tie the payment of environmental differential pay to a particular level of exposure).

[38] Exceptions Br. at 31-33.

[39] *E.g.*, *Whiteman AFB*, 68 FLRA at 973 & n.58 (declining to resolve remaining exception where Authority remanded dispute for further arbitral findings on contrary-to-law questions); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 981 n.4 (2012) (*DOJ*) (declining to resolve remaining exception where Authority remanded dispute for further arbitral findings on bargaining obligation). Our remand is without prejudice to the Agency's ability to resubmit its exceptions to the Authority if they remain unresolved after the completion of remand proceedings. *DOJ*, 66 FLRA at 981 n.4 (citing *SSA*, 30 FLRA 1003, 1005-06 (1988)).

Member Kiko, dissenting:

Remanding this dispute for further findings merely delays the inevitable conclusion that the parties' negotiated reimbursement program for some eye exams and prescription glasses or contacts (the program) is unlawful. The majority correctly notes that the Arbitrator's findings do not establish that the Agency may lawfully expend appropriated funds for the program under either 5 U.S.C. § 7903 (§ 7903) or 29 U.S.C. § 668 (§ 668).[1] Remanding is futile because the Arbitrator cannot make any findings that would salvage these legally deficient reimbursement practices.

First, looking at ordinary electronic screens is not a "hazardous duty"[2] under the Occupational Safety and Health Act or its implementing regulations. And, as the majority explains, unless the ALJs are engaged in hazardous duty, §§ 7903 and 668 prohibit the Agency from reimbursing ALJs for their eye exams, glasses, and contacts.[3] The Union failed to identify any applicable regulation that would require special protective equipment for workers looking at ordinary electronic screens – even for extended periods – and that failure is unsurprising.[4] If the ALJs here were entitled to reimbursement for their eye exams and glasses or contacts, then federal agencies would be obligated to pay for eye exams, glasses, and contacts for virtually every federal worker whose job duties require extensive computer use.[5] Under §§ 7903 and 668, that result is absurd, yet the majority appears willing to entertain it if the Arbitrator supplies further findings.[6]

Second, the negotiated certification form that ALJs submit to support their reimbursement requests does not ensure that the Agency pays only statutorily authorized reimbursements. A doctor may sign that certification form if the ALJ needs prescription glasses or contacts "in order to operate [screens] . . . because of . . . *optical-related problems*,"[7] which could include nearsightedness or farsightedness. Yet both Authority and Comptroller General decisions preclude spending appropriated funds for private eye exams to diagnose – or prescription glasses or contacts to correct – ordinary vision problems like nearsightedness or farsightedness.[8]

The certification form also requires a doctor to attest that an ALJ needs "*special* eyeglasses/contact lenses (including disposable lenses) in order to operate [screens] without eyestrain or because of other optical-related problems," but "special" is undefined.[9] Prescription glasses are "special" when compared to, for example, purely cosmetic lenses or sunglasses, but Authority

[1] Majority at 7.

[2] *Purchase of Cold Weather Clothing, Rock Island Dist., U.S. Army Corps of Eng'rs*, B-289683, 2002 WL 31521355, at *3 (Comp. Gen. Oct. 7, 2002).

[3] Majority at 5.

[4] The majority's finding that it is unable to determine whether 29 C.F.R. § 1910.133(a) (the regulation) applies to the ALJs' use of screens is, to be charitable, silly. Majority at 5; *see, e.g.*, *AFGE, Loc. 2022*, 40 FLRA 371, 396 (1991) (refusing to abandon "common-sense understandings of . . . the workplace" when conducting legal analysis). The regulation provides examples of the types of work that generate "injurious light radiation," and some of those tasks are "[s]hielded metal arc welding," "[a]rc cutting," "[t]orch brazing," and "[t]orch soldering." 29 C.F.R. § 1910.133(a)(1), (5). The suggestion that further arbitral findings could establish that ALJs' use of screens is comparably hazardous to welding, cutting, brazing, or soldering belittles the dangers of "injurious light radiation." *See id.* § 1910.133(a)(4) (requiring eye protection to include "distinct[] mark[ings] to facilitate identification of the manufacturer"), (a)(5) (requiring "filter lenses that have a shade number appropriate for the work being performed"), (b)(1)-(2) (requiring compliance with specific industrial-safety standards).

[5] This obligation would arise regardless of whether employees were covered by a negotiated agreement because agencies *must* "acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees" under § 668. 29 U.S.C. § 668(a)(2). In other words, if § 668 authorizes agency expenditures on certain personal protective equipment, then § 668 also obligates the agency to provide that equipment as "reasonably necessary to protect employees," irrespective of any negotiated obligations. *Id.*

[6] Majority at 7.

[7] Award at 2 (emphasis added) (quoting Reimplemented Collective-Bargaining Agreement (CBA) Art. 23, § 8(B)).

[8] *POPA*, 56 FLRA 69, 101-03 (2000) (Chairman Wasserman dissenting) (finding Proposal 13 about "special glasses for use with computers" unlawful); *NTEU*, 49 FLRA 973, 978 (1994) (finding unlawful a provision for "ordinary eyeglasses that are routinely furnished by employees when the need to correct their vision arises"); *NFFE, Loc. 1827*, 26 FLRA 785, 787-90 (1987) (finding Proposal 1 concerning agency-funded eye exams unlawful); *Dep't of the Army, Ohio River Div., Corps of Eng'rs – NFFE, Loc. No. 892*, B-213415, 63 Comp. Gen. 278 (1984), 1984 WL 43506, at *3 ("[O]rdinary corrective lenses . . . are personal items that should be furnished by the employees who need them."); *cf. To the Sec'y of the Interior*, B-157389, 45 Comp. Gen. 215 (1965), 1965 WL 1741, at *3 (agency could pay for eye exams needed for prescriptions for "special . . . filter spectacles" because those prescriptions would not apply to "normal glasses").

[9] Award at 2 (emphasis added) (quoting CBA Art. 23, § 8(B)). As long as glasses or contacts eliminate "eyestrain" or have an indeterminate connection to "other optical-related problems," they are presumably "special" within the meaning of the certification form. *Id.* (quoting CBA Art. 23, § 8(B)). I note that none of the occupational-safety rules provided to us recognizes "eyestrain" as a potential harm from performing a truly "hazardous duty."

precedent makes clear that describing ordinary prescription glasses as "special" does not render them reimbursable.[10] Indeed, this same contract wording reinforces that ALJs may seek reimbursement for ordinary vision-correcting contacts because the wording makes "disposable lenses" reimbursable, even though nothing in the record establishes that disposable lenses may function as special safety equipment.[11] Thus, the certification form is defective under governing precedent because it supports reimbursement in circumstances where §§ 7903 and 668 do not apply.

In truth, relying on statutory provisions designed to protect employees from the dangers of hazardous duty in order pay reimbursements for routine eye exams and glasses – or disposable contact lenses – undermines the very purpose for which these statutory provisions exist. Sections 7903 and 668 aim to protect, among many other examples, health-care workers, firefighters, construction crews, laboratory technicians, and mechanics – not employees looking at laptops. Rather than remanding this case, I would find that the Arbitrator erred in concluding that the Agency could spend appropriated funds on the program. And because the Arbitrator's conclusions that the Agency violated the reimplemented agreement and the Statute were based solely on finding that the Agency could lawfully spend appropriated funds on the program, I would set aside the award.[12]

[10] *POPA*, 56 FLRA at 101-03 (proposal requiring expenditures for "special glasses for use with computers" was unlawful). The majority asserts that a remand could cure this defect, but that assertion is untrue. Majority at 6 n.37. The wording of the certification form was negotiated years ago, so none of the Arbitrator's remand findings will add a definition of "special" to the wording of the form. *See* Exceptions, Attach. 6, Union's Opening Arb. Br. at 6 ("[ALJs] had to use Form SSA-4067. . . to request reimbursement under the [p]rogram."). Likewise, any remand findings would not have been available to the doctors who *already completed* the deficient certification forms for the five ALJs to whom the Agency denied reimbursement, so we can be certain that those doctors did not rely on any definite meaning of "special" when signing their respective forms. As such, the majority's attempt to justify the futile remand falls short.

[11] Award at 2 (quoting CBA Art. 23, § 8(B)).

[12] Because I would set aside the award as contrary to law, I would not address the Agency's exception that the award exceeded the Arbitrator's authority. Exceptions Br. at 4, 5, 8, 31; *see U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 605 n.53 (2021) (Chairman DuBester concurring) (finding it unnecessary to address remaining exceptions after setting aside award as contrary to law).