61 FLRA No. 11

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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UNITED STATES DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 948
NATIONAL COUNCIL OF FIELD LABOR LOCALS
(Union)

0-AR-3924

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DECISION

June 29, 2005

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Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members1/

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator David P. Twomey 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.2/

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1/ Chairman Cabaniss' concurring opinion is set forth at the end of this decision.

2/ In its opposition, the Union argues that the exceptions, filed January 14, 2005, are untimely. It is undisputed that the Arbitrator deposited the award in the United States mail on December 13, 2004, which constitutes the date of service

(continued...)

The Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA) by not timely providing mass transit-related administrative checks (hereinafter "fare cards") to employees enrolled in the Agency's transit subsidy program. As a remedy, he directed the Agency to provide backpay and interest to the employees and to comply with the CBA.

For the following reasons, we deny the exceptions.

## II. Background and Arbitrator's Award

Pursuant to 5 U.S.C. § 7905, the Agency instituted a nationwide mass transit subsidy program for employees.3/ The parties entered into a Memorandum of Understanding (the 1997 MOU), which stated that the Agency would provide employees with fare cards to be used for mass transit.4/

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2/ (...continued)
to the parties. *See* 5 C.F.R. § 2429.27(d). Because the award was served by mail, five days are added to the thirty-day time limit for filing exceptions. *See* 5 C.F.R. § 2429.22. As the exceptions were filed by personal delivery within thirty-five days of the date of service, we find that they were timely filed, and we consider them.

3/ 5 U.S.C. § 7905 provides, in pertinent part:

> (b)(1) The head of each agency may establish a program to encourage employees of such agency to use means other than single-occupancy motor vehicles to commute to or from work.
>
> (2) A program established under this section may involve such options as—
>
> (A) transit passes (including cash reimbursements therefor, but only if a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the agency) . . . .

4/ The MOU -- which, as discussed below, was subsequently replaced by the parties' CBA -- provided, in pertinent part, that "bargaining unit users of eligible mass transit . . .
(continued...)

The parties subsequently developed a practice under which, instead of fare cards, the Agency provided employees with cash reimbursements (via electronic funds transfers to their bank accounts) for transit expenses that the employees incurred, retroactive to the first day on which they used mass transit to their duty stations.

Subsequently, the Agency notified the Union that it intended to cease cash transfers and begin providing fare cards in cities where such cards are available. The Agency also notified the Union that it had entered into an agreement with the Department of Transportation (DOT) to administer the Agency's transit subsidy program. Thereafter, the parties bargained and agreed to Article 52 of the CBA, which replaced the 1997 MOU and increased the fare card subsidy from $50 to $100 per month.

The Union later discovered that new enrollees to the transit subsidy program were not receiving fare cards during the month in which they applied for the program (month 1). Instead, if an employee applied on or before the tenth day of month 1, then the employee began receiving fare cards at the beginning of the following month (month 2). If an employee applied after the tenth day of month 1, then the employee began receiving fare cards at the beginning of the third month (month 3). In order to rectify the latter situation, the Agency began keeping a bank of fare cards and providing them to the latter group of employees in order to cover their transit expenses during month 2. However, the Agency continued not to provide fare cards to any employees for month 1.

A grievance was filed, unresolved and submitted to arbitration. The Arbitrator framed the issues as follows: "Is the administration of the [Agency's] Mass Transit Subsidy Program for Field Employees consistent with applicable statutes, Executive Orders, Regulations, the . . . 1997 MOU, Article 2, Section 6 (past practices) and

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4/ (...continued)
will be provided a subsidy of $50.00 per month via an administrative 'check' [i.e., fare card.]" Opp'n, Attachment, Jt. Ex. 4 at 1.

Article 52 of the [CBA]?[5/] If not, what shall be the remedy?" Award at 2.

The Arbitrator found that neither Article 52 of the CBA nor the 1997 MOU provides for a delay in the employees' receipt of fare cards. Further, the Arbitrator determined that a past practice had developed, under which new enrollees in the transit subsidy program received subsidies beginning on the date they began incurring mass transit expenses.

Responding to an Agency argument that DOT procedures did not provide for distribution of fare cards on the date of application for the program, the Arbitrator found that, in contracting with DOT, the Agency was required to ensure that DOT administer the transit subsidy program in accordance with the CBA. The Arbitrator determined that, if DOT was unable to do so, then the Agency itself was required to ensure that the benefit was provided. In this regard, the Arbitrator stated that "[i]f need be, the [Agency] must set up 'banks' to provide fare media administrative checks [i.e., fare cards] for new hires once they enroll in the [transit subsidy] program in order to bridge the gap in coverage between what is required by the CBA and the DOT's ability to provide the [transit subsidy] benefits to the new enrollees." *Id.* at 14.

The Arbitrator concluded that the Agency violated Article 52 and Article 2, Section 6 of the CBA, and that the benefits denied to employees constitute pay, allowances and differentials under the Back Pay Act, 5 U.S.C. § 5596. The Arbitrator directed the Agency to provide backpay and interest to affected employees and to comply with the CBA.

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5/ Article 2, Section 6 provides in pertinent part, that "any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties." Award at 11.

III. Positions of the Parties

A. Agency Exceptions

The Agency contends that the award of backpay and interest is contrary to 5 U.S.C. § 7905 and the Back Pay Act, 5 U.S.C. § 5596.6/ According to the Agency, in § 7905, Congress prohibited the provision of transit subsidies in cash form except in very narrow circumstances and, thus, Congress has not "consented to monetization of" transit subsidies in the form of backpay and interest under the Back Pay Act. Exceptions at 4. The Agency acknowledges that, in *United States Department of HHS*, 54 FLRA 1210 (1998) (*HHS*), the Authority held that backpay was an appropriate remedy for an agency's failure to provide transit subsidies. The Agency claims, however, that "[t]ransit subsidy practices have evolved" since the issuance of *HHS* because "[m]ost transit companies now have some form of voucher or other non-cash subsidy[.]" Exceptions at 4. The Agency concludes that complying with the award "would require the Agency to violate" 5 U.S.C. § 7905. *Id.* at 5.

B. Union Opposition

The Union argues that the Authority's decision in *HHS* supports a conclusion that the Back Pay Act authorizes the remedies here. Additionally, as discussed in section IV. below, the Union asserts that, under 5 C.F.R. § 2429.5, the Authority should not consider certain claims made in the "Background and Statement of Facts" section of the Agency's exceptions, because those claims were not made before the Arbitrator.7/ Opp'n at 2.

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6/ As the Agency does not challenge the Arbitrator's direction to comply with the CBA, we do not address that aspect of the award further.

7/ 5 C.F.R. § 2429.5 provides, in pertinent part: "The Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator."

IV. Preliminary Matter

The Union asserts that, under 5 C.F.R. § 2429.5, the Authority should not consider certain claims made in "Background and Statement of Facts" section of the Agency's exceptions. Opp'n at 2. The challenged claims are that: (1) the Agency conducted a review of its transit subsidy program; (2) 5 U.S.C. § 7905 motivated the Agency's decision to use fare cards; (3) DOT administers transit subsidy programs for "80+ federal agencies[,]" Opp'n at 5; (4) DOT's "Government-wide procedures[]" provide that eligibility for transit subsidies begins only when DOT finishes processing an employee's application, *id.* at 4; and (5) metropolitan area transit systems have uniformly shifted to utilization of vouchers.

The Authority previously has declined to address a party's assertion that claims were barred by § 2429.5 where doing so was unnecessary to resolving the exceptions. *See AFGE, Council 236*, 58 FLRA 582, 583 n.3 (2003). It is unnecessary to consider the Agency's challenged claims in resolving the exceptions. *See infra*, section V. Accordingly, we find it unnecessary to determine whether those claims are barred by § 2429.5.

V. Analysis and Conclusions

The Agency argues that the award of backpay and interest is contrary to law. The Authority reviews questions of law *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency asserts that the award of transit subsidies as backpay is contrary to the terms of § 7905(b)(2)(A). That section provides that transit subsidy programs established under § 7905 "may involve such options as--- . . . transit passes (including cash

reimbursements therefor, but only if a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the agency)[.]" Thus, under the plain wording of § 7905(b)(2)(A), agencies are permitted to provide cash reimbursements as part of their transit subsidy programs, except where a voucher or similar item that may be exchanged for a transit pass is "readily available."

The award does not require the Agency to reinstate the practice of providing cash reimbursements to employees for their mass transit expenses. Instead, the award directs the Agency to provide affected employees with backpay to compensate them for transit subsidies that have been improperly denied. The Agency does not assert that there exists a voucher or similar item that could compensate employees for subsidies already foregone and, thus, does not explain how a voucher or similar item is "readily available" in the circumstances of this case. In this connection, § 7905(b)(2)(A) addresses only what is available under an agency transit program as an initial matter -- not what remedies are permitted when an agency violates a contract by failing to provide fare cards. Accordingly, the plain wording of § 7905(b)(2)(A) does not indicate that cash reimbursements are precluded as a remedy in the circumstances of this case. The legislative history of § 7905(b)(2)(A) also contains no such indication. *See* H.R. REP. No. 103-356, at 1 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2412, 2412 (noting purpose of § 7905 is "to improve air quality and to reduce traffic congestion by providing authority to agencies to establish programs to encourage Federal employees to commute by means other than single-occupancy motor vehicles.")

For the foregoing reasons, we conclude that the award of backpay is not contrary to § 7905(b)(2)(A).

The Agency's exception regarding the Back Pay Act, 5 U.S.C. § 5596, is based on its claim that § 7905(b)(2)(A) precludes the remedies here. As we have rejected that claim, we also reject the Agency's Back Pay Act exception. In reaching this conclusion, we note that, in *HHS*, the Authority stated that the Back Pay Act waives sovereign immunity for remedies that meet the requirements of the Act, *see* 54 FLRA at 1217, and that transit subsidies

constitute "pay, allowances, and differentials" within the meaning of the Act, *see id.* at 1223.

For the foregoing reasons, we conclude that the Agency has not demonstrated that the award is contrary to law.

VI. Decision

The exceptions are denied.

Concurring opinion of Chairman Cabaniss:

I write separately to address in more detail why I would find that the Agency's exceptions do not warrant overturning the Arbitrator's award. The Agency correctly asserts that the Mass Transit Subsidy statute (5 U.S.C. § 7905) does not amount to a waiver of sovereign immunity, but that does not support their ultimate conclusion: I am not aware of *any* waiver of sovereign immunity by a statute that provides a financial benefit to employees. Rather, the waiver of sovereign immunity to sue for recovery of improperly denied salary, etc. is the Back Pay Act, 5 U.S.C. § 5596. Pursuant to that statute, an employee is entitled to recover "the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred." 5 C.F.R. § 550.805(a)(2). The Office of Personnel Management defines "pay, allowances, and differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency during periods of Federal employment." 5 C.F.R. § 550.803.

The Agency appears to miss the point of the Back Pay Act's focus on "monetary benefits" when it argues that the arbitration award improperly "monetizes" Mass Transit Subsidies, and that those subsidies should not be considered as "pay, allowances, and differentials." With the advent of electronic funds transfers (EFTs) for practically all payments owed employees, Federal agencies are becoming (if not already are) a non-cash transaction employer vis-à-vis its employees, yet I doubt that few would argue against the applicability of the Back Pay Act to an improperly denied travel voucher (and the EFT never provided to the employee to cover this expense). The Agency cites no authority in support of its argument that a "monetary" benefit must by definition be a cash benefit, and no such authority is apparent. To the contrary, even 5 U.S.C. § 7905(b) itself seems at odds with the Agency's position, as the statute distinguishes between cash and transit passes as an employee benefit on the one hand in 7905(b)(2)(A), and "non-monetary" employee incentives on the other hand in 7905(b)(2)(C). I conclude from that statutory language, and the lack of any authority to the contrary, that Mass Transit Subsidies, even those not

involving cash reimbursements to employees, are a "monetary" benefit subject to the Back Pay Act.

Finally, to the extent the Agency argues that Congress did not intend through 5 U.S.C. § 7905 to permit "damages or interest awards" for employees improperly denied Mass Transit Subsidies (exceptions at 4), the Agency misses the point noted earlier, *i.e.*, that it is the Back Pay Act, and not the various pay, allowances, and other benefits statutes, that establish the right of an employee to recover remedies Congress made available to employees who have lost pay, allowances, or differentials as a result of an unjustified or unwarranted personnel action by their agency. In the case of the Back Pay Act, such employees are also entitled to interest on the improperly denied pay, allowances, and differentials, as well as reasonable attorney fees. I would not expect the various employee benefits statutes to address what happens when those statutes' benefits are improperly denied: that is the function of the Back Pay Act.

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STATEMENT OF SERVICE

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I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Thomas R. Wachter
Agency Representative
Department of Labor - OELMR
200 Constitution Avenue, N.W.
Room N-5464
Washington, D.C. 20210

James Peckham
Union Representative
AFGE, Local 948
136 Hayden Station Road
Windsor, CT 06095

FIRST CLASS MAIL

David P. Twomey
Arbitrator
17 Monmouth Street
Quincy, MA 02171

DATED: June 29, 2005
WASHINGTON, D.C.

for Deborah Johnson
Belinda Stevenson
Legal Clerk