74 FLRA No. 4

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ASHLAND, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1286
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5943

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DECISION

September 4, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

The Union filed a grievance alleging the Agency failed to protect an employee (the grievant) from exposure to asbestos and retaliated against the grievant for reporting the exposure. Arbitrator Richard K. Hanft issued an award sustaining the grievance on the merits. As part of the remedy, the Arbitrator awarded the grievant non-pecuniary damages and directed the Agency to pay for medical costs, care, and monitoring associated with the grievant's asbestos exposure. In its exceptions, the Agency argues the award violates the Back Pay Act (the BPA),[1] the doctrine of sovereign immunity, and the Federal Employees' Compensation Act (FECA).[2] For the reasons set forth below, we partially dismiss the exceptions, partially grant the exceptions, and partially set aside the award.

II. Background and Arbitrator's Award

The Agency assigned the grievant – an employee in the facilities department at the Agency's Ashland, Kentucky prison – to make repairs at an associate warden's residence, which is located on the institution grounds. With the assistance of several inmates under his supervision, the grievant removed structural materials from the property. In doing so, the grievant and the inmates came into contact with covered piping, ductwork, and electrical wire. During the course of the project, a facilities-department supervisor informed the grievant that the Agency had previously abated asbestos-containing materials at the associate warden's residence.

Subsequently, the grievant contacted the Agency's safety department to report his potential exposure to asbestos. The safety department investigated the associate warden's residence and confirmed asbestos-containing materials were present. At the safety department's direction, the grievant underwent a medical evaluation and participated in additional examinations on an annual basis. Upon further testing, the grievant's doctor determined the grievant had developed a nodule in his lung.

Following the grievant's disclosure to the safety department, the Agency opened an investigation to determine whether the grievant engaged in misconduct by exposing inmates to asbestos. While the investigation was ongoing, the Agency reassigned the grievant to the facilities office and prohibited him from working overtime. The Agency concluded its investigation without bringing any charges against the grievant.

The Union filed a grievance alleging, in pertinent part, that the Agency violated the parties' collective-bargaining agreement and Agency policy by negligently failing to protect the grievant from asbestos exposure. For this alleged violation, the Union requested compensatory and consequential damages, including non-pecuniary damages for the grievant's emotional pain and suffering. The grievance also alleged that the Agency committed a prohibited personnel practice under 5 U.S.C. § 2302(b)(8)[3] by reassigning the grievant, and denying him overtime, in retaliation for making disclosures concerning asbestos. The Agency denied the grievance, which proceeded to arbitration.

Because the parties did not agree on stipulated issues, each party submitted proposed issues for the Arbitrator to resolve. The Arbitrator stated that he would attempt to resolve each of the parties' submitted issues,[4] including, as relevant here: (1) "Did the Agency violate . . . the [m]aster [a]greement when [it] failed to prevent exposure to asbestos in an area known to contain

[1] 5 U.S.C. § 5596.
[2] *Id.* §§ 8101-93.
[3] *Id.* § 2302(b)(8) (prohibiting an agency from taking retaliatory action against an employee for making protected disclosures of information).
[4] Award at 31.

asbestos?"; (2) "Did [the grievant] have a claim for compensation for medical expenses under . . . [FECA]?"; (3) "Did the Agency violate Article 27 . . . of the [m]aster [a]greement when it failed to review and ensure completion of the required forms for a claim under . . . [FECA]?"; (4) "Did [the Agency] violate [the grievant's] whistleblower protections and retaliate against" the grievant?; (5) "Is [the grievant] entitled to compensatory and consequential damages under" 5 U.S.C. § 2302?[5]

Article 27, Section a of the parties' agreement requires the Agency to "furnish . . . employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm."[6] As to asbestos hazards specifically, Article 40, Section c states that if the Agency "determine[s] that asbestos exists in a facility, [the Agency] will ensure . . . staff exposures are controlled in accordance with" standards set forth in 29 C.F.R. § 1926.1101.[7] Additionally, Article 27, Section e provides that the Agency may not engage in "restraint, interference, coercion, discrimination, or reprisal" against an employee "for making a report and/or complaint to any outside health/safety organization and/or the Agency."[8]

Addressing the first issue listed above, the Arbitrator found that both the parties' agreement and Agency policy required the Agency to follow certain procedures before the grievant began working at the associate warden's residence. Specifically, the Arbitrator noted that Agency Program Statement 1600.12 required the associate warden to submit a work order to the facilities department, which would then review the proposed project for safety and environmental issues pursuant to Article 27. However, the Arbitrator found the Agency did not process a work order, conduct a preliminary investigation, or ensure the grievant received materials and training necessary for working with asbestos-containing material. Further, the Arbitrator found the Agency possessed documentation regarding asbestos at the associate warden's residence, and therefore "knew or should have known" asbestos "was present in the workplace that [the Agency] assigned [the grievant] to renovate."[9] According to the Arbitrator, the Agency's failure to follow its own mandatory procedures caused the Agency to breach its obligation to protect the grievant from a known hazard. As a result, the Arbitrator determined that the Agency negligently exposed the grievant to asbestos and created an unsafe work environment, in violation of Articles 40 and 27.

At arbitration, the Agency argued the grievant was ineligible for FECA relief because the grievant did not file a FECA claim. Responding to this argument, the Arbitrator found that the Agency did not fulfill its duty under Article 27, Section h of the parties' agreement to "inform[]" the grievant "of the procedures to be followed for filing a claim for benefits under . . . [FECA]."[10] Ultimately, the Arbitrator concluded that the grievant "was injured in the performance of duty and should be compensated pursuant to the findings and rules of the administrators of . . . [FECA]."[11]

Considering whether the Agency retaliated against the grievant, the Arbitrator found that the grievant made disclosures protected under Article 27, Section e of the parties' agreement and 5 U.S.C. § 2302(b)(8). Applying a burden-shifting framework, the Arbitrator determined the Agency knew of the grievant's protected activity, the grievant's reassignment was a personnel action within the meaning of § 2302, the grievant suffered lost overtime, and a causal connection existed between the protected activity and the personnel action. As such, the Arbitrator found the burden shifted to the Agency to articulate a non-retaliatory reason for the reassignment. Evaluating the Agency's proffered basis for this action, the Arbitrator acknowledged the Agency's "right . . . to investigate possible endangerment of inmates."[12] Nonetheless, the Arbitrator found, based on the record evidence, that the investigation and reassignment were "in retaliation for [the grievant] reporting his asbestos exposure."[13] Thus, the Arbitrator concluded the Agency violated Article 27, Section e and committed a prohibited personnel practice in violation of § 2302(b)(8).[14]

As remedies for the Agency's contractual and statutory violations, the Arbitrator awarded the grievant: lost overtime, attorney fees, and costs under the BPA; environmental differential pay; and $250,000 "for emotional pain and suffering and mental anguish."[15] In this last regard, the Arbitrator stated that the "[n]on-pecuniary losses requested by the Union were not the product of the Agency's prohibited personnel practice and reprisal" but, instead, related to the Agency negligently exposing the grievant to asbestos in violation of the parties' agreement.[16] Noting the grievant's medical

[5] *Id.* at 3-4 (quoting Union's proposed issues).
[6] Exceptions, Attach. B, Collective-Bargaining Agreement (CBA) at 61.
[7] *Id.* at 86.
[8] *Id.* at 62-63.
[9] Award at 31; *see also id.* at 32 (describing 2010 documentation of asbestos in the associate warden's residence).
[10] *Id.* at 35-36 (quoting CBA at 63).
[11] *Id.* at 43.
[12] *Id.* at 35.
[13] *Id.* at 42; *see also id.* at 41 (finding the investigation and related reassignment were "a sham and for retaliatory reasons"), 35 ("The [g]rievant was retaliated against for reporting the exposure to asbestos by being denied overtime opportunities during the period of reassignment.").
[14] *Id.* at 42.
[15] *Id.* at 52-53.
[16] *Id.* at 48.

condition could worsen "in the next two . . . months or twenty . . . years," the Arbitrator found it "[]reasonable to assume that [the grievant] has emotional pain and suffering and mental anguish" due to the uncertain prognosis.[17] With respect to the grievance's FECA claim, the Arbitrator directed the Agency to reimburse the grievant for previously-incurred "medical expenses related to his exposure to asbestos" and make "future payments for medical monitoring and medical care related to his exposure to asbestos."[18]

The Agency filed exceptions to the award on January 4, 2024,[19] and the Union filed an opposition to the Agency's exceptions on February 22.[20]

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

The Agency argues that the Arbitrator's remedy of non-pecuniary damages is contrary to the BPA.[21] Similarly, the Agency contends the Arbitrator exceeded his authority by directing that remedy.[22] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[23]

Before the Arbitrator, the Union requested monetary compensation for "non-pecuniary losses" the grievant suffered.[24] The Agency could have argued to the Arbitrator that this remedy would be unlawful and outside the scope of the Arbitrator's remedial authority. However, the record does not reflect the Agency did so.[25] Because the Agency could have, but did not, raise its arguments concerning non-pecuniary damages at arbitration, it cannot do so now.[26] Accordingly, we dismiss these arguments.[27]

In its opposition, the Union asserts that §§ 2425.4(c) and 2429.5 bar the Agency's argument that the award conflicts with FECA.[28] Contrary to the Union's assertion, the Agency argued in its post-hearing brief that the grievant could not obtain FECA relief through the parties' negotiated grievance procedure.[29] Consequently, §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's FECA argument, and we address it below.[30]

IV. Analysis and Conclusions

A. The award does not violate the doctrine of sovereign immunity.

The Agency asserts that the Arbitrator's remedy of $250,000 in non-pecuniary damages is deficient because it is not based on a valid waiver of sovereign immunity.[31] Under the doctrine of sovereign immunity, the United States is immune from suit except as it consents to be sued.[32] In this regard, an arbitration award directing an agency to provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy.[33] The BPA constitutes a waiver of sovereign immunity.[34]

The Agency concedes that the BPA waives sovereign immunity,[35] but contends the waiver does not

[17] *Id.* at 51.
[18] *Id.* at 52.
[19] Unless otherwise noted, all dates hereafter occurred in 2024.
[20] The Authority's Office of Case Intake and Publication granted the Union's request for an extension of time to file an opposition, giving the Union until February 23. Extension of Time Order at 1. Therefore, the opposition is timely.
[21] Exceptions Br. at 7-8.
[22] *Id.* at 10.
[23] 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 2344*, 73 FLRA 765, 766 (2023) (*Loc. 2344*) (citing 5 C.F.R. §§ 2425.4(c); *U.S. DHS, Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022)).
[24] Award at 27 (requesting pecuniary and non-pecuniary damages "for [the grievant] being subjected to unjustified retaliation"); *see also id.* at 24 (requesting "any other damages suffered as a result of [the grievant's] exposure to the asbestos").
[25] *See* Exceptions, Attach. A, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 3-6 (arguing grievance was procedurally deficient), 6-8 (arguing Agency complied with its workplace-safety obligations under Articles 27 and 40 of the parties' agreement).
[26] *Loc. 2344*, 73 FLRA at 766 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 474, 757-76 (2023)).
[27] 5 C.F.R. §§ 2425.4(c), 2429.5; *see U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 775, 776 (2024) (dismissing exceptions to arbitrator's remedies where union requested those remedies at arbitration but agency did not argue they were deficient before arbitrator).
[28] Opp'n Br. at 10-11.
[29] Agency's Post-Hr'g Br. at 7-8 (arguing that the grievant "did not complete the required paperwork" for a FECA claim, and "the [f]ormal [g]rievance [p]rocedure [was] not the appropriate platform to file that claim"), 9 (arguing that "the [U]nion did not file a claim with the appropriate entity that could sustain" the grievance's FECA allegations).
[30] *See AFGE, Nat'l Border Patrol Council, Loc. 2595*, 67 FLRA 361, 364 (2014) (finding contrary-to-law arguments not barred under §§ 2425.4(c) and 2429.5 of Authority's Regulations where party raised those arguments in its post-hearing brief).
[31] Exceptions Br. at 6.
[32] *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 633 (2023) (citing *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 (2020) (Member DuBester concurring)).
[33] *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 775 (2022) (*Fort Myer*).
[34] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 73 FLRA 762, 764 (2024) (citing *Fort Myer*, 72 FLRA at 775).
[35] Exceptions Br. at 6 ("The [BPA] provides a waiver of sovereign immunity by Congress.").

apply to an award that violates the BPA.[36] This contention is a restatement of the Agency's argument that the non-pecuniary-damages remedy is contrary to the BPA, which we dismiss for the reasons stated in Section III. Where a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the party does not demonstrate that the award is inconsistent with the BPA, the Authority denies the sovereign-immunity claim.[37] Because the Agency has waived its argument that the non-pecuniary-damages remedy violates the BPA, the Agency provides no basis for finding the award contrary to the doctrine of sovereign immunity. Accordingly, we deny the Agency's sovereign-immunity claim.[38]

B. The award is contrary to FECA, in part.

The Agency argues that the Arbitrator unlawfully enforced FECA through the parties' negotiated grievance procedure.[39] Specifically, the Agency argues that "the [A]rbitrator d[id] not have the authority to require the [A]gency to [provide] medical monitoring and care related to the [grievant's] asbestos exposure" under FECA and its implementing regulations.[40] 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.[41] 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.[42]

Under FECA, with certain exceptions not relevant here, federal employees are entitled to "compensation" if they suffer "disability or death . . . resulting from personal injury sustained while in the performance of" their duties.[43] Section 8116(c) of FECA explains that "[t]he liability of the United States . . . under this subchapter . . . with respect to the injury or death of an employee is exclusive."[44]

In *NTEU, Chapter 51* (*NTEU*),[45] the Authority found that FECA and its implementing regulations establish the exclusive mechanism for obtaining certain relief for occupational injuries, including payment or reimbursement of medical expenses.[46] Based on this interpretation, the Authority concluded that an arbitrator's remedy of "reimbursement for out-of-pocket medical care costs and payment for medical examinations" was "within the exclusive purview of . . . FECA" and, thus, inconsistent with law.[47] Relying on *NTEU*, the Authority subsequently held in *U.S. Department of the Navy, Navy Public Works Center, Naval Facilities Engineering Command Midwest, Great Lakes, Illinois* (*Navy*)[48] that a "remedy of payment for medical costs incurred by employees . . . as a result of . . . exposure to [asbestos-containing material] is exclusively covered by . . . FECA."[49] On this basis, the Authority set aside the arbitrator's remedies – agency payment for medical monitoring and partial reimbursement of the grievants' health-insurance premiums – as contrary to FECA.[50]

Here, it is undisputed that the grievant is covered under FECA.[51] Consistent with *NTEU* and *Navy*, the Arbitrator lacked authority to award the payment of medical expenses through the negotiated grievance procedure where such relief unequivocally falls within FECA's exclusive jurisdiction.[52] To the extent the Arbitrator directed this remedy because the Agency violated a contractual obligation to assist the grievant in filing a FECA claim,[53] that contract violation did not empower the Arbitrator to grant relief available solely through the FECA claims procedure.[54] Accordingly, we set aside the Arbitrator's remedy directing the Agency to reimburse the grievant for past medical expenses and make payments for future medical care and monitoring. Although we set aside this remedy, the Arbitrator's other remedies – lost overtime, attorney fees, and costs in accordance with the BPA; environmental differential pay; and non-pecuniary damages – remain undisturbed.

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[36] *Id.* at 8-9.
[37] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).
[38] *Id.* at 190 (where § 2429.5 of Authority's Regulations barred argument "that the award fail[ed] to satisfy the . . . [BPA]," Authority denied sovereign-immunity claim that "depend[ed] on" barred argument); *see also Fort Myer*, 72 FLRA at 775-76 (denying sovereign-immunity exception to backpay remedy where excepting party "fail[ed] to challenge the . . . award of backpay under the [BPA]").
[39] Exceptions Br. at 10.
[40] *Id.* at 11.
[41] *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 73 FLRA 865, 867 (2024).
[42] *Id.*
[43] 5 U.S.C. § 8102(a).
[44] *Id.* § 8116(c).
[45] 40 FLRA 614 (1991).
[46] *Id.* at 630-32.
[47] *Id.* at 633.
[48] 64 FLRA 556 (2010).
[49] *Id.* at 558.
[50] *Id.*
[51] 5 U.S.C. § 8101(1)(A) (defining an "employee," for purposes of FECA and in pertinent part, as an "employee in any branch of the Government of the United States").
[52] *Navy*, 64 FLRA at 558; *NTEU*, 40 FLRA at 630-33.
[53] Award at 35-36.
[54] *See NTEU*, 40 FLRA at 629 (considering, and rejecting, argument that FECA "does not extend to remedies ordered under a negotiated grievance procedure"); *see also U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 41 FLRA 710, 726 (1991) (affirming Authority's holding in *NTEU* that FECA's jurisdiction encompasses remedies attainable through a negotiated grievance procedure for contract violations).

V. Decision

We partially dismiss, and partially deny, the Agency's exceptions. We grant the Agency's exception that the award is, in part, contrary to FECA, and we set aside the Arbitrator's remedy directing the Agency to pay for medical costs, care, and monitoring.