

66 FLRA No. 167

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4840

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DECISION

August 23, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

The Union filed an exception to a remedy award (remedy award) of Arbitrator Barry E. Shapiro under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

In a merits award (merits award), the Arbitrator found that the Agency violated the parties' agreement. In his subsequent remedy award, the Arbitrator determined that any monetary award would be contrary to law. For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The Union held a series of events, known as "Lunch & Learn" sessions, at which the Union encouraged employees to join the Union, hosted speaking events of interest to employees, and provided lunch to induce attendance. Merits Award at 2. These events usually were announced to employees over the Agency's public address system. *Id.* However, a new associate director determined that the noise level in patient rooms was too loud, *id.* at 3, and, therefore, declined the Union's request to publicly announce their Lunch & Learn session in February 2010, *id.* at 4-5. As a result,

attendance at the event was reduced by 25-30%. *Id.* at 6. The Union filed a grievance alleging that the Agency violated the parties' agreement and past practice. *Id.* As a remedy, the Union sought reimbursement for the money it had spent on food. *Id.*

The Arbitrator determined that "[t]he Agency violated the [parties'] agreement when it refused to allow announcement of the Union's Lunch & Learn sessions of February 2010 over the [Agency's] public address system." *Id.* at 23. In this regard, the Arbitrator interpreted the parties' agreement as allowing the Union to use the public address system for "appropriate use" and found that the Lunch & Learn announcements constituted an appropriate use. *Id.* at 19. Additionally, the Arbitrator found that the Agency had a well-established practice of allowing the Union to use the public address system and did not provide advance notice to the Union before terminating the practice. *Id.* at 20-21.

As a remedy, the Arbitrator ordered the parties to try to "work out an appropriate amount" for the Agency to reimburse the Union, but retained jurisdiction in the event they could not do so. *Id.* at 23-24.

When the parties did not reach an agreement, the Arbitrator issued another award to address the remedy. Remedy Award at 2. The Arbitrator concluded that, although the Agency violated the parties' agreement, "any order . . . that the Agency reimburse the Union for its wasted expenditures would be contrary to law." *Id.* at 4. Specifically, the Arbitrator found that there was no waiver of sovereign immunity because "the Union [did] not identify any statute that would authorize [him] to order a monetary award for the Agency's violation of the [parties'] agreement." *Id.* at 5 (citing *U.S. Dep't of Transp., Fed. Aviation Admin., Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*)). The Arbitrator also noted that the Back Pay Act was not at issue. *Id.* at 5 n.1.

The Arbitrator found that the cases cited by the Union involved dues withholding, which are distinguishable from "situations in which unions are seeking damages from a [f]ederal agency." *Id.* at 7. Therefore, the Arbitrator decided that "[t]he Union is not entitled to any payment from the Agency to reimburse it for food that it ordered in connection with the February 2010 Lunch & Learn sessions." *Id.* at 8.

III. Positions of the Parties**A. Union's Exception**

The Union argues that the remedy award is contrary to law. Exception at 3. According to the Union, the Arbitrator incorrectly determined that the Agency is

precluded by law from reimbursing the Union for its expenditures for food. *Id.*

The Union asserts that the Authority has held that agencies may reimburse a union, including payment for matters not normally subject to payment by the government. *Id.* at 4 (citing *U.S. Dep't of Veterans Affairs, Charles George VA Med. Ctr., Asheville, N.C.*, 65 FLRA 797 (2011); *DOJ, U.S. Attorney's Office, Los Angeles, Cal.*, 17 FLRA 1005 (1985); *Defense Logistics Agency*, 5 FLRA 126 (1981)). The Union also argues that, because this case does not involve the Back Pay Act, *FAA*, the case cited by the Arbitrator, is inapplicable. *Id.* at 5.

B. Agency's Opposition

The Agency argues that the Arbitrator was correct to find that there was no waiver of sovereign immunity because "there is no [f]ederal statute that would authorize reimbursement to the Union for meals provided to bargaining unit employees in a Lunch & Learn session." Opp'n at 3. According to the Agency, the cases cited by the Union are inapposite because they concern union dues under § 7115(a) of the Statute. *Id.* at 4.

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

The Union contends that the award is contrary to law. Exception at 3. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo. *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)). In applying this standard, the Authority assesses 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 assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The United States, as a sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (*DOT*) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). As such, an award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy. *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (then-Member Pope dissenting in part on another matter) (citing *U.S. Dep't of HHS, FDA*, 60 FLRA 250, 252 (2004) (*FDA*)). Absent a waiver of sovereign immunity, an

arbitrator's monetary remedy is contrary to law. *See DOT*, 52 FLRA at 49.

The Arbitrator concluded that no monetary damages could be awarded because the Union did not identify any statute that would authorize a waiver of sovereign immunity. Remedy Award at 5. The Union, in its exception, does not offer any statutory authority that would constitute a waiver of sovereign immunity. Rather, the Union simply cites to Authority precedent allowing reimbursement for "matters not normally subject to payment by the government." Exception at 4. As the Arbitrator found, the cases cited by the Union concerning dues withholding are inapplicable; in this regard, the Authority has held that sovereign immunity does not apply to allotments, such as the union dues addressed in those cases. *See U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 517, 520 (2012). Further, the parties agree that the Back Pay Act, which is an established waiver of sovereign immunity, is inapplicable. *See Remedy Award* at 5 n.1 (noting that the Back Pay Act is "not relevant to the matter at issue here"); Exception at 5 (noting that "this case does not involve the [Back Pay Act]").

Accordingly, because the Union has not provided any statutory authority which would authorize a waiver of sovereign immunity, the Arbitrator did not err in finding that a monetary remedy would be contrary to law. *See U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 123 (2011) (finding that because an award was not authorized under the Act and the union did not cite any alternative authority for a remedy, the monetary remedy was contrary to law); *SSA, ODAR, Region 1*, 65 FLRA 334, 338 (2010) (same). Thus, we deny the Union's exception. *See SSA*, 63 FLRA 313, 315 (2009) (setting aside award of monetary remedy because there was no statutory authorization); *FDA*, 60 FLRA at 252 (same).

V. Decision

The Union's exception is denied.