68 FLRA No. 152

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION
NATIONAL WEATHER SERVICE
(Agency)

and

NATIONAL WEATHER
SERVICE EMPLOYEES ORGANIZATION
(Union)

0-AR-5042

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DECISION

September 24, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated a memorandum of understanding (the MOU) and the Federal Service Labor-Management Relations Statute (the Statute)[1] by ceasing to provide employees with "disposable cups, plates, [and] utensils" (disposable dining ware).[2] Arbitrator Mariann E. Schick found that the Agency: (1) violated the MOU; and (2) repudiated the MOU in violation of the Statute. As a remedy, she directed the Agency to resume providing disposable dining ware.

The central issue before us is whether the Arbitrator's award is contrary to law. The parties and the Arbitrator have relied on decisions of the Comptroller General of the Government Accountability Office (GAO) to resolve the legality of the expenditures at issue, and, as discussed further below, the GAO has issued a decision in this matter stating that "appropriated funds are not available to pay for [disposable dining ware] for [Agency] employees."[3] Accordingly, we conclude that the award is contrary to law.

II. Background, Arbitrator's Award, and Comptroller General Decisions

A. Background

As a result of governmental concern about the possibility of a flu pandemic, the Agency and the Union negotiated the MOU, in which the Agency promised, in pertinent part, to "hereafter provide . . . [disposable dining ware]."[4]

Approximately three and a half years later, the Agency unilaterally stopped providing disposable dining ware. Subsequently, the Agency informed the Union that it was "terminat[ing]" the provision of disposable dining ware under the MOU because there was no longer a public-health emergency and it was "illegal and improper" for the Agency to use appropriated funds to provide "personal[-]use items" to employees.[5]

B. Arbitrator's Award

The Union filed a grievance that went to arbitration, where the stipulated issues before the Arbitrator were, in relevant part: (1) whether the Agency violated the MOU when it stopped purchasing disposable dining ware; if so, then (2) whether the Agency's violation of the MOU was an "unfair labor practice" in violation of § 7116(a)(1) and (5) of the Statute; and, if so, then (3) "what shall the remedy be?"[6]

At arbitration, the Agency argued that it "lawfully repudiated" the MOU[7] because the MOU required the Agency to "expend funds for items [that] were of personal benefit to employees" in violation of appropriations law.[8] Before the Arbitrator, both parties cited the "necessary[-]expense" doctrine,[9] which provides that where an appropriation does not specifically provide for a particular item, its purchase may be authorized as a "necessary expense" if there is a "reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated."[10]

[1] 5 U.S.C. §§ 7101-7135.
[2] Award at 4 (quoting MOU).
[3] Agency's Supp. Submission, Ex. 1, *In re Dep't of Commerce – Disposable Cups, Plates, & Cutlery*, B-326021, 2014 WL 7331168, at *5 (Comp. Gen. Dec. 23, 2014) (*Disposable Dining Ware*).
[4] Award at 4 (quoting MOU).
[5] *Id.* at 8 (quoting Agency email to Union official).
[6] *Id.* at 3-4.
[7] *Id.* at 10.
[8] *Id.* at 13.
[9] *Id.* at 11 (internal quotation marks omitted).
[10] *In re Use of Appropriated Funds to Purchase Kitchen Appliances*, B-302993, 2004 WL 1853469, at *2 (Comp. Gen. June 25, 2004) (*Appliances*).

Under this doctrine, the Comptroller General "recognizes an agency's discretion in using its appropriation to fulfill its purposes,"[11] but "[i]f the primary beneficiary of an expenditure of public funds is the individual, not the agency or government, the well-established rule is that such expenditures are personal in nature and hence not an authorized use of appropriated funds."[12] In this regard, the Agency argued that it could not lawfully spend appropriated funds to provide disposable dining ware because these items "can only be viewed as personal items" that benefit the employees as individuals.[13]

In contrast, the Union argued that the parties intended that the provision of disposable dining ware under the MOU would help avoid absenteeism and ensure continued operations of the Agency by preventing the spread of illness "from use of common dishware and utensils."[14] Thus, the Union argued that the expenditure is lawful under the necessary-expense doctrine. Alternatively, the Union argued that the expenditure is authorized under 5 U.S.C. § 7901, which authorizes agencies to spend appropriated funds on health-service programs.

In her award, the Arbitrator discussed the Comptroller General decisions cited by the parties, including the statement in *In re Use of Appropriated Funds to Purchase Kitchen Appliances*[15] that the purchase of items arguably viewed as personal is permissible where "the primary benefit of the expenditure accrues to the agency[,] notwithstanding a collateral benefit to the individual."[16] The Arbitrator discussed several ways in which the Agency benefited from employees' use of disposable dining ware. In particular, the Arbitrator found that because sharing utensils and plates might spread illness, the Agency could supply disposable dining ware "as a reasonable way to curb the spread of disease."[17]

The Arbitrator concluded that the provision of disposable dining ware under the MOU was "of primary benefit to the Agency, not the employees,"[18] and that "the provision of [disposable dining ware] was necessary to the efficient operation of [the Agency's] offices and was not in contravention of appropriation laws."[19] Accordingly, she rejected the Agency's argument that it could not lawfully comply with the MOU, and found that the Agency violated the MOU.

In light of her finding that the Agency could authorize the purchase of disposable dining ware under the necessary-expense doctrine, the Arbitrator found it unnecessary to address the Union's argument that the expenditures at issue were also authorized as part of a "health[-]service[] program" under 5 U.S.C. § 7901.[20] However, she stated that "any reading of [§ 7901] to include the provision of [disposable dining ware] as a 'program' appear[ed] to be rather strained."[21]

Next, the Arbitrator examined whether the Agency's breach of the MOU constituted repudiation. The Agency defended its actions "on the basis that the [MOU] was illegal."[22] But the Arbitrator rejected that argument, and found that the Agency's breach of the MOU constituted a repudiation in violation of § 7116(a)(1) and (5) of the Statute.[23]

As a remedy, the Arbitrator directed the Agency to resume providing disposable dining ware.[24]

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions. The Agency also filed a request with the GAO for a formal opinion on "the legality of purchasing the disposable items in question."[25]

C. Comptroller General Decisions

Subsequently, the General Counsel of the GAO issued *In re Department of Commerce – Disposable Cups, Plates, and Cutlery* (*Disposable Dining Ware*),[26] in which she concluded that "appropriated funds are not available" to pay for disposable dining ware for Agency employees.[27] (As the Authority has referred to decisions by the General Counsel of the GAO as "Comptroller General" decisions in the past,[28] and there is no claim that this decision should be treated otherwise, we consider *Disposable Dining Ware* to be a decision of the Comptroller General.)

[11] *Id.*
[12] *Id.*
[13] Award at 11.
[14] *Id.* at 9 (quoting Union's Post-Hr'g Br.) (internal quotation mark omitted).
[15] 2004 WL 1853469.
[16] Award at 16 (quoting *Appliances*, 2004 WL 1853469, at *5) (internal quotation marks omitted).
[17] *Id.* at 15.
[18] *Id.* at 21 n.29.
[19] *Id.* at 20.
[20] *Id.* at 21 n.29 (quoting 5 U.S.C. § 7901(a)) (internal quotation marks omitted).
[21] *Id.* (quoting 5 U.S.C. § 7901(a)).
[22] *Id.* at 22.
[23] *Id.* at 23.
[24] *Id.* at 24.
[25] Exceptions at 2.
[26] 2014 WL 7331168.
[27] *Id.* at *5.
[28] *E.g.*, *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 26 (2010) (*IRS, Small Bus.*) (discussing *In re Catherine L. Drake*, B-247553, 1992 WL 109481 (Comp. Gen. May 8, 1992)).

In *Disposable Dining Ware*, the Comptroller General reviewed the Arbitrator's award and the Agency's request for an opinion, and found insufficient "empirical evidence" to support the assertion that the purchase of disposable dining ware "would directly advance [the Agency's] statutory mission or that the benefit accruing to the government through the provision of such items outweighs the personal nature of the expense."[29] Rather, the Comptroller General stated that "[t]here can be no doubt that disposable [dining ware] are personal items, and that the benefit of their use (and thus the cost of acquiring them) inures to the individuals who use them."[30]

In particular, the Comptroller General considered – and rejected as unsupported – the Arbitrator's finding that the provision of disposable dining ware benefited the Agency by preventing the spread of illness. Specifically, the Comptroller General noted that neither the Agency's nor the Department of Health and Human Services' guidance on preventing the spread of influenza recommend the use of disposable dining ware to prevent the spread of disease. "Consequently," the Comptroller General stated that there was "no legal basis on which to conclude that [the Agency's] appropriations are available to provide free disposable [dining ware] to [Agency] employees."[31]

The Agency then filed a supplemental submission asking the Authority to defer to the Comptroller General's decision in *Disposable Dining Ware* and grant the Agency's exceptions. In response, the Union filed a motion asking the Authority to "give no weight or consideration" to *Disposable Dining Ware*.[32]

Because the Authority had an interest in determining whether *Disposable Dining Ware* represented the Comptroller General's "final determination" in the matter, the Authority issued an order asking the Union to clarify whether it had requested – or would be requesting – reconsideration of *Disposable Dining Ware*.[33] In this regard, the Authority noted that "it would not be an efficient use of administrative resources for the Authority to continue to process [the Agency's] exceptions while the [Comptroller General] simultaneously engage[d] in an ongoing examination of [the] matter."[34] The Union filed a response, with the Authority, stating that it had filed, with the GAO, a request for reconsideration of *Disposable Dining Ware*. And the Agency filed a response, with the Authority, stating that it had filed, with the GAO, a reply opposing the Union's request for reconsideration. Accordingly, the Authority placed the case in abeyance and ceased processing the Agency's exceptions pending resolution of the Union's request for reconsideration of *Disposable Dining Ware*.

Subsequently, the Comptroller General denied the Union's request for reconsideration of *Disposable Dining Ware* (the denial).[35] The Union filed, with the Authority, the denial. Consequently, the Authority took the case out of abeyance, and resumed processing of the Agency's exceptions to the Arbitrator's award.

III. Preliminary Matter: We deny the Union's motion requesting leave for the parties to file supplemental submissions.

The Union filed, with the Authority, a motion seeking leave for the parties to file supplemental submissions concerning the denial.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.6 of those Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate.[36] The Authority has held that a filing party must show why its supplemental submission should be considered.[37] Parties have been granted leave to address the applicability of court decisions that issued while the parties' dispute was pending before the Authority.[38] However, the Authority has stated that where the record is sufficient for it to resolve the issues in a case, it will not consider a party's supplemental submission.[39]

Here, other than pointing out the existence of a "relevant, intervening decision[]" – the denial – the Union does not explain why the Authority should grant leave for the parties to file supplemental submissions.[40] Taking the denial into consideration, we find that the record is sufficient for the Authority to resolve the issues before us. And, as discussed below, until the Comptroller General issued *Disposable Dining Ware*, the Union conceded that Comptroller General precedent should apply here. In this regard, the Union has not explained what it could argue in a

[29] 2014 WL 7331168 at *4.
[30] *Id.* at *2.
[31] *Id.* at *5.
[32] Union's Supp. Submission at 1.
[33] Order at 4.
[34] *Id.*
[35] *Richard J. Hirn*, B-327146, 2015 WL 4719865, at *5 (Comp. Gen. Aug. 6, 2015).
[36] 5 C.F.R. § 2429.26.
[37] *AFGE, Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*) (citing *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012)).
[38] *E.g., U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 423 n.1 (2009).
[39] *E.g., Local 3652*, 68 FLRA at 396; *NTEU*, 41 FLRA 1241, 1241 n.2 (1991).
[40] Union's Motion at 2.

supplemental submission that would affect the disposition of this case, and we find that the Union has not met its burden of showing why we should grant leave for the parties to file supplemental submissions. Thus, we deny the Union's motion, and we decide the case based on the existing record (including the denial) and the filings before us.[41]

IV. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law because it conflicts with Comptroller General precedent – specifically, the Comptroller General's decision in *Disposable Dining Ware*.[42] In contrast, the Union argues that the expenditures at issue are authorized under the necessary-expense doctrine,[43] or, alternatively, under 5 U.S.C. § 7901.[44] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[45] 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.[46] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are "nonfacts."[47]

We note that decisions of the Comptroller General are not binding on the Authority.[48] In that regard, "[a]lthough a Comptroller General opinion serves as an expert opinion that should be prudently considered," it is not one to which the Authority must defer.[49] [50] 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.[51]

Here, the parties cited Comptroller General precedent to the Arbitrator,[52] who relied upon that precedent in her award.[53] Similarly, in the Agency's exceptions to that award,[54] and the Union's opposition to those exceptions,[55] the parties both cite Comptroller General precedent.

As noted previously, following the Comptroller General's issuance of *Disposable Dining Ware*, the Union argued, in a supplemental submission, that the Authority "should give no weight or consideration to" that decision.[56] In particular, the Union emphasized that the Comptroller General decided *Disposable Dining Ware* based on only the documents that the Agency submitted to the GAO.[57] However, subsequently, the Union filed a request for reconsideration of *Disposable Dining Ware* with the GAO, and the Comptroller General denied that request. Thus, both parties have now had an opportunity to make submissions to the Comptroller General – whose decisions both parties previously conceded should determine the legality of the expenditures at issue. Accordingly, consistent with our precedent, because "the parties and the [A]rbitrator have examined Comptroller General precedent to address legal questions raised by [the] grievance," we assume the applicability of

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[41] *See, e.g.*, *Local 3652*, 68 FLRA at 396; *NTEU*, 41 FLRA at 1241 n.2.
[42] Exceptions at 14-21; Agency's Supp. Submission at 1-4.
[43] *See* Opp'n at 6-12.
[44] *Id.* at 13-15.
[45] *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)).
[46] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[47] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[48] *See, e.g.*, *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*); *IRS, Small Bus.*, 65 FLRA at 26 n.5 (citing *AFGE, Local 1458*, 63 FLRA 469, 471 (2009) (*Local 1458*)).
[49] *Local 1458*, 63 FLRA at 471.
[50] For the same reasons that he set forth in his dissenting opinion in *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 975 (2015) (Dissenting Opinion of Member Pizzella), Member Pizzella notes that he welcomes the majority's recognition that decisions of the Comptroller General "serve[] as an expert opinion that should be prudently considered" but does not agree insofar as today's decision perpetuates the perception that Comptroller General decisions are ones which may simply be ignored by the Authority. Member Pizzella notes that he would adopt instead the approach of the U.S. Court of Federal Claims which accords "persuasive weight" to decisions of the Comptroller General and GAO and recognize them as experts in matters concerning fiscal issues, appropriations law, and federal employee salary, benefits, and reimbursements. *Hawaiian Dredging Constr. Co. v. United States*, 59 Fed. Cl. 305, 311 (Fed.Cl. 2004).
[51] *E.g.*, *NOAA*, 67 FLRA at 358; *see U.S. Dep't of the Navy, Naval Underseas Warfare Ctr., Newport, R.I.*, 54 FLRA 1495, 1499-1500 & n.2 (1998) (and cases cited therein).
[52] *E.g.*, Award at 9 (Union), 10-13 (Agency).
[53] *See id.* at 16-17.
[54] Exceptions at 11-21, 24.
[55] Opp'n at 7-11.
[56] Union's Supp. Submission at 1.
[57] *Id.* at 3.

Comptroller General decisions, generally – and *Disposable Dining Ware*, in particular – in resolving the Agency's contrary-to-law exceptions to the Arbitrator's award.[58]

As discussed above, in *Disposable Dining Ware*, the Comptroller General found "no legal basis on which to conclude that [the Agency's] appropriations are available to provide free disposable [dining ware] to [Agency] employees."[59] In this regard, the Comptroller General found that disposable-dining-ware items "are personal items,"[60] and rejected the Arbitrator's conclusion that the benefits to the Agency from employees' use of disposable dining ware justified the expenditure under the necessary-expense doctrine.[61] Accordingly, because we have assumed the applicability of *Disposable Dining Ware*, the Arbitrator's conclusion that the necessary-expense doctrine authorized the expenses at issue is contrary to law.

In addition to arguing that the expenditures at issue are authorized under the necessary-expense doctrine,[62] the Union argues that the Agency may use appropriated funds to purchase disposable dining ware as a "health[-]service program" under 5 U.S.C. § 7901.[63] Under § 7901, agencies may use appropriated funds to establish certain types of health-service programs to "promote and maintain the physical and mental fitness of employees."[64] In particular, the Union argues that the provision of disposable dining ware should be considered a "preventive program[] relating to health" under § 7901(c)(4).[65] For support, the Union cites Comptroller General decisions authorizing the use of appropriated funds to pay for employees' "access to private health and fitness facilities" and routine influenza immunizations.[66] Thus, according to the Union, § 7901 provides "an additional or alternative basis upon which to affirm [the Arbitrator's] award."[67]

In contrast, the Agency argues that § 7901's implementing regulations, as well as Comptroller General decisions interpreting § 7901, clarify that § 7901(c)(4) authorizes spending on preventive *services* rather than health-related *items*.[68] According to the Agency, it may use appropriated funds to purchase personal health-related *items* only under the necessary-expense doctrine.[69] And, in any event, the Agency disputes that employees receive health benefits from using disposable dining ware.[70]

Because the Arbitrator concluded that the Agency could purchase disposable dining ware under the necessary-expense doctrine, she did not reach the Union's § 7901 argument.[71] However, she stated that "any reading of [§ 7901] to include the provision of [disposable dining ware] as a 'program' appear[ed] to be rather strained."[72] Moreover, in *Disposable Dining Ware*, the Comptroller General rejected the idea that the expenditure could be justified because disposable dining ware might prevent the spread of illness.[73] In that regard, the Comptroller General noted that neither the Agency's nor the Department of Health and Human Services' guidance on preventing the spread of influenza recommend the use of disposable dining ware to prevent the spread of disease.[74] Thus, although the Comptroller General did not address § 7901 specifically, the Comptroller General clearly rejected any rationale for the expenditure at issue that relied on the alleged health benefits to employees of using disposable dining ware. Accordingly, § 7901 provides no basis for upholding the award.

In addition, the Agency argues that the Arbitrator's finding of repudiation in violation of § 7116(a)(1) and (5) of the Statute is contrary to law because "[a]n agency's failure to follow an illegal agreement does not constitute a repudiation."[75] Consistent with *Disposable Dining Ware*, we have concluded that the Arbitrator erred in concluding that the Agency could lawfully spend appropriated funds on disposable dining ware. Consequently, the MOU is illegal to the extent that it requires such spending, and we find that the Agency did not violate the Statute by breaching it.

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[58] *NOAA*, 67 FLRA at 358.
[59] 2014 WL 7331168 at *5.
[60] *Id.* at *2.
[61] *See id.* at *5.
[62] *See* Opp'n at 6-12.
[63] *Id.* at 13-15.
[64] 5 U.S.C. § 7901(a).
[65] Opp'n at 13 (quoting 5 U.S.C. § 7901(c)(4)) (internal quotation marks omitted).
[66] *Id.* at 13-14 (citing *In re Def. Med. Sys. Support Ctr. – Health & Fitness Program*, B-240371, 1991 WL 72824 (Comp. Gen. Jan. 18, 1991) (*Health & Fitness Program*); *To the Chairman, U.S. Civil Serv. Comm'n*, 47 Comp. Gen. 54 (1967)).
[67] *Id.* at 13.
[68] Exceptions at 23-24 (citing 41 C.F.R. § 101-5.304(e); *Health & Fitness Program*, 1991 WL 72824; *In re Smoking Cessation Program for Fed. Emps.*, 68 Comp. Gen. 222 (1989)).
[69] *See id.* at 24.
[70] *Id.* at 23-24.
[71] Award at 21 n.29.
[72] *Id.* (quoting 5 U.S.C. § 7901(a)).
[73] 2014 WL 7331168 at *4.
[74] *Id.*
[75] Exceptions at 25 (quoting *U.S. Dep't of VA, Consol. Mail Outpatient Pharm., Leavenworth, Kan.*, 60 FLRA 844, 850 (2005)) (internal quotation marks omitted).

The Agency makes several additional arguments concerning the Arbitrator's finding of repudiation,[76] and the Union claims that the Agency is barred from raising these arguments before us.[77] However, because we find that the Agency did not violate the Statute, we need not address these arguments or determine whether they are properly before us.

V. Decision

We grant the Agency's exceptions and set aside the award.

[76] *Id.* at 26-29.
[77] Opp'n at 15-16.