OFFICE OF COMPLIANCE
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Washington, D.C. 20540-1999

AFSCME Council 26, Petitioner, and Office of the Architect of the Capitol, Employing Office	)	Case No. 00-LMR-03

Before the Board of Directors; Susan S. Robfogel, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This is a negotiability appeal in which the Board must decide whether a proposed collective bargaining agreement provision is "inconsistent with any Federal law..." and therefore nonnegotiable, pursuant to Section 7117(a)(1) of the Federal Service Labor-Management Relations Statute ("FSLRMS"), 5 U.S.C. 7117 (a)(1), as applied by Section 220(c) of the Congressional Accountability Act ("CAA"), 2 U.S.C. 1351(c). The Board is authorized to resolve such negotiability appeals under Section 7105(a)(2)(E) of the FSLMRS, 5 U.S.C. 7105(a)(2)(E), as applied by Section 220(c)(1) of the CAA, 2 U.S.C. 1351(c)(1).

The proposed contract provision is deemed "inconsistent with Federal law" by the employing office, the Office of the Architect of the Capitol (hereinafter, "AOC"); AFSCME Council 26 ("the Union") disagrees and contends that there is no inconsistency with the law. In

effect, the proposed agreement states that make-whole relief, including back pay, may be awarded to bargaining unit employees who prevail in binding arbitration, or successfully achieve pre-arbitration settlement, under the grievance procedure to be incorporated in the parties' collective bargaining agreement. The proposal further provides that the parties shall jointly request the Office of Compliance to approve such awards and settlements, and direct payment pursuant to Section 415(a) of the CAA. The disputed portions of the proposal provide that if the Office of Compliance fails to direct payment from its Section 415(a) account at the U.S. Treasury, AOC itself is then financially responsible for complying with the award or settlement.[1]

The parties agree that their collective bargaining agreement must provide a negotiated grievance procedure, including binding arbitration. See Section 7121 of the FSLMRS, 5 U.S.C. Section 7121, as applied by Section 220(a) of the CAA. The parties also agree that AOC employees may obtain back pay and other make-whole relief in negotiated grievance

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[1]The full text of the disputed proposal is:

"The parties agree that the arbitrator shall have the authority to award make whole relief, including back pay in appropriate circumstances. If the arbitrator makes such an award and the Employer determines not to file exceptions to the award, or in the event the Board of Directors affirms the award after the employer has filed exceptions the parties will jointly request the Office of Compliance to approve the award and direct payment from its awards and judgments account under Section 415(a) of the Congressional Accountability Act. In the event the Office of Compliance fails to approve the award and direct payment the Employer will be responsible for complying with the award. Similarly, in the event the parties' settlement of a pending grievance requires payment of make whole relief to the grievant(s) the parties will jointly request the Office of Compliance to approve the settlement and direct payment from the awards and judgments account under Section 415(a) of the Act. In the event the Office of Compliance fails to approve the settlement and direct payment, the Employer will be responsible for complying with the settlement."

proceedings. However, the parties disagree as to the proper source of funding to satisfy such awards and settlements.

AOC asserts that any requirement that AOC pay monetary awards and settlements in negotiated grievance proceedings from its own appropriated funds is inconsistent with Federal law. Specifically, AOC contends that there is no clear and unequivocal statutory authority for it to make back pay payments and, accordingly, the doctrine of sovereign immunity applies. Under that doctrine, the government is not liable for monetary awards unless its immunity has been unequivocally waived. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). Further, AOC contends, the CAA itself establishes that the sole basis and source of payment for awards and settlements under the Act is the Section 415(a) fund administered by the Office of Compliance.[2]

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[2]The full text of Section 415 is:

"SECTION 415. PAYMENTS" "(a) AWARDS AND SETTLEMENTS.— Except as provided in subsection (c), only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements under this Act. There are authorized to be appropriated for such account such sums as may be necessary to pay such awards and settlements. Funds in the account are not available for awards and settlements involving the General Accounting Office, the Government Printing Office, or the Library of Congress.

(b) COMPLIANCE.— Except as provided in subsection (c), there are authorized to be appropriated such sums as may be necessary for administrative, personnel, and similar expenses of employing offices which are needed to comply with this Act.

(c) OSHA, ACCOMMODATION, AND ACCESS REQUIREMENTS.— Funds to correct violations of section 201(a)(3), 210, or 215 of this Act may be paid only from funds appropriated to the employing office or entity responsible for correcting such violations. There are authorized to be appropriated such sums as may be necessary for such funds."

The Union maintains that nothing in the CAA, or other provision of Federal law, bars AOC from submitting disputes to binding arbitration that may result in its paying back pay or other make-whole relief from its own funds. The Union also asserts that Section 415(a) of the CAA should not apply to arbitration awards or settlements under the parties' collective bargaining agreement, as such awards and settlements do not constitute awards and settlements "under this Act" within the meaning of Section 415(a). Rather, the Union contends, Section 415(b) covers awards and settlements in grievance cases because it expressly authorizes appropriations for "administrative, personnel, and similar expenses of employing offices which are needed to comply with this Act." 2 U.S.C. Section 1415(b).

We address, first, AOC's sovereign immunity argument. It is true, of course, that a waiver of the Federal government's sovereign immunity must be expressed unequivocally in statutory text. It is also true, as AOC points out, that AOC is not one of the agencies identified in the 1966 Back Pay Act, 5 U.S.C. 5596(a), as authorized to make back pay payments to agency employees who successfully challenge "unwarranted personnel actions". *Id*. But the 1966 Back Pay Act is not the only statutory basis for finding a waiver.

Section 7122 of the FSLMRS explicitly authorizes the payment in grievance cases of back pay by covered Federal government entities:

> "An agency shall take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided in section 5596 of this title)." 5 U.S.C. 7122(b)

When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in Section 7122 of the FSLMRS to AOC and its employees. (See, Section 220(a) of the CAA, 2 U.S.C. 1351(a).) By doing so, Congress made its intention clear to subject the employing offices to back pay obligations in the same manner as the Federal agencies covered by the FSLMRS and the Back Pay Act, and thereby effectively and unambiguously waived AOC's immunity. There was, therefore, no need to amend the Back Pay Act to accomplish an effective waiver of sovereign immunity.

Thus, we conclude, the CAA provides that AOC employees are entitled to obtain back pay and related relief in negotiated grievance procedures. However, the question remains as to the proper source of payment for such relief. According to AOC, the only proper source for such monetary relief is the U. S. Treasury account established in Section 415(a). According to the Union, however, the employing office may properly be required to pay such sums from its own appropriated funds pursuant to Section 415(b). This dispute presents the Board with an important issue of first impression: is an arbitrator's award or settlement providing back pay or other make-whole relief in a contract grievance one of those "awards and settlements" which must be satisfied only from the Section 415(a) U.S. Treasury account?

The parties have not cited and we have not found any judicial or administrative precedent. Our task then is to discern, as best we can, what Congress intended, as evidenced by the text and structure of the CAA itself, and its legislative history.

Section 415(a) provides that, with certain inapplicable exceptions, "only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements *under this Act.*"

2 U.S.C. 1415(a) (emphasis supplied). It is argued that an arbitration award or grievance settlement in a negotiated grievance procedure does not fit this description, even though it is the CAA ("this Act") that imposes upon AOC and other covered entities the duty to establish a negotiated grievance procedure including binding arbitration. See 5 U.S.C. Section 7121, as applied by Section 220 (a)(1) of the CAA. The Union contends that the phrase "awards and settlements under this Act" applies only to those awards and settlements resolving violations of the labor and employment statutes incorporated in the CAA. Given the important and well-established distinction between contractual rights and statutory rights under the FSLMRS, and in labor-management law generally, there is some basis for an interpretation of Section 415(a) that would differentiate between remedies for breach of contract and remedies for statutory violations.

Although awards and settlements in negotiated grievance procedures are not expressly covered under Section 415(b) of the CAA, 2 U.S. C. 1415(b), the Union proposes a broad interpretation of Section 415(b), which authorizes appropriations for "administrative, personnel, and similar expenses of employing offices which are needed to comply with this Act."
The quoted phrase in Section 415 (b) is, indeed, susceptible to different meanings. Viewed out of context, it might well be read to embrace back pay for any employees who were paid less than

their bargaining agreement—as interpreted by an arbitrator— actually required. But we cannot adopt this broad interpretation of Section 415(b).

First, we note that Section 415(b) appears as one of several related subsections, which were intended to be read together. Section 415(a), fairly read, supports a narrow reading of Section 415(b) because it purports to govern all awards and settlements: " ...only [Section 415(a)] funds... may be used for the payment..." (emphasis supplied). Moreover, Section 415(a) prohibits the use of its fund for awards and settlements involving certain specified legislative entities (*e.g.*, the General Accounting Office) or to correct violation of certain substantive provisions of the CAA (*e.g.,* Section 215, regarding occupational safety and health). If Congress had intended to preclude Section 415(a) from being used to satisfy arbitration awards, it might therefore have been expected to express this exclusion as well.

Finally, we note that the legislative history of Section 415(b) also supports a narrower reading than the Union proposes. The following discussion of Section 415(b) appears in the section-by-section analysis of the Senate version of the bill (S.2) that ultimately became the CAA which was introduced into the Congressional Record by Senators Grassley and Lieberman, sponsor and co-sponsor of the bill, respectively:

> Subsection (b) provides that, except as provided in subsection (c), there are authorized appropriations of such sums as may be necessary for administrative, personnel and similar expenses of employing offices which are needed to comply with this Act. These expenses could be such items as funding management side labor negotiations under Section 220. These expenses are costs of adhering to the Act, but not costs of complying with adjudicative decisions remediating violations, which are addressed in Section 415.

141 Cong. Rec. S621-02 (January 9, 1995).

In our view, these remarks reveal that the true function of Section 415(b) is to deal with certain on-going employer compliance expenses which are unrelated to the costs of complying with particular judgments and awards, such as the costs attributable to hiring more employees to perform the labor relations functions required by enactment of the CAA.

Since the Union's disputed contract proposal clearly would impose responsibility upon AOC to pay a back pay award or settlement from its own appropriated funds under certain circumstances, and since Section 415(a), as we have construed it, requires payment of such awards and settlements from the OOC account at the U.S. Treasury, the disputed proposal is, to that extent, inconsistent with Federal law. Accordingly, it is nonnegotiable.[3]

For the reasons set forth above, the Union's petition/appeal is denied.

IT IS SO ORDERED

Issued, Washington, D.C., January 29, 2001.

[3]The distinction between the costs of complying with an award and the costs of complying with the statute may, in some situations, be difficult to discern. Some grievance awards and settlements might, for example, impose permanent obligations of a continuing nature ─ such as training or record-keeping functions─ upon an employing office. We need not, and do not, hold that any and all such awards or settlements must be satisfied from Section 415(a).