

**73 FLRA No. 122**

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL COMPLEX  
VICTORVILLE, CALIFORNIA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3969  
COUNCIL OF PRISON LOCALS #33  
(Union)

0-AR-5854

—  
DECISION

August 3, 2023

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Before the Authority: Susan Tsui Grundmann,  
Chairman, and Colleen Duffy Kiko, Member

**I. Statement of the Case**

Arbitrator Gerald Burke found that the Agency violated the parties' collective-bargaining agreement by failing to timely complete administrative investigations of two employees. The Agency filed exceptions on nonfact, essence, and contrary-to-law grounds. For the reasons explained below, we partially dismiss and partially deny the Agency's exceptions.

**II. Background and Arbitrator's Award**

The Agency opened an investigation in July 2019 into whether a technician, whose job duties involve investigating inmate misconduct, had mishandled contraband he confiscated from two inmates. In an unrelated incident, the Agency opened a misconduct investigation in June 2020 to determine whether a correctional officer used excessive force related to a physical altercation between two inmates. When the Agency opened the investigations, it reassigned the

employees (the grievants) to positions in which they were ineligible to work overtime hours.

In June 2021, the Union filed a grievance alleging that by failing to conduct timely investigations, the Agency violated, as relevant here, Article 30(D) of the parties' agreement and a "2006 memorandum from the U.S. Department of Justice to the Federal Bureau of Prisons [stating] that local investigations should be completed and the investigation forwarded to the [Office of Internal Affairs] within 120 calendar days" (the Kenney Memo).<sup>1</sup> The parties were unable to resolve the grievance, and on September 21, 2021, the Union invoked arbitration. In November 2021, despite not having completed the investigations, the Agency returned the grievants to their normal positions, with eligibility to work overtime.

The parties agreed that the issue at arbitration was whether the Agency violated the parties' agreement, or other agreements specified in the grievance, when it improperly delayed the investigations of the grievants. The Arbitrator found that Articles 30(D) and 30(G) were most relevant to the issue. Article 30(D) states that "recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions."<sup>2</sup> Article 30(G) provides that where an alleged offense "may adversely affect the [Agency's] confidence in the employee or the security or orderly operation of the institution," the Agency "may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter."<sup>3</sup>

The Agency argued that there are no time limits in the parties' agreement for concluding an investigation and reassigning employees. The Arbitrator rejected that argument, finding that Article 30(D) requires "timely disposition" of an investigation into "alleged misconduct."<sup>4</sup> The Arbitrator noted the contrast between the Kenney Memo's statement that local investigations should be completed within 120 calendar days and the "remarkable" fact that the Agency's investigations of the grievants were "not completed some two years after the alleged offenses."<sup>5</sup>

The Arbitrator acknowledged that Article 30(G) allows the Agency to reassign an employee to another position during an investigation, "assuming that the alleged offense adversely affects the employer's

<sup>1</sup> Award at 10-11; Exceptions, Ex. 3, Formal Grievance Form (Grievance Form) at 1 (alleging that Agency violated various laws and agreements, including "Article 30, section d [of] the [Master Labor Agreement]" and the "Kenney Memo on Investigations").

<sup>2</sup> Exceptions, Attach. 3, Master Labor Agreement at 69.

<sup>3</sup> *Id.* at 70.

<sup>4</sup> Award at 10.

<sup>5</sup> *Id.* at 11-12.

confidence in the employee [regarding] . . . the security or orderly operation of the institution.”<sup>6</sup> However, the Arbitrator stated that “[i]n both the dispositions and reassignments of [the grievants],” the Agency did not demonstrate that it lost “confidence [in the grievants]” or that the grievants posed a risk to the “security or orderly operation of the institution.”<sup>7</sup> Moreover, he found the investigations should have been straightforward and swift due to the availability of video surveillance footage and other evidence. The Arbitrator concluded that it would have been reasonable for the Agency to have completed its investigation of the 2019 incident within sixty to 120 days and returned the first grievant to his position by October 2019. For the 2020 incident, the Arbitrator concluded the Agency should have completed that investigation within six weeks and returned the second grievant to his regular position by August 2020. Accordingly, the Arbitrator found that Article 30(G) did not authorize the Agency’s unduly long investigations of the grievants or the accompanying loss of opportunities to earn overtime.<sup>8</sup>

As a remedy, the Arbitrator awarded backpay. He determined the backpay period was twenty-six months for the first grievant and sixteen months for the second grievant, beginning on the date the Agency should have completed each investigation and ending in November 2021, when the Agency returned the grievants to their positions. To calculate backpay, the Arbitrator reviewed several years of the grievants’ timesheets and determined the average number of overtime hours each grievant worked before and after their reassignments.<sup>9</sup> He found the first grievant worked an average of ten hours of overtime per month and the second grievant averaged 100 hours per month. Consistent with those findings, he awarded the first grievant 260 hours of backpay and the second grievant 1600 hours of backpay.

On January 6, 2023, the Agency filed exceptions to the award. The Union filed an opposition to the Agency’s exceptions on February 8, 2023.

### III. Preliminary Issue: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s nonfact exception and essence exception, in part.

The Agency argues that the award is based on a nonfact because the Arbitrator relied on the Kenney Memo, which was not identified as an exhibit at the hearing.<sup>10</sup> In addition, the Agency argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator used the Kenney Memo to interpret the meaning of “timely disposition of investigations” in Article 30(D).<sup>11</sup>

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.<sup>12</sup> The record demonstrates that, at each step in the grievance process, the Union alleged the Agency violated the Kenney Memo.<sup>13</sup> Additionally, in its post-hearing brief, the Union argued that even though the parties’ agreement did not define a timeframe for “timely disposition of investigations,” the Agency’s policy – as set forth in the Kenney Memo – required completion of local investigations within 120 days.<sup>14</sup> The Union filed its post-hearing brief, with the Kenney Memo attached as an exhibit, on November 29, 2022.<sup>15</sup> The Agency filed its closing brief on December 2, 2022.<sup>16</sup>

Therefore, before the Arbitrator, the Agency could have addressed the Union’s arguments that Agency policy required local investigations to be completed within 120 days, and it could have argued that the Arbitrator should not consider the Kenney Memo. The Agency did not do so. Consequently, we dismiss these exceptions under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.<sup>17</sup>

### IV. Analysis and Conclusions

- A. The award does not fail to draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from Article 30(G).<sup>18</sup> The Authority will find

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *See id.* at 11-12.

<sup>9</sup> The Union submitted pay records for the calendar years of 2013 through 2022 for one grievant and pay records from the years 2019, 2021, and 2022 for the other grievant. *Id.* at 8.

<sup>10</sup> Exceptions Br. at 4.

<sup>11</sup> *Id.* at 4-6.

<sup>12</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 474, 475-76 (2023).

<sup>13</sup> Exceptions, Attach. 5, Union’s Informal Resolution Attempt at 2; Grievance Form at 1; Exceptions, Attach. 9, Union’s Arbitration Invocation at 2.

<sup>14</sup> Opp’n, Attach. 1 (Union Br.) at 5-6; *see also* Opp’n at 4.

<sup>15</sup> Union Br. at 5-6, 10-13.

<sup>16</sup> Exceptions, Attach. 4, Agency’s Post-Hr’g Br.

<sup>17</sup> *NTEU*, 73 FLRA 315, 317 (2022) (Chairman DuBester concurring) (dismissing nonfact argument because excepting party did not present argument to arbitrator); *NAGE*, 71 FLRA 775, 776 n.15 (2020) (dismissing essence claim where no indication in record that excepting party raised it at arbitration).

<sup>18</sup> Exceptions Br. at 9-10.

an award fails to draw its essence from the parties' agreement when the excepting party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.<sup>19</sup>

The Agency argues that the "clear and concise language" of Article 30(G) gives the Agency the "right to reassign pending the investigation and resolution of the matter."<sup>20</sup> On this basis, the Agency claims the Arbitrator improperly substituted his judgment on whether the grievants should have been reassigned by finding, "[i]n both the dispositions and reassignments of [the grievants], it does not measure up to the requirement that the Agency lost their confidence or there was some type of breach in the security or orderly operation of the institution."<sup>21</sup> Ultimately, however, the Arbitrator found the Agency "had a right to temporarily reassign" both grievants "because of the alleged offenses."<sup>22</sup> Therefore, the Agency's argument is premised on a misunderstanding of the award and does not demonstrate that the award is deficient.<sup>23</sup>

The Agency also challenges the Arbitrator's finding that the Agency violated the parties' agreement by not returning the grievants to their positions within a reasonable time period, asserting that Article 30(G) does not contain a time limitation.<sup>24</sup> However, the Arbitrator found the grievants had a right to "timely disposition of investigations" under Article 30(D), and we have dismissed the Agency's essence exception challenging the Arbitrator's interpretation of Article 30(D) in this respect.

Thus, this argument does not demonstrate that the award is deficient.

Accordingly, we deny the Agency's essence exception regarding Article 30(G).

B. The award is not contrary to the Back Pay Act.

The Agency argues that the award is contrary to the Back Pay Act (the Act).<sup>25</sup> When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.<sup>26</sup> In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>27</sup> Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.<sup>28</sup>

To justify an award of backpay under the Act, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of any employee's pay, allowances, or differentials.<sup>29</sup>

The Agency asserts that the award of backpay is contrary to the Act because the grievants were not affected by an unjustified or unwarranted personnel action.<sup>30</sup> However, the Arbitrator found the Agency's failure to complete the investigations in a timely manner violated Article 30(D), and we have dismissed the Agency's challenges to that determination. It is well established that a violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action under the Act.<sup>31</sup> Accordingly, the award satisfies the Act's first requirement.

The Agency further asserts that the award does not satisfy the Act's requirement that "an arbitrator's award be specific as to whether a grievant suffered a reduction in pay as a direct result of improper agency action."<sup>32</sup> On this point, the Agency argues that because

<sup>19</sup> *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 133, 136 (2022); *U.S. Dep't of HHS*, 72 FLRA 522, 524 n.19 (2021) (Chairman DuBester concurring); *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.11 (2020) (Member DuBester concurring)).

<sup>20</sup> Exceptions Br. at 9-10.

<sup>21</sup> *Id.* (quoting Award at 11, 14-17).

<sup>22</sup> Award at 11.

<sup>23</sup> *NTEU*, 72 FLRA 182, 184 (2021) (denying essence exception based on a misunderstanding of the award (citing *NTEU, Chapter 26*, 66 FLRA 650, 654 (2012))).

<sup>24</sup> Exceptions Br. at 9-10.

<sup>25</sup> *Id.* at 11-13.

<sup>26</sup> *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Or.*, 68 FLRA 178, 180 (2015) (*Interior*)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *Interior*, 68 FLRA at 180-81).

<sup>29</sup> *U.S. Dep't of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 72 FLRA 691, 692 (2022) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 479-80 (2021) (Chairman DuBester concurring; Member Abbott concurring)).

<sup>30</sup> Exceptions Br. at 11-12.

<sup>31</sup> *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 568 (2012) (*Laredo*)).

<sup>32</sup> Exceptions Br. at 13.

the “relevant contract provisions on employee investigations do not contain any specific time[]frames for concluding investigations,” the Arbitrator erred by adopting “his own personal date that investigations should have been concluded.”<sup>33</sup> However, this argument is premised on the Agency’s essence exception, which challenges the Arbitrator’s reliance on the Kenney Memo to find that the Agency violated its contractual obligation to complete investigations in a timely manner.<sup>34</sup> Because we have dismissed that essence exception, we also reject this argument.<sup>35</sup>

The Agency also argues that the award does not meet the Act’s specificity requirement because it lacks a “detailed finding that the grievants were ready, willing[,] and able to work overtime or that there was actually available overtime to work in this amount.”<sup>36</sup> The Agency argues the Arbitrator’s reliance on the Union’s claim “that the employees would work the same type and amount of overtime as in the past” is the same “type of speculation”<sup>37</sup> that the Authority rejected in *AFGE, Local 1857 (Local 1857)*.<sup>38</sup>

Here, the Arbitrator found that the Agency’s protracted investigation caused the grievants to lose overtime. Relying upon time sheets showing the amount of overtime worked by both grievants prior to their reassignment, the Arbitrator then determined the grievants’ entitlement to overtime damages based upon the average amount of overtime they worked prior to the Agency’s actions.<sup>39</sup>

The Authority has repeatedly affirmed arbitrators’ awards of backpay under the Act based upon similar findings.<sup>40</sup> Moreover, the Arbitrator’s specific findings readily distinguish the award from the award in *Local 1857*, where the arbitrator made no finding that the grievant would have worked overtime and awarded backpay based on what the arbitrator characterized as

“pure conjecture.”<sup>41</sup> Consequently, the Agency has not demonstrated that the award is based on “conjecture” so as to be deficient under the Act.<sup>42</sup>

Accordingly, we deny the Agency’s exception.

## V. Decision

We partially dismiss and partially deny the Agency’s exceptions.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 6-10.

<sup>35</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 (2011) (*Coleman*) (rejecting agency’s argument that the Act’s requirement that employee was affected by an unjustified or unwarranted personnel action was not satisfied where argument was premised on denied essence exception).

<sup>36</sup> Exceptions Br. at 13.

<sup>37</sup> *Id.*

<sup>38</sup> 35 FLRA 325 (1990).

<sup>39</sup> Award at 12.

<sup>40</sup> *See, e.g., Coleman*, 65 FLRA at 1045-46 (rejecting agency’s challenge to arbitrator’s backpay award where arbitrator based award upon prior personnel and pay records); *U.S. Dep’t of the Army, Fort Carson, Colo.*, 65 FLRA 565, 567 (2011) (rejecting agency’s challenge to arbitrator’s backpay award where arbitrator found that, but for the agency’s action, the grievant would have been returned to his normal duties and would have

worked the typical overtime required of all members of the unit); *see also U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 181-82 (2017) (upholding backpay award calculated using an average of overtime earnings for the five preceding years).

<sup>41</sup> *Local 1857*, 35 FLRA at 328; *see also Coleman*, 65 FLRA at 1046 (distinguishing *Local 1857* because arbitrator’s finding was based on “pure conjecture” (quoting *Local 1857*, 35 FLRA at 326-27)).

<sup>42</sup> *Compare U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739-40 (2012) (award not contrary to the Act where arbitrator made factual findings concerning employees who would have been available for overtime opportunities), *with U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 59 FLRA 466, 467-68 (2003) (Chairman Cabaniss dissenting in part on other grounds) (finding award contrary to the Act because arbitrator awarded grievant the “average” overtime amount paid to coworkers without making findings specific to the grievant).