

63 FLRA No. 144

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
ENGINEERS AND ARCHITECTS
AFL-CIO
(Union)

0-AR-4019

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DECISION

June 30, 2009

Before the Authority: Thomas M. Beck, Chairman
and Carol Waller Pope, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Jerome H. Ross filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

The Arbitrator sustained grievances over disputed reassignments and awarded employees backpay. For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Award

Grievances were filed when the Agency unilaterally amended the job documentation of numerous unit employees and reassigned and realigned employees within the unit. The Union asserted that the Agency's actions violated the parties' collective bargaining agreement and memoranda of understanding (MOUs). In particular, the Union argued that the mass unilateral reassignments violated Article 46 of the collective

bargaining agreement* because the Agency failed to first solicit volunteers prior to involuntarily reassigning employees. The Union claimed that the failure to follow Article 46 "had a direct impact on employees since in many cases it meant a loss in overtime pay[.]" Award at 8. Accordingly, the Union specifically requested backpay for "all [employees] who lost compensation in the form of overtime[.]" *Id.* at 2.

In agreement with the Union, the Arbitrator concluded that the Agency violated Article 46 by reassigning employees without first soliciting volunteers. As to remedy, the Arbitrator found "the Union's essentially un rebutted evidence and contentions to be persuasive with regard to the appropriate remedy for the Agency's violations." *Id.* at 19. In accordance with the request of the Union, the Arbitrator did not order a *status quo ante* remedy, but, instead, ordered post-implementation bargaining. The Arbitrator also awarded employees backpay because he agreed with the Union that an award of backpay "is appropriate to all employees who lost overtime compensation because of the Agency's failure to solicit volunteers." *Id.* at 20. He found, as argued by the Union, that the lost overtime compensation was "directly tied to the Agency's failure to abide by the terms of the [collective bargaining agreement], which constitutes an unwarranted personnel action [under] the Back Pay Act." *Id.*

* Article 46, Section 4 pertinently provides:

When staffing imbalances exist within organizational units and competitive procedures are not used, solicitations shall be made as follows:

For positions in the Engineering Center (EC) to be filled from within the EC, the position will be placed on an inter-facility vacancy announcement soliciting volunteers. . . .

For positions in other than the EC to be filled from within a specific facility, the position will be placed on an intra-facility vacancy announcement soliciting volunteers. . . .

The announcement shall contain the qualifications established by the Employer, if any.

Award at 2.

III. Positions of the Parties

A. Agency's Exception

The Agency contends that the Arbitrator's award of backpay is contrary to the Back Pay Act, 5 U.S.C. § 5596. The Agency acknowledges that "[t]he Union offered testimony from some employees who alleged they had been reassigned, although they had not been solicited and had not volunteered for reassignment" and that "they were not earning overtime after their reassignment." Exception at 4. However, the Agency asserts that there was no unwarranted personnel action because the reassignments constituted an exercise of management's right to assign work. *Id.* at 5. Alternatively, the Agency asserts that, even if the violation of Article 46 constituted an unwarranted personnel action, the Union failed to prove that a reduction in overtime pay was a result of the violation. The Agency argues that, even if it had followed Article 46, "there is no proof that the employees who had received overtime pay would not have suffered withdrawal or reduction of overtime pay if they remained at their prior location or position." *Id.* at 5. The Agency maintains that there is no causal connection "[b]ecause the overtime work was not required to continue at the former site[.]" *Id.* at 6.

The Agency also argues that there cannot be an award of backpay "[i]n the absence of a *status quo ante* remedy[.]" *Id.* at 7. The Agency asserts that, in the absence of a *status quo ante* remedy, the access of employees "to overtime work is contingent on its availability at their present assignments." *Id.* at 6. The Agency maintains that "the overtime pay that was available at the former location or position did not continue in the new position and location[.]" *id.* at 7, and notes that employees testified "that they were not given overtime work since being reassigned," *id.* at 6.

B. Union's Opposition

The Union contends that the award of backpay is not contrary to the Back Pay Act because the Agency violated Article 46 of the collective bargaining agreement, which constitutes the required unjustified or unwarranted personnel action under the Act, and that, as a direct result, numerous employees lost overtime pay that they otherwise would have earned. Opposition at 3-4. The Union claims that the Arbitrator factually determined that employees lost overtime pay and appropriately awarded backpay to remedy the loss.

IV. Analysis and Conclusions

When an exception contends that an arbitration award is contrary to law, the Authority reviews *de novo* the question of law raised by the exception and the award. *E.g.*, *NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g.*, *NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying findings of fact. *Id.*

The Agency first argues that there was no unjustified or unwarranted personnel action because the reassignments constituted an exercise of a management right. However, the exercise of management rights under § 7106(a) are expressly subject to contract provisions negotiated pursuant to § 7106(b). The Authority has consistently held that contract provisions, which require management to first solicit volunteers among qualified employees prior to selecting any employee for reassignment, constitute enforceable procedures negotiated pursuant to § 7106(b)(2). *See, e.g.*, *United States Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, 62 FLRA 328, 330 (2007). Such provisions are enforceable if the agency retains the right to determine employee qualifications, and the provisions are applied to qualified employees. *Id.* Article 46 specifically provides for the determination of qualifications by the Agency, and the Agency does not argue, and the Arbitrator did not find, that employees who should have been solicited were not qualified. Consequently, the Arbitrator properly concluded that the Agency was obligated to follow Article 46 and that the Agency's violation of Article 46 constituted an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *See, e.g.*, *United States Dep't of the Treasury, United States Customs Serv., El Paso, Tex.*, 55 FLRA 553, 559 (1999). We note that, in numerous cases, the Authority has upheld awards of backpay in which the arbitrator found that the exercise of a management right violated the parties' collective bargaining agreement. *E.g.*, *id.* at 559-60.

We also reject the Agency's argument that there cannot be an award of backpay in the absence of a *status quo ante* remedy. Under the language of the Back Pay Act, 5 U.S.C. § 5596, a *status quo ante* remedy is unnecessary. In this regard, § 5596(b)(1)(A)(i) specifically provides that an employee "is entitled, on correction of the personnel

action, to receive . . . an amount equal to all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned or received during the period if the personnel action had not occurred[.]”

Finally, we reject the Agency’s argument that there was no loss of overtime pay as the result of the violation of Article 46. This argument disputes the Arbitrator’s underlying findings of fact. In this regard, the Union expressly argued to the Arbitrator that the Agency’s failure to first solicit volunteers for reassignment “had a direct impact on employees since in many cases it meant a loss of overtime pay[.]” Award at 8. The Arbitrator found “the Union’s essentially un rebutted evidence and contentions to be persuasive with regard to the appropriate remedy for the Agency’s violations” *Id.* at 19. He agreed with the Union that an award of backpay “is appropriate to all employees who lost overtime compensation because of the Agency’s failure to solicit volunteers.” *Id.* at 20. He concluded, as argued by the Union, that the lost overtime compensation was “directly tied to the Agency’s failure to abide by the terms of the [collective bargaining agreement], which constitutes an unwarranted personnel action [under] the Back Pay Act.” *Id.*

In the absence of a determination that a factual finding is deficient as based on a nonfact, the Authority defers to an arbitrator’s factual findings in resolving whether the award is contrary to law. *See, e.g., Soc. Sec. Admin., Office of Hearings & Appeals, Falls Church, Va.*, 55 FLRA 349, 353 (1999). Here, the Agency makes no nonfact assertions. As the Arbitrator’s factual findings support his legal conclusion that the Agency’s violation of Article 46 resulted in a loss of overtime pay for employees who were improperly reassigned, the award of backpay satisfies the Back Pay Act. *See id.* Moreover, the Agency objects that there is no causal connection because the availability of overtime is uncertain. Exception at 6 (“[T]here [i]s no assurance that overtime would have been available to them as they had worked before being reassigned.”). However, the Agency’s argument is a matter of compliance and implementation and does not implicate the legal requirements of the Back Pay Act. *United States Dep’t of Veterans Affairs Med. Ctr., Ann Arbor, Mich.*, 56 FLRA 216, 224 (2000); *United States Dep’t of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.*, 55 FLRA 28, 29 (1998). In addition, in calculating the amount of such backpay, the Authority has specifically endorsed the use of past history of overtime as an acceptable basis of

determining what employees would have earned, but for the unwarranted action. *United States Immigration & Naturalization Serv., Honolulu Dist. Office, Honolulu, Haw.*, 43 FLRA 608, 619 (1991). Consequently, the Agency’s allegations of uncertainty provide no basis for finding the award of backpay deficient.

Accordingly, we deny the Agency’s exception.

V. Decision

The Agency’s exception is denied.