65 FLRA No. 205

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
(Union)

0-AR-4438

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DECISION

June 30, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an interim award and a remedial award of Arbitrator Margery F. Gootnick 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 exceptions.

In her interim award, the Arbitrator determined that the Agency violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121 when scheduling the work of Customs Officers. In her remedial award, the Arbitrator ordered remedial relief including backpay and attorney fees. For the reasons that follow, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The dispute involves the Agency's Revised National Inspectional Assignment Policy (RNIAP). Interim Award at 3. The RNIAP replaced an earlier National Inspectional Assignment Policy (NIAP) that had been negotiated by the Agency and the Union and that provided for local negotiation of matters set forth in § 7106(b)(1) of the Statute, including staffing levels and tours of duty at the local level.[1] The Union, after receiving complaints from Customs Officers that their work assignments were being changed without adequate notice because of flexibilities created by the RNIAP, requested bargaining over the RNIAP and a new "bid and rotation" system. *Id*. at 5. The Agency declined the request based, in part, on the existence of a question concerning representation (QCR), explaining that negotiating over the RNIAP would give the Union an unfair competitive advantage over competing labor organizations in the upcoming election. *Id.*[2] After the Agency refused the request, the Union presented a grievance alleging that the Agency violated 5 U.S.C. § 6101(a)(3), 5 C.F.R. § 610.121, § 7116(a)(1), (5), and (8) of the Statute, and the parties' collective bargaining agreement.[3] *Id*. at 6. When the Agency did not respond, the Union invoked arbitration.

A. Interim Award

Although the Agency and the Union proposed substantially similar issues, they were unable to stipulate the issues to be resolved. In her award, the Arbitrator addressed the following issues:

1. The Authority found, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed, that the RNIAP was properly implemented and that it replaced the NIAP. Interim Award at 3-4 (citing *NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005), *aff'g U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703 (2004) (Member Pope concurring)). However, the court was not presented with the issue now before the Authority – i.e., whether the provisions of the RNIAP are consistent with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121.

2. As the Arbitrator explained, the QCR arose from the creation of Customs and Border Protection as a component of the Department of Homeland Security and the consolidation of employees formerly in the Customs Service, Border Patrol, and the Plant Inspection Service – each exclusively represented by a different labor organization – into one agency. Interim Award at 27. In its letter to the Union declining the request to bargain, the Agency noted that the Authority was about to conduct an election in the Agency-wide bargaining unit and opined that it would be improper to begin negotiations just before an upcoming election. *Id*.

3. The text of the relevant statutory, regulatory, and contractual provisions is set forth in the appendix to this decision.

1. Whether the Agency violated 5 U.S.C. § 6101(a)(3), 5 C.F.R. § 610.121, and Article 21, Sections 3A and B of the parties' agreement when scheduling the work of Customs Officers? If so, what is the appropriate remedy?

2. Whether the Agency violated Article 37 of the parties' agreement and/or § 7116(a)(1) and (5) of the Statute when it failed to bargain over the RNIAP and/or a new bid and rotation policy as proposed by the Union? If so, what is the appropriate remedy?

3. Whether the Agency violated Articles 37 and 39 and/or § 7116(a)(1), (5), and (8) of the Statute when it declined to provide information in response to the information request attached to the Union's grievance? If so, what is the appropriate remedy?

Id. at 7-8, 17, 25, 30.

The Arbitrator found that the Customs Officers are protected by the work scheduling requirements in 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121 (a) and (b) and that the RNIAP standards deviate from the requirements of the statute and regulation. *Id.* at 17-23. Moreover, the Arbitrator determined that, even if she "were to assume that the issuance of [RNIAP] . . . constituted an action attributable to 'the head of the Agency,'. . . there was no determination in [RNIAP] that carrying out the Agency's functions would be 'seriously handicapped' or that costs would be 'substantially increased'" if each Agency employee were provided the protections of 5 U.S.C. § 6101(a)(3). *Id.* at 20-21. Having made these findings, the Arbitrator found it unnecessary to address whether the Agency also violated Article 21, Sections 3A and B of the parties' agreement because those provisions were a verbatim recitation of the statute and regulation. *Id*. at 24-25.

Additionally, the Arbitrator found that the Agency had not violated § 7116(a)(1) and (5) of the Statute when it refused to bargain over the RNIAP or a new bid and rotation policy. The Arbitrator held that it was appropriate for the Agency to decline the Union's request to bargain during the pendency of a QCR. The Arbitrator noted that the Authority has held that an agency is not obligated to bargain during the pendency of a QCR but must, instead, maintain the status quo to the maximum extent possible. *Id*. at 28-29 (citing *U.S. Dep't of Justice, U.S. INS*, 9 FLRA 253, 283-86 (1982); *INS*, 16 FLRA 80, 87 (1984)).

Finally, the Arbitrator found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it failed to respond to the Union's information request pertaining to the officers' work schedules. Award at 30-31. Moreover, because the Union had explained its need for the requested information with sufficient specificity, the Arbitrator ordered the Agency to provide the information. *Id*. at 33.

In addressing the appropriate remedy, the Arbitrator noted that the parties' agreement provides that the parties should discuss some aspects of the remedy, including compensation and attorney fees, for a period of 60 days following the issuance of the interim award. *Id*. at 34. As an interim remedy, the Arbitrator ordered the Agency to:

(1) Cease and desist from violating 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and (b) and from failing to furnish necessary information requested by the Union; and

(2) Post appropriate notices wherever Customs Officers are assigned acknowledging the Agency's violations and promising not to commit such violations in the future.

Id. at 36-37. The Arbitrator retained jurisdiction for sixty days for the limited purpose of considering remedial issues and issuing an appropriate remedy. *Id.* at 37.

B. Remedial Award

After the interim award was issued, the Union advised the Arbitrator that the remedial issues remained unresolved and requested a decision both as to substantive relief and attorney fees. Remedial Award at 4.

The Arbitrator first addressed the appropriate recovery period under the Back Pay Act for those Customs Officers whose established work schedules were changed in violation of applicable law and regulation. *Id.* at 8. The Arbitrator found that, contrary to the Agency's assertion, retroactive adjustments in pay to which the affected officers were entitled should not be limited to the period

starting with the date of the Union's grievance. *Id.* The Arbitrator found that the only limitation that the Back Pay Act imposes on the period of backpay recovery is that it cannot exceed six years from the filing of the Union's grievance and that, therefore, backpay was appropriate for the entire period since the RNIAP took effect. *Id.* at 9.

Next, the Arbitrator addressed the Agency's assertions regarding exclusions from 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. Referring to the reasons in her Interim Award, the Arbitrator again rejected the Agency's argument that Customs Officers are not covered by the statute or regulation. *Id.* at 10. In addition, the Arbitrator addressed several other exclusions asserted by the Agency. As to one of the asserted exclusions, the Arbitrator agreed that the Agency should not be liable for backpay whenever the Agency could demonstrate that a schedule change, otherwise inconsistent with applicable law, was implemented to accommodate an officer's request. *Id.* at 11. However, the Arbitrator rejected the Agency's assertion that an officer who volunteered for assignment to a special work team and, as a result, suffered a change in his established work schedule was not entitled to backpay. *Id.* at 11-12. Instead, she found that the Agency retained the discretion to accept or reject volunteers and to direct the assignment of Customs Officers to the teams. *Id.* Moreover, the Arbitrator agreed with the Agency that, where a change in an officer's work schedule is made to accommodate a court appearance, the Agency is not required to pay backpay. *Id.* at 13. Finally, the Arbitrator found that the Agency violated 5 U.S.C. § 6101(a)(3)(E) by changing work schedules, in at least some cases, in order to avoid overtime or holiday pay premiums. *Id.* at 13-14.

As for attorney fees, the Arbitrator found that the Union was the prevailing party, that the award of attorney fees was in the interest of justice, and that the fees sought by the Union were reasonable. *Id.* at 15-23. In her remedial award, the Arbitrator ordered the relief set out in her Interim Award, along with compensation under the Back Pay Act and attorney fees. *Id.* at 25-26.

III. Positions of the Parties

A. Agency's Exceptions

First, the Agency contends that the awards are contrary to law because the Arbitrator improperly subjected Customs Officers to the provisions of 5 U.S.C. § 6101 and its implementing regulations at 5 C.F.R. part 610, specifically, 5 C.F.R. § 610.121. Exceptions at 11-17. The Agency notes language in part 610 stating that the part applies only to "each employee to whom subpart A of part 550 applies." *Id.* at 12 (quoting 5 C.F.R. § 610.101). The Agency notes, in turn, that part 550, governing premium pay, excludes "overtime, night, Sunday, or holiday" services performed pursuant to "19 U.S.C. 261, 267, involving customs inspectors and canine enforcement officers." *Id.* (quoting 5 C.F.R. § 550.101(d)(1)). According to the Agency, this shows the Office of Personnel Management's (OPM's) recognition that Customs Officers have their own system for premium pay under the Customs Officer Pay Reform Act (COPRA), 19 U.S.C. §§ 261 and 267. *Id.*

The Agency argues, in the alternative, that the awards are contrary to law because the Commissioner's decision to except Customs Officers was made in accordance with congressional intent, 5 U.S.C. § 6101(a)(3), and 5 C.F.R. § 610.121. *Id.* at 18-34. In this regard, the Agency asserts that congressional intent supports the Commissioner's determination that Customs Officers are excepted from the scheduling requirements contained in 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. *Id.* at 18-23, 33. The Agency claims that language in several versions of a Department of Treasury, Bureau of Customs manual (Manual) supports its claim that the Commissioner properly excepted Customs Officers in accordance with 5 U.S.C. § 6101(a)(3). *Id.* at 23-26. Additionally, the Agency asserts that language contained in an Agency regulation, 19 C.F.R. § 24.16(d), and RNIAP supports its assertion that the Commissioner acted in accordance with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. *Id.* at 27-33.

Next, the Agency contends that the Arbitrator's finding that employees who voluntarily participate on special work teams are entitled to backpay is based on a nonfact. *Id.* at 34-38. Specifically, the Agency contends that the Arbitrator erred in her conclusion that "it is clear that the Agency at all times has retained the discretion to accept or reject volunteers and to direct the assignment of Customs Officers to such teams." *Id.* at 34-35 (quoting Remedial Award at 11-12). In addition, the Agency contends that this conclusion fails to draw its essence from Article 20, Section 23 of the parties' agreement, which the Agency claims reinforces the voluntary nature of participation on the teams. *Id.* at 35.

Further, the Agency contends that the awards are based on a nonfact and are contrary to law because the Arbitrator failed to recognize that the Agency's scheduling practices were "holiday-blind." *Id.*

at 38-39. The Agency explains that it accommodated changes in workload during holidays so as to "avoid a serious handicapping to its mission or substantially increased costs . . . ." *Id*. at 40.

The Agency also asserts that the remedial award is contrary to law because relief under the Back Pay Act cannot be awarded for violations of 5 U.S.C. § 6101(a)(3). *Id*. at 42 (citing *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985)).

Finally, the Agency contends that the awards violate equitable principles because they require the Agency to reimburse employees for the entire six-year period prior to the filing of the grievance. *Id*. at 43. Instead, the Agency contends, the retroactive award of backpay should not commence until the date that the Union filed the grievance because the Union "slept on its rights" by waiting for 5 ½ years after the RNIAP took effect before filing its grievance. *Id*. at 43-44.

B. Union's Opposition

The Union contends that the Arbitrator correctly ruled that Customs Officers are covered by 5 U.S.C. § 6101 and 5 C.F.R. § 610.121. Opp'n at 9-15. In this regard, the Union notes that the definition of "employee" in 5 U.S.C. § 6101(a)(1) contains an express exclusion for those individuals listed in 5 U.S.C. § 5541(2) and that Customs Officers are not included on that list. *Id*. at 10. Similarly, the Union notes, as does the Agency, that subpart A of part 610 applies to each employee to whom subpart A of part 550 applies. *Id*. at 11. The Union notes further that subpart A of part 550 provides that it applies to "each employee in or under an Executive agency, as defined in 5 U.S.C. 105, except those named in paragraphs (b) and (c) of this section." *Id*.[4] (quoting 5 C.F.R. § 550.101(a)). Observing that neither subsection (b) nor (c) of 5 C.F.R. § 550.101 excludes Customs Officers from the coverage of subpart A of part 550, the Union contends that Customs Officers are covered by 5 C.F.R. § 610.121. *Id*. at 11-12. The Union contends that the Agency's argument to the contrary contradicts the parties' agreement, which reflects the provisions set forth in 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and requires the Agency to schedule Customs Officers in accordance with those provisions. *Id*. at 13.

Next, the Union contends that the Arbitrator correctly determined that the RNIAP work scheduling standards do not comply with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a). *Id*. at 15. In this regard, the Union contends that the Arbitrator correctly found that the RNIAP's scheduling regime did not incorporate the only available exception: that "the [A]gency would be seriously handicapped in carrying out its functions or that costs would be substantially increased." *Id*. In addition, the Union contends, there is no evidence that the Agency head made a determination that the Agency could not comply with 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a) because to do so would seriously handicap it in carrying out its functions or that its costs would be substantially increased. *Id.* at 17-23. Further, the Union contends that, as the Arbitrator found, the record contains numerous scheduling changes by the Agency that violated the statute and regulation. *Id*. at 23-24.

Additionally, the Union contends that the Arbitrator did not base her award on a nonfact when she determined that employees volunteering to participate in special work teams are entitled to the scheduling protections of 5 U.S.C. § 6101 and 5 C.F.R. § 610.121. *Id.* at 25. Instead, according to the Union, the record supports the Arbitrator's finding that the Agency maintained discretion over the assignment of employees to the teams. *Id*. at 8, 26. Nor, according to the Union, did the Arbitrator base her award on a nonfact when she determined that the Agency did not engage in holiday-blind scheduling. *Id*. at 26. The Union argues that the Agency's explanation that it changed employee schedules due to holiday workload is an admission that it violated the prohibition in 5 U.S.C. § 6101(a)(3)(E) and 5 C.F.R. § 610.121(a)(5) against "the occurrence of holidays . . . affect[ing] the designation of the basic workweek." *Id*. at 27.

Finally, the Union contends that the remedial award does not violate equitable principles by requiring the Agency to reimburse backpay for the entire six-year period prior to the filing of the grievance. *Id*. at 32.

IV. Preliminary Issues

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before

4. The parties do not dispute that the Agency, which is within an executive department, is an "Executive agency" as defined in 5 U.S.C. § 105.

the . . . arbitrator." 5 C.F.R. § 2429.5.[5] *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003) (the Authority will not consider issues that could have been, but were not, presented to the arbitrator).

The Agency asserts that the remedial award is contrary to law because relief under the Back Pay Act cannot be awarded for violations of 5 U.S.C. § 6101(a)(3). Exceptions at 42 (citing *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985)). In addition, the Agency asserts that, under Article 20, Section 23 of the parties' agreement, employees volunteer to participate in the special work teams. *Id*. at 35.

The Agency could have made, but did not make, these arguments before the Arbitrator. Indeed, in its response to the Union's petition for attorney fees, the Agency acknowledged the applicability of the Back Pay Act, stating that: "[s]hould a remedial order for backpay be found appropriate, the Agency proposes that the remedial order be limited to the date of the grievance . . . and the specific relief be as simple as: The Agency is ordered to make impacted [Customs] Officers whole in accordance with the Back Pay Act." Opp'n, Ex.13 at 16. Likewise, there is no indication in the record that the Agency ever argued before the Arbitrator that, under Article 20, Section 23, participation in the special work teams is strictly voluntary. Because these arguments could have been presented below, but were not, we find that both of these arguments are barred by § 2429.5 and dismiss these exceptions.

V. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Agency contends that the award was based on two nonfacts: (1) that the Agency retained discretion over the assignment of employees to special work teams and that, therefore, employees participating in those teams were entitled to backpay; and (2) that the Agency's scheduling policies were not holiday-blind. However, both the Agency's degree of discretion over assignments to the special work teams and whether the Agency's adjustment of work schedules for holidays was for the purpose of avoiding holiday pay were factual matters that were disputed before the Arbitrator. *See* Remedial Award at 11-12 (special work teams), 13-14 (holidays affecting scheduling of basic workweeks). Accordingly, we deny this exception.

B. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any 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 the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Customs Officers are covered by 5 U.S.C. § 6101 and 5 C.F.R. § 610.121.

The Agency contends that the awards are contrary to law because the Arbitrator improperly subjected Customs Officers to the provisions of 5 U.S.C. § 6101 and its implementing regulations at 5 C.F.R. part 610, specifically, 5 C.F.R. § 610.121. Exceptions at 11-17. According to the Agency, because 5 U.S.C. § 6101 provides OPM with the authority to promulgate implementing regulations, and because Congress has not indicated that OPM's regulations do not accurately reflect Congress's intent regarding 5 U.S.C. § 6101, "any exemption or exclusion from [p]art 610 necessarily reflects exclusion from the provisions of 5 U.S.C. § 6101." *Id*. at 12.

5. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

The Agency's argument is without merit. The definition of "employee" in 5 U.S.C. § 6101(a)(1) contains an express exclusion for those individuals listed in 5 U.S.C. § 5541(2). Customs Officers are not included on that list. In addition, the coverage provision of 5 C.F.R. part 610 states that it applies to "each employee to whom [s]ubpart A of [p]art 550 applies . . . ." 5 C.F.R. § 610.101. Subpart A of part 550 states that it applies "to each employee in or under an Executive agency . . . except those named in paragraphs (b) and (c) of this section." 5 C.F.R. § 550.101(a). Customs Officers do not fall within any of the exceptions set out in § 550.101(b). Moreover, as the Arbitrator explained, paragraph (c) merely recognizes that Customs Officers, among other groups of employees subject to the overtime pay provisions of Section 7 of the Fair Labor Standards Act and 5 C.F.R. part 551, are excluded from the overtime pay rules set out in subpart A of part 550. Interim Award at 18-19. It does not also mean that Customs Officers are excluded from the scheduling protections in 5 C.F.R. § 610.121.

The Agency argues that, because 5 C.F.R. § 550.101(d)(1) excludes overtime, night, Sunday, and holiday services conducted by Customs Officers and covered by the COPRA, these employees are not "employees" to which subpart A of part 550 applies and, therefore, they are excluded from the scheduling protections set out in 5 C.F.R. § 610.121. This interpretation ignores the plain language of 5 U.S.C. § 5541(2), in which Congress chose to exclude seventeen categories of individuals from the definition of "employee," but not Customs Officers. It also ignores the plain language of 5 C.F.R. § 550.101, paragraph (a), which covers Customs Officers, and paragraph (b), which explicitly excludes seventeen categories of individuals, but not Customs Officers. The Agency does not cite any legal precedent to support this strained interpretation of the foregoing statutes and regulations.[6] The Union, however, cites *Acuna v. U.S.*, 479 F.2d 1356, 1362 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 905 (1974) (*Acuna*), which involved immigration inspectors, who have a special overtime pay system recognized by 5 C.F.R. § 550.101(d)(3). As is the case with the Customs Officers, subpart A of part 550 does not apply to the overtime, night, Sunday, and holiday services provided by immigration inspectors. Yet, the *Acuna* court analyzed the immigration inspectors' scheduling claims under 5 U.S.C. § 6101.

6. Nothing in the COPRA or its regulations at 19 C.F.R. § 24.16 excludes Customs Officers from the scheduling protections.

Accordingly, we find that the Customs Officers are covered by 5 U.S.C. § 6101 and 5 C.F.R. § 610.121, and deny this exception.

2. The Customs Officers are not excepted from the scheduling requirements in accordance with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a).

As noted by the Arbitrator, both 5 U.S.C. § 6101 and 5 C.F.R. § 610.121 contain an exception from compliance with the work scheduling requirements when the head of an executive agency "determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased . . . ." 5 U.S.C. § 6101(a)(3); 5 C.F.R. § 610.121(a); *see also* Interim Award at 20. In order to qualify for this exception, an agency head must make a determination that "an exception from the normal scheduling was justified, in view of agency functions and the costs involved." *Acuna*, 479 F.2d at 1362. An agency head makes a determination that the agency would be "seriously handicapped" or that "costs would be substantially increased" when the agency head justifies the need for an exception with a "discussion of the nature of work performed" by the employees and "the inherent administrative difficulties in scheduling their hours of duty." *Id.* Although not requiring "exhaustive findings," such determination must be "reasoned." *Gahagan v. U.S.*, 19 Cl. Ct. 168, 179 (1989) (*Gahagan*). A serious handicap is one that "would jeopardize an agency's entire mission and demand priority attention throughout the organization." *Id*. Moreover, an agency head fails to make such a determination simply by instructing in a policy that schedulers will prepare workweek schedules to improve efficiency. *Id*. at 178-79.

The Agency's contention that the Commissioner's determination to except Customs Officers was made in accordance with 5 U.S.C. § 6101 and 5 C.F.R. § 610.121 is without merit. Although the Agency asserts that the Commissioner's determination to except Customs Officers is supported by congressional intent, this assertion fails to demonstrate that the Commissioner made a reasoned decision in accordance with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a). *See Gahagan*, 19 Cl. Ct. at 179 (determining that the agency must provide evidence which demonstrates that the agency head made a reasoned determination in accordance with § 6101(a)(3)).

Also, the Agency relies on language contained in the Manual to support its contention that the

Commissioner's determination to except Customs Officers was made in conformity with 5 U.S.C. § 6101 and 5 C.F.R. § 610.121. Exceptions at 23-26. However, because the Manual was superseded by the RNIAP, the Agency's reliance on it does not prove that the Commissioner excepted Customs Officers to avoid seriously handicapping the Agency in performing its functions or substantially increasing the cost of customs operations. *See id.* at 27, 29-34 (conceding that, after Congress passed the Consolidated Budget Reconciliation Act of 1993 (COBRA) containing the statutory provisions for COPRA, the Manual was no longer applied to customs inspectors and that the Agency implemented COPRA through RNIAP); Interim Award at 12 (noting that Section 3 of RNIAP states that "[t]he policies and procedures contained in this Handbook take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local levels, concerning the matters covered within this Handbook" and that "[t]he policies and procedures contained in this Handbook reflect the parties' full and complete agreement on the matters contained and addressed herein"); *see also NTEU, Chapter 137*, 60 FLRA 483, 487 (2004) (finding that, by its terms, Section 3 established RNIAP as the governing policies and procedures with respect to inspectional assignment matters over any and all other agreements and that, consistent with its clear terms, Section 3 terminated locally negotiated agreements concerning inspectional assignment matters).

Although the Agency asserts that language contained in an Agency regulation, namely 19 C.F.R. § 24.16(d), supports its assertion that the Commissioner excepted Customs Officers in accordance with 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121, the language contained in § 24.16(d) does not state that the Agency's functions will be seriously handicapped, or that costs will be substantially increased, if work assignment priorities are not followed; rather, § 24.16(d) merely affirms that "[t]ours of duty should be aligned with the Customs workload" and that "[a]ll work assignments should be made in a manner which minimizes the cost to the government or party in interest." Because precedent indicates that changes to employees' hours of work are not justified under 5 U.S.C. § 6101 when made only to improve efficiency, the Agency has failed to demonstrate that the Commissioner properly excepted Customs Officers. *See Gahagan*, 19 Cl. Ct. at 179 (determining that the agency head did not make a determination that its costs would be substantially increased in the 1986 policy because improving efficiency might affect agency costs only marginally); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 49 FLRA 1563, 1566 (1994) (quoting *Gahagan*, 19 Cl. Ct. at 179) (noting that "[i]mproving an agency's efficiency is different from seriously handicapping its functions" because a serious handicap, within the meaning of § 6101, would jeopardize an agency's mission).

Additionally, the Agency cites phrases such as "operational need" and "budgetary limitations" contained in RNIAP to support its contention that the Commissioner's determination to except Customs Officers was made in conformity with 5 U.S.C. § 6101 and 5 C.F.R. § 610.121. Exceptions at 29-33. However, because precedent demonstrates that changes made to employees' work schedules are not justified when made to further the agency's mission or to address budgetary limitations, the Agency's reliance on RNIAP does not prove that the Commissioner decided to except Customs Officers from the scheduling requirements contained in 5 U.S.C. § 6101 and 5 C.F.R. § 610.121 to avoid seriously handicapping the Agency in performing its functions or substantially increasing the cost of customs operations. *See Gahagan*, 19 Cl. Ct. at 179; *Veterans Admin. Med. Ctr., Palo Alto, Cal.*, 36 FLRA 98, 106 (1990) (*VAMC Palo Alto*) (finding that, although the agency argued that transporting patients on recreational outings furthered its mission and that budgetary limitations precluded regularly scheduled overtime, it failed to demonstrate that it changed the work schedules of motor vehicle operators to prevent serious handicapping of its functions or to prevent substantially increased costs).

Consequently, because the Commissioner did not make a reasoned "handicap" or "substantial cost" determination in order to justify his decision to except Customs Officers from the scheduling requirements of 5 U.S.C. § 6101 and 5 C.F.R. § 610.121, the Agency has failed to demonstrate that the award is deficient. *See Phila. Naval Shipyard*, 39 FLRA at 604-05 (upholding the arbitrator's determination that the agency did not meet the requirements of law (5 U.S.C. § 6101(a)(3)) and regulations when it modified the third shift production department employees' schedule). Accordingly, we deny this exception.

3. The Agency's scheduling practices for the holidays did not comply with 5 U.S.C. § 6101(a)(3)(E) and 5 C.F.R.§ 610.121(a)(5).

The Agency contends that its scheduling practices for the holidays were in compliance with 5 U.S.C. § 6101(a)(3)(E) and 5 C.F.R. § 610.121(a)(5) because: (1) the Agency's scheduling policies were holiday-blind and (2) it needed to adjust schedules to changed workloads during holidays in order to prevent serious handicapping and substantially increased costs in performing its mission. However, as discussed above, (1) the Arbitrator determined that the Agency's scheduling policies, in at least some cases, were not holiday-blind; and (2) based on the evidence, the Agency head failed to make a determination of "handicap" or "substantial cost" warranting an exception from the requirement that the occurrence of holidays not affect the designation of the basic workweek. Consequently, because the Agency's scheduling practices did not comply with the requirement that the occurrence of holidays not affect the designation of the basic workweek, the Agency has failed to demonstrate that the award is deficient. Accordingly, we deny this exception.

4. The Arbitrator did not err in determining that backpay was available under the Back Pay Act for the entire six-year period preceding the filing of the grievance.

The Agency contends that the awards violate equitable principles because they require the Agency to reimburse employees for the entire six-year period prior to the filing of the grievance even though, the Agency claims, the Union took too long to file it. Concerning the time period for which relief may be awarded, 5 U.S.C. § 5596(b)(4) provides, in relevant part, as follows: "[I]n no case may pay, allowances, or differentials be granted under this section for a period beginning more than [six] years before the date of the filing of a timely appeal[.]" The Authority has specifically held that this provision establishes the earliest date from which an award of backpay may commence. *AFGE, Local 1156*, 57 FLRA 602, 603 (2001); *accord AFGE, Local 933*, 58 FLRA 480, 482 (2003). In addition, the Authority has determined that Back Pay Act recovery periods are within the discretion of arbitrators, as long as awards do not exceed the maximum recovery authorized by law. *Id.* (citations omitted). Moreover, the Back Pay Act imposes no time restrictions on the filing of grievances. *See AFGE, Local 933*, 58 FLRA at 482 (finding that Back Pay Act does not, implicitly or explicitly, establish a filing period for negotiated grievance procedures). Accordingly, we find that the Arbitrator did not err in her interpretation of the Back Pay Act and deny this exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.

APPENDIX

5 U.S.C. § 6101 provides, in pertinent part:

> (a)(1) For the purpose of this subsection, "employee" . . . does not include an employee . . . excluded from the definition of employee in section 5541(2) of this title, except as specifically provided under this paragraph. . . .
>
> (a)(3) Except when the head of an Executive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that –
>
> > (A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
> >
> > . . . .
> >
> > (E) the occurrence of holidays may not affect the designation of the basic workweek . . . .

5 C.F.R. § 610.121 provides, in pertinent part:

> (a) Except when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he or she shall provide that --
>
> > (1) Assignments to tours of duty are scheduled in advance of the administrative workweek over periods of not less than 1 week;
> >
> > . . . .
> >
> > (5) The occurrence of holidays may not affect the designation of the basic workweek . . . .

Section 7116(a) of the Statute provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency –
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> >
> > . . . .
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
> >
> > . . . .
> >
> > (8) to otherwise fail or refuse to comply with any provision of this chapter.

19 U.S.C. § 267 provides, in pertinent part:

> (b) Premium pay for customs officers
>
> > (1) Night work differential
> >
> > > (A) 3 p.m. to midnight shiftwork
> > >
> > > If the majority of the hours of regularly scheduled work of a customs officer occurs during the period beginning at 3 p.m. and ending at 12 a.m., the officer is entitled to pay for work during such period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 15 percent of that basic rate.
> > >
> > > (B) 11 p.m. to 8 a.m. shiftwork
> > >
> > > If the majority of the hours of regularly scheduled work of a customs officer occurs during the period beginning at 11 p.m. and ending at 8 a.m., the officer is entitled to pay for work during such period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 20 percent of that basic rate.

> (C) 7:30 p.m. to 3:30 a.m. shiftwork
>
> If the regularly scheduled work assignment of a customs officer is 7:30 p.m. to 3:30 a.m., the officer is entitled to pay for work during such period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 15 percent of that basic rate for the period from 7:30 p.m. to 11:30 p.m. and at the officer's hourly rate of basic pay plus premium pay amounting to 20 percent of that basic rate for the period from 11:30 p.m. to 3:30 a.m.
>
> (2) Sunday differential
>
> A customs officer who performs any regularly scheduled work on a Sunday that is not a holiday is entitled to pay for that work at the officer's hourly rate of basic pay plus premium pay amounting to 50 percent of that basic rate.
>
> (3) Holiday differential
>
> A customs officer who performs any regularly scheduled work on a holiday is entitled to pay for that work at the officer's hourly rate of basic pay plus premium pay amounting to 100 percent of that basic rate.
>
> (4) Treatment of premium pay
>
> Premium pay provided for under this subsection may not be treated as being overtime pay or compensation for any purpose.

Article 20, Section 23 provides, in pertinent part:

> In the absence of local agreements, the following provisions apply:
>
> A. The parties will solicit volunteers for participation in the assignment. . . .
>
> B. Where workload requirements and/or staffing needs dictate and where there are no qualified volunteers on a waiting list (see F., below), the Employer may conduct additional solicitations during the course of the year; if additional solicitations are conducted, selections will be made pursuant to F., below.
>
> . . . .
>
> F. If there are too few volunteers, selections will be made by inverse order of seniority utilizing the procedures outlined in Section 5.B., above.

Exceptions, Ex. 20 at 136-37.