

66 FLRA No. 107

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2455
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4780

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DECISION

March 30, 2012

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

Decision by Member Thomas M. Beck for the Authority

I. Introduction and Background

The Agency placed the grievant on administrative duty for eighteen months while it conducted an investigation into whether he used excessive force in performing his duties as a border patrol agent. After the investigation, the grievant was returned to his regular duties, and his Union presented a grievance charging that, during the eighteen months on administrative duty, the grievant was wrongfully prevented from earning administratively uncontrollable overtime (AUO), night differential pay, holiday pay, and other premium pay. Arbitrator John B. Barnard determined that the investigation should have taken only eight months and awarded to the grievant backpay for premium pay lost during the additional ten months spent on administrative duty. Award at 11-12.

In exceptions to the Arbitrator's award filed under § 7122(a) of the Federal Service Labor-Management Relations Statute, the Agency argues that the Arbitrator erred as a matter of law when he found the grievance to be timely and when he found that the Agency committed an unjustified or unwarranted personnel action that resulted in a loss of pay to the grievant. But the Agency has identified no law, rule, or

regulation that would invalidate the Arbitrator's determination on timeliness. Further, the Arbitrator determined that the Agency violated the parties' agreement by failing to conduct a timely investigation, and determined also that, but for this violation, the grievant would have worked overtime. These findings, to which we defer, are adequate to support an award under the Back Pay Act. Consequently, we deny the Agency's exceptions.

II. Analysis and Conclusions

A. The Arbitrator's procedural arbitrability determination is not deficient.

The Agency argues that the Arbitrator's timeliness determination is contrary to law because the grievance "was untimely per Article 33(E)" of the parties' agreement,¹ Exceptions at 12, because it was not filed within thirty days of any relevant "incident," *id.* at 8-11. For a procedural arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure. *U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011).

Here, the Agency does not cite any law, rule, or regulation with which the Arbitrator's award fails to conform. *See AFGE, Local 779*, 64 FLRA 672, 674 (2010) (denying a contrary-to-law exception because it was based on the arbitrator's interpretation of the parties' agreement). Accordingly, we find that the Agency has not demonstrated that the Arbitrator's timeliness determination is deficient and deny this exception. *See AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 890 (2011) (Member Beck dissenting in part) (denying an exception that failed to support a properly raised ground under 5 C.F.R. § 2425.6(a)-(b) pursuant to § 2425.6(e)).

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

The Agency also argues that the award is contrary to the Back Pay Act. Exceptions at 12. 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*, but defers to the

¹ Article 33(E) of the parties' agreement provides, in relevant part: "Informal grievances must be filed within thirty (30) calendar days after the incident occurs." Exceptions, Attach. P, Collective Bargaining Agreement at 54.

arbitrator's underlying factual findings unless the excepting party establishes that they were based on nonfacts. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 340 (2011). An award of backpay under the Back Pay Act is authorized only if an unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials. *AFGE, Local 3627*, 66 FLRA 207, 209 (2011) (citing *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998)).

With respect to the first Back Pay Act requirement, it is well established that a personnel action that violates a collective bargaining agreement is unjustified or unwarranted under the Back Pay Act. *U.S. Dep't of Veterans Affairs Med. Ctr., Coatesville, Pa.*, 56 FLRA 829, 834 (2000). The Arbitrator found that the Agency violated Article 32(G) of the parties' agreement by conducting an "overly drawn out investigation."² Award at 12. The Agency challenges the Arbitrator's finding on two bases.

First, the Agency argues that the Arbitrator's finding is based on nonfacts because the Arbitrator erroneously found that the Agency was delinquent in its investigation and because he held the Agency responsible for actions out of its control. Exceptions at 20, 23. 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. *NFFE, Local 1984*, 56 FLRA 38, 41 (2000). Even assuming that the Arbitrator's findings constitute factual findings that may be challenged as being based on nonfacts, these facts were disputed below during the arbitration hearing. Exceptions, Attach. B, Tr. at 3; Opp'n at 3-4. Therefore, they do not provide a basis for finding the award deficient. See *AFGE, Local 1395*, 64 FLRA 622, 626 (2010) (citing *AFGE, Local 376*, 62 FLRA 138, 141 (2007) (Chairman Cabaniss concurring)) (denying a nonfact exception because the facts were disputed before the arbitrator).

Second, the Agency argues that the Arbitrator erred in finding that it violated Article 32(G) of the

parties' agreement because that provision is inapplicable. Exceptions at 14. However, the Authority defers to an arbitrator's interpretation of the parties' agreement in this context.³ See *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.*, 58 FLRA 279, 284 (2003). Thus, the Arbitrator's finding that the Agency violated Article 32(G) of the parties' agreement satisfies the first requirement of the Back Pay Act. See *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 (2011).

The Agency also challenges the Arbitrator's determination concerning the second Back Pay Act requirement. According to the Agency, the grievant did not suffer a withdrawal or reduction in pay, allowances, or differentials because the Union could not show that the grievant would have worked overtime and because the grievant was "not entitled to . . . overtime." Exceptions at 19. The Authority has found that, even if employees did not actually work overtime, they may receive backpay under the Back Pay Act if a contract violation resulted in the failure to work overtime. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 463 (2011) (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maintenance Facility, Bremerton, Wash.*, 62 FLRA 4, 7 (2007)). Although the Agency contends that the grievant failed to show he would have worked overtime, Exceptions at 19, the Arbitrator explicitly found that the grievant "would have worked the hours," Award at 13. Because the Authority defers to an Arbitrator's factual findings, and because the Agency does not challenge this finding as being based on a nonfact, the Agency has not demonstrated that the Arbitrator's determination concerning the second Back Pay Act requirement is deficient. See *U.S. Dep't of the Army, Fort Carson, Colo.*, 65 FLRA 565, 567 (2011) (upholding an award of backpay because the arbitrator found that the grievant would have worked overtime but for the agency's actions).

We find that the award is not contrary to the Back Pay Act and deny this exception.

III. Decision

The Agency's exceptions are denied.

² Article 32(G) of the parties' agreement provides:

The employer shall furnish employees with notices of proposed disciplinary/adverse actions at the earliest practicable date after the alleged offense has been committed and made known to the employer. It is understood criminal investigations outside the control of the employer may be prolonged, in such cases, the employer shall furnish notice at the earliest practicable date after the employer has obtained control over the matter under investigation.

Award at 2.

³ We note that the Agency does not argue that the Arbitrator's interpretation of Article 32(G) fails to draw its essence from the parties' agreement. See *U.S. Dep't of the Army, Headquarters, I Corps & Fort Lewis, Fort Lewis, Wash.*, 65 FLRA 699, 703 (2011) (upholding an award of backpay because the agency did not successfully challenge the arbitrator's finding of a contract violation on essence grounds).