

**67 FLRA No. 105**

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 1968  
(Union)

and

UNITED STATES  
DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
CASS JOB CORPS CENTER  
OZARK, ARKANSAS  
(Agency)

0-AR-4914

—  
DECISION

April 30, 2014  
—

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Michael B. Huston found that the Agency violated the parties' collective-bargaining agreement by failing to keep an employee (the grievant) in a paid status during certain periods when the grievant was on call. But the Arbitrator found that the parties' agreement limited any remedy to the period beginning thirty days before the grievance was filed. And the Arbitrator found that the Union failed to provide sufficient proof of any specific violations during that thirty-day period, so he declined to award a remedy. This case presents two questions.

The first question is whether the award is contrary to the Back Pay Act<sup>1</sup> because the Arbitrator limited the remedial period to the period beginning thirty days before the grievance was filed. Because the Back Pay Act does not require a recovery period longer than thirty days, the answer is no.

The second question is whether the award is based on nonfacts. Because the Union challenges the Arbitrator's weighing of the evidence, and such challenges do not show that an award is based on a nonfact, the answer is no.

<sup>1</sup> 5 U.S.C. § 5596.

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

After the Agency hired the grievant on May 24, 2009, he worked for an extended period of time without a day off. And during that time he was almost always on call. He filed a grievance alleging that the Agency violated the parties' agreement by not paying him standby pay and by improperly constraining him from taking personal and annual leave. The parties did not resolve the grievance and submitted it to arbitration, where the Arbitrator framed the issue as follows: "Did the Agency violate any provisions of Articles 18 and/or 19 [of the parties' agreement] with regard to the scheduling and payment for [the grievant's] service while [in] on-call or standby status from May 24, 2009 to the present? If so, what shall the remedy be?"<sup>2</sup>

Article 18.11 of the parties' agreement describes "[o]n-call status [a]s an assignment of coverage for call back to duty during specific nonduty timeframes during the administrative work week."<sup>3</sup> It states that "[a]n employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if . . . [t]he employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted," or "[t]he employee is allowed to make arrangements such that any work that may arise during the on-call period will be performed by another person."<sup>4</sup> It further states that "[m]anagement will provide employees who are on[call] with a list of qualified individuals the employee may contact for this purpose."<sup>5</sup> And it states that "on-call period[s] will be reasonable," that "[n]ormally, employees are entitled to . . . at least [two] days per pay period when they are not on[call], at least one of which will be on their regular day off," and that "employee[s] shall not be on[call] during periods of approved leave."<sup>6</sup> Article 19.8 provides that "[e]mployees will not be required to provide coverage for call back to duty under conditions more restrictive than those provided for in Article 18.11 unless they are in pay status."<sup>7</sup>

The Arbitrator recognized that the grievant was in an on-call status for much of his employment but noted that, on many of those occasions, the parties' agreement did not require the Agency to consider the grievant to be in a pay status because he was allowed to leave a telephone number for the purpose of being contacted if the Agency needed him to work, or because he was able to make arrangements for another employee to perform work arising during the on-call period.

<sup>2</sup> Award at 4.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 6.

Yet the Arbitrator also recognized that the Agency provided the grievant with the name of only one individual whom the grievant could contact for the purpose of sharing the on-call work. He also found that that individual was not even available to assist the grievant for a period in excess of three months – so during that time, the grievant had no one that he could contact for the purpose of sharing the on-call work. In addition, the Arbitrator found that the Agency required the grievant, at times, to work fourteen days in a single pay period and to be on call for all of the hours that he was not working during that same pay period. Finally, the Arbitrator found that the Agency did not allow the grievant a “regular day off,” and noted that the Agency never scheduled the grievant so that he would have at least two days in a pay period when he was not on call “on any regular basis.”<sup>8</sup>

In light of these findings, the Arbitrator concluded that the Agency placed “call conditions” on the grievant that were “more restrictive” than those permitted by Article 18.11 of the parties’ agreement, without placing the grievant in a paid status for those periods, as required in such circumstances under Article 19.8.<sup>9</sup> Thus, the Arbitrator determined that the Agency’s scheduling practices violated the parties’ agreement.

However, the Arbitrator also found that Article 9.7(b) of the parties’ agreement – which pertinently requires filing a grievance “within [thirty] days of the incident resulting in the complaint or the date the grievant first became aware of the matter”<sup>10</sup> – required the grievant to file his grievance within thirty days of either the grieved matter or the date on which the grievant first became aware of that matter. The Arbitrator determined that the grievant was aware of the violation thirty days before filing the grievance on October 21, 2011 – in other words, on September 20, 2011 – and concluded that “the events about which [the grievant could] be allowed to grieve and seek remedy extend[] backwards only as far as” September 20, 2011.<sup>11</sup>

But the Arbitrator found that “[i]n the second[-]step grievance, the evidence presented at the arbitration hearing, and the Union’s closing brief, there is virtually no specific claim made with regard to events occurring between September 20 and October 20.”<sup>12</sup> And the Arbitrator found that there were “insufficient proofs that [contractual violations] occurred between September 20 and October 20 . . . [so as] to allow [him]

to provide any of the remedies the Union seeks.”<sup>13</sup> As “none of the evidence showed specific violations in the period of grievability,” the Arbitrator “decline[d] to order any relief.”<sup>14</sup>

The Union filed exceptions to the award.

### III. Analysis and Conclusions

#### A. The award is not contrary to law.

The Union argues that the award is contrary to law.<sup>15</sup> Specifically, the Union claims that the Arbitrator’s limitation of the remedial period is contrary to the Back Pay Act which, according to the Union, provides for a six-year recovery period.<sup>16</sup>

The Back Pay Act provides, in pertinent part, that backpay awarded under the Act may not “be granted . . . for a period beginning more than [six] years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.”<sup>17</sup> The Authority has held that this provision establishes the earliest date from which an award of backpay may commence.<sup>18</sup> However, nothing in the Back Pay Act required the Arbitrator to grant backpay before September 20, 2011.<sup>19</sup> Furthermore, the Arbitrator here found no violation warranting backpay after September 20, 2011.<sup>20</sup> Thus, the Union’s argument provides no basis for finding the award contrary to law.

#### B. The award is not based on a nonfact.

The Union argues that the award is based on nonfacts in two respects.<sup>21</sup> To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>22</sup> Disagreement with an arbitrator’s evaluation of evidence, including the

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 8-10.

<sup>10</sup> Exceptions, App. A at 5.

<sup>11</sup> Award at 3.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 12.

<sup>15</sup> Exceptions at 3-4.

<sup>16</sup> Exceptions Br. at 8-10.

<sup>17</sup> 5 U.S.C. § 5596(b)(4).

<sup>18</sup> *U.S. DHS, U.S. CBP*, 65 FLRA 978, 985 (2011).

<sup>19</sup> See *AFGE, Local 933*, 58 FLRA 480, 482 (2003) (noting that the remedy period established under the Back Pay Act is independent of the filing period established under negotiated grievance procedures).

<sup>20</sup> Award at 11.

<sup>21</sup> Exceptions Br. at 10-11.

<sup>22</sup> *U.S. Dep’t of the Air Force, Lowry Air Force Base, Denver Colo.*, 48 FLRA 589, 593 (1993).

determination of the weight to be given such evidence, provides no basis for finding the award deficient.<sup>23</sup>

The Union's first nonfact argument is that the Arbitrator erred by finding no evidence of violations from September to October of 2011.<sup>24</sup> In this regard, the Union asserts that it provided copies of the grievant's time and attendance records from May 24, 2009, to October 6, 2012.<sup>25</sup> The Union's argument disagrees with the Arbitrator's evaluation of the evidence, including his determination of the weight to be given such evidence. As such, the argument provides no basis for finding the award based on a nonfact.<sup>26</sup>

The Union's second nonfact argument is that the Arbitrator erroneously failed to conclude that the grievant was on call for 917 days. But the Union provides no basis for finding that – for the thirty-day period that the Arbitrator found relevant in this case – the Arbitrator erred by concluding that “none of the evidence showed specific violations.”<sup>27</sup> To the extent that the Union is challenging the Arbitrator's weighing of the evidence, as stated above, this does not provide a basis for finding the award based on a nonfact.<sup>28</sup>

#### **IV. Decision**

We deny the Union's exceptions.

---

<sup>23</sup> *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012) (*IRS*).

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

<sup>25</sup> *Id.* at 10-11.

<sup>26</sup> *IRS*, 67 FLRA at 103.

<sup>27</sup> Award at 12.

<sup>28</sup> *IRS*, 67 FLRA at 103.