

67 FLRA No. 92

UNITED STATES
DEPARTMENT OF THE INTERIOR
U.S. PARK POLICE
(Agency)

and

FRATERNAL ORDER OF POLICE
LABOR COMMITTEE
(Union)

0-AR-4949

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DECISION

April 14, 2014

—————
Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Donald S. Wasserman awarded interest, under the Back Pay Act (BPA),¹ on backpay that he previously had awarded under the Fair Labor Standards Act (FLSA).² The main issue before the Authority is whether the award is contrary to law. Because arbitrators may rely on the BPA to award interest on backpay that they previously awarded under the FLSA, the award is not contrary to law.

II. Background and Arbitrator's Award

This case has a lengthy, factually complicated background that encompasses over seven years of litigation, including four arbitration awards, a previous Authority decision, and a denial of a request for reconsideration of that decision. The litigation began in 2006, when the Union filed a grievance alleging, as relevant here, that the Agency violated the FLSA by requiring certain employees (the grievants) to accept compensatory time, rather than overtime pay, for overtime work.³

The grievance went to arbitration. Before the Arbitrator, the Union initially requested backpay, liquidated damages, and attorney fees, but did not request interest. In his first award (the backpay award), the Arbitrator awarded backpay, stating that the backpay “shall be paid retroactively from September 22, 2004[,] until such time as affected employees are made whole.”⁴ He denied the Union’s request for liquidated damages, but “tentatively approved” the Union’s request for attorney fees, subject to the Union’s briefing of that issue.⁵ In addition, he retained jurisdiction for a specified period of time “in the event that any part of this award requires clarification.”⁶ The Agency filed, with the Authority, exceptions to the backpay award.⁷

While exceptions to the backpay award were pending before the Authority, the parties agreed to extend the Arbitrator’s jurisdiction “indefinite[ly,] . . . subject to revocation by either party at any time.”⁸ Subsequently, the Arbitrator issued his second award (the first fee award), which partially granted the Union’s request for attorney fees. In awarding fees, the Arbitrator cited the BPA’s attorney-fee standards. A dispute then arose as to whether the Agency was required to pay the fees while its exceptions to the backpay award were pending before the Authority. In his third award (the second fee award), the Arbitrator found that the Agency was not required to do so.

Thereafter, the Authority issued a decision that granted in part, and denied in part, the Agency’s exceptions to the backpay award.⁹ The Authority subsequently denied the Agency’s request for reconsideration.¹⁰

Shortly after the Authority denied the Agency’s request for reconsideration, beginning with a July 31, 2010 conference and continuing “for the next [eighteen] months, throughout 2011,” the Arbitrator and the parties had “no [fewer] than [fourteen] status teleconferences, progress reports, and information[-]sharing conversations,” as well as “many exchanges of emails and written documents.”¹¹ During the July 31

¹ 5 U.S.C. § 5596.

² 29 U.S.C. §§ 201-219.

³ *U.S. Dep’t of the Interior, U.S. Park Police*, 64 FLRA 763, 763 (*Park Police I*), *recons. denied*, *U.S. Dep’t of the Interior, U.S. Park Police*, 64 FLRA 894 (2010) (*Park Police II*).

⁴ Interest Award at 19; *accord id.* at 18 (“back wages must be paid from the period beginning September 22, 2004 and continue until [the Agency] implements the required computations described above and the employees are made whole”).

⁵ *Id.* at 20.

⁶ *Id.*

⁷ *Park Police I*, 64 FLRA at 766.

⁸ Interest Award at 1.

⁹ *Park Police I*, 64 FLRA 763.

¹⁰ *Park Police II*, 64 FLRA at 895.

¹¹ Interest Award at 4.

conference, the Union, “for the first time, raised the issue of interest payments under the [BPA].”¹²

On November 22, 2010, the parties agreed that the matter of interest should be arbitrated and that the Arbitrator should resolve it. There were a number of subsequent conversations, including discussions about when the Agency would pay the grievants their backpay, and in what amounts. On September 20, 2011, the parties again discussed whether interest was warranted, and agreed that if the parties did not settle the issue, then the Arbitrator would arbitrate the dispute. In mid-December, 2011, the parties informed the Arbitrator that they had not reached agreement regarding interest, and requested that he decide the issue.

The Arbitrator then issued his fourth award – the award at issue here (the interest award). In the interest award, the Arbitrator stated that “[t]he issue previously agreed to by the parties and jointly submitted to [him]” was: “Whether or not interest should be awarded (pre-judgment and post-judgment) to [the grievants] on the [backpay] they are due and what impact, if any, the issue of when the interest claim was raised has on such claims.”¹³

The Arbitrator acknowledged the doctrine that the government is generally immune from suit for money damages (the doctrine of sovereign immunity), but found that the BPA waives sovereign immunity from interest payments on backpay that is awarded under the FLSA.

The Arbitrator noted the Agency’s citation to *U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Office of Marine & Aviation Operations, Marine Operations Center, Norfolk, Virginia (NOAA)*,¹⁴ where the Authority denied a union’s request for interest because the union had not requested interest at arbitration.¹⁵ But the Arbitrator found that decision distinguishable. As relevant here, he stated that, unlike in *NOAA*, in this case

[t]he parties voluntarily agreed to have this matter (interest) submitted to arbitration at the [U]nion’s request. [The Agency] could have, but did not, refuse to arbitrate; nor did it challenge the arbitrability of the issue. It also had the ability to cancel (unilaterally) my jurisdiction in the matter. Instead, [the Agency] voluntarily agreed to arbitration, even stipulating (with [the

Union]) on the precise language to submit to the [A]rbitrator.¹⁶

The Arbitrator also rejected Agency claims that awarding interest was a “substantive change[] to the [backpay] award” that he was not permitted to make.¹⁷ Specifically, he noted that, as part of his extended jurisdiction to which the parties had agreed, he had issued two fee awards and participated in “many status conferences and email exchanges” that had “gone far beyond clarifying” the backpay award.¹⁸ He also stated that an award of interest was “within a reasonable definition of making the employees ‘whole,’ which [was] . . . the critical point or the bottom line of” the backpay award.¹⁹ Moreover, he noted that the parties’ stipulated issue “afford[ed him] the authority and latitude to carefully review their evidence and arguments concerning the payment of interest, and to render a decision.”²⁰

In addition, the Arbitrator found that the Union raised the matter of interest “initial[ly] . . . on July 13, 2010”²¹ – shortly after the Authority’s denial of the Agency’s request for reconsideration – and that the Union had raised it “in the context of discussing the BPA.”²² Nevertheless, the Arbitrator found that it was “immaterial when the request for interest was made.”²³ In this connection, the Arbitrator stated that “[n]o provision of the BPA requires the victim of an unjustified and unwarranted personnel action to request interest at a specific time.”²⁴ The Arbitrator also cited *U.S. DOD, Marine Corps Logistics Base, Barstow, California (Marine Corps)*,²⁵ and that decision’s “progeny.”²⁶ The Arbitrator stated that *Marine Corps* “makes it appear abundantly clear”²⁷ that the BPA – which pertinently states that interest “shall” be awarded on backpay awarded under the BPA²⁸ – “is dispositive, irrespective of when interest is requested.”²⁹

Based on the foregoing, the Arbitrator concluded that interest was warranted. In addition, he stated that he had “consider[ed] reviewing pre-judgment and post-judgment interest separately, but could find no support for that analysis in [Authority] case law.”³⁰

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ 57 FLRA 559 (2001).

¹⁵ *Id.* at 565.

¹⁶ Interest Award at 11.

¹⁷ *Id.* at 18.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 15.

²² *Id.*

²³ *Id.* at 18.

²⁴ *Id.* at 15 (internal quotation marks omitted).

²⁵ 37 FLRA 796 (1990).

²⁶ Interest Award at 16-17.

²⁷ *Id.* at 16.

²⁸ 5 U.S.C. § 5596(b)(2)(A).

²⁹ Interest Award at 16.

³⁰ *Id.* at 18.

Accordingly, he awarded the grievants pre- and post-judgment interest, which accrued until the pay period in either August or September 2010 when the Agency began paying overtime on a current basis. He also awarded additional attorney fees, and retained jurisdiction to resolve any “questions or disagreements concerning the meaning of any provision of this award, or otherwise of how to bring this matter to a satisfactory closure.”³¹

The Agency filed exceptions to the interest award, and the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matters

As discussed in greater detail below, the Agency argues that, under the doctrine of sovereign immunity and pertinent case law, the Arbitrator was precluded from awarding interest under the BPA.³² The Union argues that the Agency “waived”³³ any arguments regarding the application of the BPA by: (1) stipulating to the issue before the Arbitrator,³⁴ and (2) failing to challenge the Arbitrator’s previous application of the BPA in the fee awards.³⁵ Although the Agency stipulated to the issue before the Arbitrator in the interest award, that stipulation does not indicate that the Agency conceded that the BPA applies;³⁶ in fact, the Agency expressly argued to the Arbitrator that the BPA did not apply.³⁷ With respect to the Union’s claim that the Agency did not object to the Arbitrator’s previous application of the BPA to the Union’s requests for *attorney fees*, the Union cites no authority for finding that the Agency thereby waived its right to challenge the Arbitrator’s application of the BPA to the Union’s request for *interest*.

In addition, we note that the Arbitrator stated that, during one of the telephone conferences with the parties in 2010, the parties “had a common understanding that . . . interest in accordance with the [BPA] was in order in the absence of liquidated damages.”³⁸ The Agency argues that this statement is incorrect.³⁹ Normally, under § 2429.5 of the Authority’s Regulations,⁴⁰ the Authority will not consider an excepting party’s claims that are inconsistent with claims that the party raised during arbitration.⁴¹ However, the

Authority has declined to apply § 2429.5 to bar claims regarding sovereign immunity because such claims may be raised at any time.⁴² Therefore, even assuming that the Agency agreed at arbitration that the BPA allows interest on FLSA backpay, § 2429.5 does not preclude it from raising its sovereign-immunity claim to the Authority.

For the above reasons, we resolve the Agency’s exceptions on the merits.

IV. Analysis and Conclusions

The Agency contends that, under the doctrine of sovereign immunity, the government may be required to pay interest only if there is a statute that specifically authorizes interest.⁴³ The Agency asserts that the wording of the FLSA provides for liquidated damages, not interest, and that courts have held that the BPA cannot provide a waiver of sovereign immunity for recovery of interest under the FLSA.⁴⁴ Citing the U.S. Court of Federal Claims’ (Claims Court’s) decision in *Angelo v. United States (Angelo)*,⁴⁵ the Agency asserts that this “makes sense, because allowing the BPA to automatically provide a waiver for awarding interest under the FLSA would render the FLSA provision providing for liquidated damages absolutely meaningless.”⁴⁶ According to the Agency, the Authority “has agreed with such reasoning” by holding that “[b]ecause the FLSA is a waiver of sovereign immunity and independently provides a statutory right to money damages, . . . FLSA violations are remedied under the FLSA, not the BPA.”⁴⁷

When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law de novo.⁴⁸ 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.⁴⁹ In making that assessment, the Authority defers to the arbitrator’s

³¹ *Id.* at 19.

³² Exceptions at 4-5.

³³ Opp’n at 5-6.

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ Interest Award at 6.

³⁷ *Id.* at 8-9.

³⁸ *Id.* at 4.

³⁹ Exceptions at 3 n.3.

⁴⁰ 5 C.F.R. § 2429.5.

⁴¹ *NTEU, Chapter 26*, 66 FLRA 650, 652 (2012).

⁴² *SSA, Office of Disability Adjudication & Review, Region I*, 65 FLRA 334, 337 (2010).

⁴³ Exceptions at 4-5.

⁴⁴ *Id.* at 5.

⁴⁵ 57 Fed. Cl. 100 (2003).

⁴⁶ Exceptions at 5.

⁴⁷ *Id.* at 6 (quoting *U.S. Dep’t of Transp., FAA*, 66 FLRA 441, 447 (2012) (*FAA*) (citing *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Greenville, Ill.*, 65 FLRA 607 (2011) (*FCI Greenville*); *U.S. Dep’t of the Navy, U.S. Naval Acad., Nonappropriated Fund Program Div.*, 63 FLRA 100 (2009) (*Naval Acad.*); and *NTEU*, 53 FLRA 1469 (1998)).

⁴⁸ *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)).

⁴⁹ *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

underlying factual findings unless the excepting party establishes that they are nonfacts.⁵⁰

The United States, as sovereign, is immune from suit except as it consents to be sued.⁵¹ As such, an arbitrator's direction that an agency provide monetary damages to an employee must be supported by a statutory authority to impose such a remedy.⁵² An allowance of interest on a claim against the United States requires an explicit waiver of sovereign immunity.⁵³ Absent a waiver of sovereign immunity, an arbitrator's monetary remedy is contrary to law.⁵⁴

Both the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) and the Authority have held that the BPA waives "sovereign immunity from interest claims on awards arising under other statutes, such as the FLSA."⁵⁵ "Like any other waiver of sovereign immunity, however, the [BPA's] allowance of interest against the government is effective only as to awards that come within the scope of the [BPA]."⁵⁶ Thus, in order to determine whether the Arbitrator properly ordered interest, it is necessary to determine whether his backpay award comes within the scope of the BPA.

An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.⁵⁷ The failure to pay an employee in violation of the FLSA is an unjustified or unwarranted personnel action resulting in a withdrawal or reduction of pay under the BPA, which entitles a grievant to interest under the BPA⁵⁸ in situations where the grievant has not received liquidated damages under the FLSA.⁵⁹

In the backpay award, the Arbitrator found that the Agency's failure to pay the grievants violated the FLSA.⁶⁰ Further, the Arbitrator did not award liquidated

damages under the FLSA.⁶¹ For these reasons, the BPA and the above-cited standards support an award of interest on the backpay.

As for the Agency's reliance on *Angelo*,⁶² that decision pertinently stated that if

the BPA separately serves as a waiver of sovereign immunity for a recovery of interest under FLSA, given that such an interest award is *mandatory* under the BPA and that interest and liquidated damages cannot both be awarded, then liquidated damages would never be available in a FLSA action against the United States. "In essence, liquidated damages would be read out of the FLSA. This result is so at odds with the FLSA remedy Congress created that we could not adopt it unless the waiver were plain."⁶³

But, four years after *Angelo*, the Claims Court issued a decision that undercut the above-quoted wording. Specifically, in *Astor v. United States (Astor)*,⁶⁴ the court awarded interest, under the BPA, on overtime pay that was awarded under the FLSA.⁶⁵ In this regard, the court found "no convincing reason why the BPA and the FLSA should not be read as complementary where, as here, plaintiffs are seeking interest on their [backpay] awards."⁶⁶ In reaching this conclusion, the Court distinguished *Angelo* by noting that the decision had "entitl[ed] prevailing plaintiffs to liquidated damages under the FLSA."⁶⁷ Specifically, the Claims Court: (1) held that, absent an award of liquidated damages, BPA interest may be awarded on FLSA backpay; and (2) limited *Angelo*'s holding to cases where liquidated damages have been awarded. Therefore, *Angelo* provides no basis for finding that the Arbitrator – who denied liquidated damages – could not award BPA interest.

As mentioned above, the Agency also cites the Authority's previous statement that "[b]ecause the FLSA is a waiver of sovereign immunity and independently provides a statutory right to money damages, . . . FLSA violations are remedied under the

⁵⁰ *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).

⁵¹ *AFGE, Local 2145*, 66 FLRA 911, 912 (2012) (*Local 2145*).

⁵² *Id.*

⁵³ *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 436 (2001) (citation omitted) (*Marine Operations*).

⁵⁴ *Local 2145*, 66 FLRA at 912.

⁵⁵ *SSA, Balt., Md. v. FLRA*, 201 F.3d 465, 468 (D.C. Cir. 2000) (*SSA*); see also *Marine Operations*, 57 FLRA at 436.

⁵⁶ *SSA*, 201 F.3d at 468.

⁵⁷ *AFGE, Local 446*, 58 FLRA 361, 361-62 (2003).

⁵⁸ *Id.*

⁵⁹ *Marine Operations*, 57 FLRA at 435-36.

⁶⁰ Backpay Award at 18.

⁶¹ *Id.*

⁶² 57 Fed. Cl. 100.

⁶³ *Id.* at 111 (quoting *Adams v. United States*, 48 Fed. Cl. 602, 611 (2001), *aff'd*, 350 F.3d 1216 (Fed. Cir. 2003)).

⁶⁴ 79 Fed. Cl. 303 (2007).

⁶⁵ *Id.* at 318-20.

⁶⁶ *Id.* at 319.

⁶⁷ *Id.*

FLSA, not the BPA.”⁶⁸ However, none of the Authority decisions cited by the Agency demonstrates that the Arbitrator erred in this case. In this regard, *U.S. Department of Transportation, FAA*⁶⁹ held that arbitrators may not award both liquidated damages and interest;⁷⁰ *U.S. DOJ, Federal Bureau of Prisons, Federal Correctional Institution, Greenville, Illinois (FCI Greenville)*,⁷¹ and *U.S. Department of the Navy, U.S. Naval Academy, Nonappropriated Fund Program Division*,⁷² held that the BPA’s requirement that attorney fees be “warranted in the interest of justice” does not apply to attorney fees that are awarded under the FLSA, which has its own attorney-fee requirement;⁷³ and *NTEU*⁷⁴ held that “any inconsistent statutory provisions of the FLSA and the [BPA] must be resolved in favor of applying the terms of the FLSA,”⁷⁵ and that an arbitrator’s award, which did not extend the full period of recovery set forth in the FLSA, was contrary to law.⁷⁶ None of those decisions held that interest may not be awarded under the BPA for backpay awarded under the FLSA where, as here, liquidated damages have not been awarded.

The Agency also argues that the Arbitrator could not award interest under the BPA because, at the time he awarded the backpay, he did not rely on the BPA.⁷⁷ In this regard, the Agency claims that, for an arbitrator to properly award interest under the BPA, “a party needs to have made a BPA claim, which the Union failed to do before the [backpay] issue was adjudicated under the FLSA and the [backpay] was awarded under the FLSA.”⁷⁸ The Agency further claims that the Arbitrator “cannot allow the Union to raise a BPA claim on the underlying FLSA overtime issue several years after that issue was already decided.”⁷⁹ For support, the Agency cites⁸⁰ *Adams v. United States (Adams)*,⁸¹ *NOAA*,⁸² and *U.S. Department of Transportation, FAA, Nashua, New Hampshire (FAA Nashua)*.⁸³

The decisions that the Agency cites do not support a conclusion that the Arbitrator erred. In *Adams*, the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit) denied plaintiffs’ request, on appeal, for interest under the BPA, because the plaintiffs had not cited the BPA before the trial court (the Claims Court).⁸⁴ Similarly, in *NOAA*, the Authority barred a union from arguing an entitlement to interest because the union had not made such an argument to the arbitrator.⁸⁵ Neither *Adams* nor *NOAA* precludes an arbitrator from awarding interest under the BPA, subsequent to a backpay award under the FLSA, when the arbitrator continues to have jurisdiction to resolve issues regarding entitlement to interest and the Union requests interest under the BPA.

As for *FAA Nashua*, the Authority noted that the BPA did not apply to the agency at issue,⁸⁶ and then stated: “Moreover, the [a]rbitrator did not award backpay under the BPA. Thus, . . . even if the BPA were applicable to the [a]gency, and the [a]gency’s sovereign immunity to monetary damages under the BPA had been waived, the [a]rbitrator could not award interest under the BPA without first awarding backpay under the BPA.”⁸⁷ *FAA Nashua* is distinguishable from this case because there, the arbitrator had not relied on any statute allowing the award of backpay;⁸⁸ thus, the Authority did not address whether an arbitrator may rely on the BPA to award interest on backpay that previously was awarded under another statute.

Finally, the Agency argues that the Arbitrator erred by relying on *Marine Corps* because that decision did not involve the FLSA and did not make a “sweeping statement” that there are “no exceptions” to the BPA’s requirement of interest.⁸⁹ The Agency also argues that, to the extent the Arbitrator relied on *Marine Corps*’ “progeny,” that reliance also is misplaced because those decisions similarly did not involve the FLSA.⁹⁰

As an initial matter, the Arbitrator did not state that there are “no exceptions” to the BPA’s requirement of interest.⁹¹ Further, although *Marine Corps Barstow* and its “progeny”⁹² did not involve the FLSA, the Arbitrator’s reliance on those decisions does not render the award contrary to law. In this regard, the Arbitrator also relied on decisions that involved the FLSA.⁹³ In addition, as discussed above, we find that relevant

⁶⁸ Exceptions at 6 (quoting *FAA*, 66 FLRA at 447) (citing *FCI Greenville*, 65 FLRA 607; *Naval Acad.*, 63 FLRA 100; *NTEU*, 53 FLRA 1469)).

⁶⁹ 66 FLRA 441.

⁷⁰ *Id.* at 447.

⁷¹ 65 FLRA 607.

⁷² 63 FLRA 100.

⁷³ *FCI Greenville*, 65 FLRA at 608; *Naval Acad.*, 63 FLRA at 103.

⁷⁴ 53 FLRA 1469.

⁷⁵ *Id.* at 1492.

⁷⁶ *Id.* at 1495.

⁷⁷ Exceptions at 8-9.

⁷⁸ *Id.*

⁷⁹ *Id.* at 9.

⁸⁰ *See id.*

⁸¹ 350 F.3d 1216.

⁸² 57 FLRA 559.

⁸³ 65 FLRA 441.

⁸⁴ 350 F.3d at 1231.

⁸⁵ 57 FLRA at 565.

⁸⁶ 65 FLRA at 450.

⁸⁷ *Id.*

⁸⁸ *See id.* at 447-48.

⁸⁹ Exceptions at 7.

⁹⁰ *Id.* at 8 n.5.

⁹¹ *Id.* at 7.

⁹² Interest Award at 16.

⁹³ *Id.* at 10.

precedent supports the Arbitrator's conclusion that interest was warranted, and in conducting de novo review, the Authority assesses the arbitrator's legal conclusion, not his or her underlying reasoning.⁹⁴ Therefore, these Agency arguments provide no basis for finding the award contrary to law.

For the foregoing reasons, we find that the Agency has not demonstrated that the award is contrary to law. We note that the Agency does not separately discuss pre- and post-judgment interest, or provide a basis for treating those types of interest differently. Accordingly, we do not address those types of interest separately.

V. Decision

We deny the Agency's exceptions.

Member Pizzella, concurring:

I agree with my colleagues that the Agency has not demonstrated that the Arbitrator's award of interest is contrary to law.

But I believe this case illustrates an embarrassing scenario whereby the grievance process took on a life of its own and failed to "facilitate[] . . . the amicable settlement[] of [the parties'] dispute[]"¹ or to promote "work practices [that] facilitate and improve . . . the efficient accomplishment of the operations of the Government."² The grievance that underlies this case was filed by the Union in 2006 and has been before the Arbitrator four times and the Authority three times!³ I write separately to emphasize the forgotten interests of the American taxpayer – who has paid for every conference call, hearing, and background machination of this proceeding.

In *NTEU, Chapter 32*, I noted that "an effective bargaining relationship is not fostered when" frivolous grievances are filed and pursued through the parties' collective-bargaining agreement.⁴ It is also apparent to me, however, that an agency undermines its bargaining relationship with the union when it frivolously engages in procedural machinations that serve no purpose other than to delay the implementation of an otherwise reasonable award.

Here, the parties' have sparred in a theoretical match of ping pong for seven years *after* the Arbitrator *first determined* (in November 2007) that the Agency violated the Fair Labor Standards Act (FLSA) and awarded backpay to the grievants.⁵ Since that time, the Agency has filed two exceptions and one request for reconsideration with the Authority, and the parties have *returned* this matter to the Arbitrator no less than *three additional times* in order to resolve tangential matters (amount of attorney fees, whether the attorney fees should be paid pending the outcome of the Agency's first merits exceptions, and whether interest on the backpay is warranted)⁶ that clearly could have been, and should have been, resolved by the parties, themselves, in a far more expeditious manner.

¹ 5 U.S.C. § 7101(a)(1)(C).

² *AFGE, Council 215*, 67 FLRA 164, 166-67 (2014) (*Council 215*) (Concurring Opinion of Member Pizzella) (quoting *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella) (*CBP*)).

³ Majority at 1-3.

⁴ 67 FLRA 174, 177 (2014) (*Chapter 32*) (Concurring Opinion of Member Pizzella).

⁵ See Award at 1.

⁶ Majority at 1-4.

⁹⁴ *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010).

I do not suggest that the Agency should not have filed exceptions to the original award – that right is protected by the Federal Service Labor-Management Relations Statute (our Statute).⁷ And when, as here, the Arbitrator finds a violation of the FLSA, I do not suggest that the Union is not entitled to an award of attorney fees or that the grievants are not entitled to interest on their backpay, especially when there has been an inordinate delay in bringing this case to closure. Neither do I suggest that parties are wrong to seek clarification, when necessary, from a duly-appointed arbitrator.

However, as I have noted in prior opinions, “[w]hen Congress enacted [our Statute], it did so in part to promote ‘the effective conduct of public business’”⁸ and to promote “work practices [that] facilitate and improve . . . the efficient accomplishment of the operations of the Government.”⁹ But, here, the parties’ inability, or unwillingness, to directly resolve the inconsequential matters that arose after the Arbitrator issued his initial award (and most certainly after the Authority denied the Agency’s merit exceptions) “unwisely consume[d] federal resources: time, money, and human capital . . . and completely fail[ed] to take into account the resulting costs to the taxpayers, who fund the Agency’s operations and pay for the significant costs of Union official time.”¹⁰

The record in this case does not indicate the full cost of these proceedings. But a hint may be gleaned from the Arbitrator’s second award. By November 2008, the Union had incurred, and was awarded, attorney fees that exceeded \$67,000.00.¹¹ Since that time, the parties relentlessly continued their theoretical ping pong match, and returned to the Authority for three volleys and to the Arbitrator for two additional sets. In the fourth and final set, the parties required no less than fourteen conference calls with the Arbitrator, in addition to “many exchanges of emails and written documents” in order to resolve a myriad of procedural issues before the Arbitrator could render a final decision on the question of the payment of interest on the original backpay award.¹²

Every conference call and each exchange of emails and documents by the parties added to the amount of Union official time used by its representatives, the number of hours that were billed by Union attorneys, and to the number of hours that Agency representatives

(including attorneys, labor-relations professionals, and I can imagine senior Agency officials) could not perform other more productive duties.

But less obvious is the fact that every time the parties engaged the Arbitrator, to referee their disagreements (on how to implement the Arbitrator’s award) through conference calls and subsequent opinions, the Arbitrator’s time was billed to the parties, and the Agency’s share was ultimately paid by the American taxpayer.¹³ The parties required fourteen conference calls with the Arbitrator over an eighteen-month period before the Arbitrator issued his final decision on the question of whether the Agency was required to pay interest on the original award of backpay.¹⁴ Quite simply, the answer to that question is either “yes” or “no.” But, even after the Arbitrator determined that the Agency was required to pay interest, the Agency came back to the Authority *for a third time*.

At some point, the bounds of commonsense are exceeded and part of me would not be surprised (that whenever that “point” occurred during his eight-year stint as referee) that the Arbitrator must have channeled his inner Howard Beale and yelled out of his window: “I’m as mad as hell, and I’m not going to take this anymore.”¹⁵

Nonetheless, as I noted in *U.S. DHS, CBP*, it is a simple fact in every case that comes before the Authority, all of the costs incurred by the Union (including official time and attorney fees) and by the Agency (including backpay, interest, employee time, and its share of costs billed by the Arbitrator) are paid for by the American taxpayer.¹⁶

Under these circumstances, I can only conclude that the Agency’s use of procedural machinations, not only undermined its bargaining relationship and delayed the implementation of a reasonable award, but also unnecessarily increased the costs that must now be borne by those same taxpayers.

Thank you.

⁷ 5 U.S.C. § 7122.

⁸ *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).

⁹ *Council 215*, 67 FLRA at 166-67 (Concurring Opinion of Member Pizzella).

¹⁰ *Chapter 32*, 67 FLRA at 177 (Concurring Opinion of Member Pizzella).

¹¹ *Opp’n, Attach., Fee Award* at 24.

¹² *Majority* at 2 (quoting *Interest Award* at 4).

¹³ *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).

¹⁴ *Majority* at 2 (quoting *Interest Award* at 4).

¹⁵ Peter Finch in “Network.”

¹⁶ *See CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).