68 FLRA No. 31

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 139
(Union)

0-AR-5020

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DECISION

January 13, 2015

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

I. Statement of the Case

Arbitrator Alan Krebs found that the Agency violated Article 35 of the parties' collective-bargaining agreement when it failed to assign an employee (the grievant) to work a particular overtime assignment. He determined that the prerequisites for an award of backpay under the Back Pay Act (the Act)[1] were met. Separately, he found that, even when the Act is inapplicable, most arbitrators have held that this kind of violation warrants a monetary remedy. Accordingly, the Arbitrator directed the Agency to pay the grievant backpay in an amount equal to the overtime pay that she would have earned if the violation had not occurred, plus interest. There are four substantive questions before us.

The first question is whether the award is contrary to the Act. Because the Arbitrator found that the two prerequisites for an award of backpay under the Act were met, and the Agency has not demonstrated that those findings are deficient, the answer is no.

The second question is whether the award is based on a nonfact. Because the Agency's nonfact argument is premised on the Agency's claim that the award is contrary to the Act, and we have found that the award is not contrary to the Act, the answer is no.

The third question is whether the award is contrary to law based on the Arbitrator's finding that, even separate from the Act, backpay was warranted. And the fourth question is whether the award fails to draw its essence from the parties' agreement to the extent that the Arbitrator found that, separate from the Act, the agreement authorizes backpay. Because we find that the award is not contrary to the Act, and that the Act provides a separate and independent basis for the award of backpay, we find it unnecessary to resolve the third and fourth questions.

II. Background and Arbitrator's Award

The grievant was assigned to work seven hours of unanticipated overtime, but the Agency also assigned another employee to work the same overtime. When the grievant and the other employee realized that they were both assigned to work the same overtime, they contacted their supervisor, who rescinded the grievant's assignment and instructed the other employee to work the overtime.

The Union filed a grievance alleging that the grievant was entitled to the overtime assignment. The Agency conceded that it should have assigned the overtime to the grievant, and the Agency offered her the next opportunity to work overtime or, alternatively, administrative leave. The Union argued that the grievant should be compensated monetarily for the hours of overtime that she was denied. The grievance went to arbitration.

The Arbitrator determined that, under the parties' agreement, because the grievant was the lowest-overtime-earning employee during the fiscal year (low earner) and had volunteered to work the overtime, she should have been assigned the overtime. Although he found that the agreement contained no specific remedy for a violation of the agreement's overtime-assignment provisions, he also noted that Article 28, Section 9 of the agreement provides that "remedies may include 'attorneys' fees, back pay, and interest . . . in accordance with standards established by the [Federal Labor Relations Authority], [Merit Systems Protection Board], or other applicable jurisdiction.'"[2] Moreover, the Arbitrator recognized that, in appropriate circumstances, the Act provides for backpay to remedy violations of the agreement.

The Arbitrator then concluded that the Act's two prerequisites for an award of backpay – that the aggrieved employee was affected by an unjustified or unwarranted personnel action, and that personnel action resulted in the withdrawal or reduction of an employee's pay – had been met. In that regard, the Arbitrator noted

[1] 5 U.S.C. § 5596.

[2] Award at 8 (omission in original) (quoting Art. 28, § 9).

that Article 35 states, in pertinent part, that "[u]nanticipated overtime assignments will be made on least[-]cost, low[-]earner principles."[3] He also found that the Agency violated Article 35 when it improperly bypassed the grievant for the overtime assignment, and that the contractual violation was "an unjustified [or] unwarranted personnel action" under the Act.[4] Further, he determined that, if the grievant had been assigned the overtime to which she was entitled, then she would have received more pay for the period for which the personnel action was in effect. Therefore, the Arbitrator found that the "personnel action resulted in a reduction in the [g]rievant's pay."[5]

The Arbitrator stated that the Agency's suggested "appropriate remedy" of providing the grievant with an opportunity to work the next available overtime assignment did not comply with the Act.[6] Rather, the Arbitrator found that the Act calls for backpay equal to the amount that the employee would have earned "during the period if the personnel action had not occurred."[7] He also noted that, even when the Act is inapplicable, "most arbitrators have held that an employee bypassed for overtime in violation of a [collective-bargaining] agreement is entitled to a monetary remedy, rather than a make-up overtime assignment."[8] In that regard, he explained that "make-up overtime at some later unspecified date . . . does not provide sufficient incentive to the employer to adhere to the contractual rules for the assignment of overtime."[9]

Moreover, the Arbitrator cited other arbitrators' awards involving remedies for violations of the overtime-assignment provisions of the parties' agreement, and he found that all of those awards supported his conclusion to award the grievant a monetary remedy. Finally, he relied on the Authority's decision in *U.S. DHS, U.S. CBP, Scobey, Montana*,[10] stating that it reflected the Authority's most recent interpretation of the Act as it applies to remedying the improper bypass of an employee for an overtime assignment. Accordingly, the Arbitrator directed the Agency to pay the grievant backpay with interest.

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions. The Agency also requested leave to file, and did file, a response to the Union's opposition.

[3] *Id.* at 3.
[4] *Id.* at 10.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 10-11.
[8] *Id.* at 11.
[9] *Id.* (citing Marvin Hill, Jr. & Anthony Sinicropi, *Remedies in Arbitration* 370-75 (2d ed. 1991)).
[10] 67 FLRA 67 (2012).

III. Preliminary Matter: We do not consider the Agency's response to the Union's opposition.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of those Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate.[11] The Authority has granted leave to file other documents where the supplemental submission responds to issues raised for the first time in an opposing party's filing.[12] Conversely, where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[13] The Authority has also denied a party's request to file a supplemental submission to respond to a party-opponent's alleged mischaracterization of the party's position or a misstatement of law.[14]

The Agency states that it has filed its response in order "to rectify an incorrect assertion [in the Union's opposition] regarding the nature of the Agency's [e]xception and the underlying facts upon which that assertion is based."[15] The Agency makes two arguments in this regard. First, according to the Agency, the opposition incorrectly assumes that the Agency is "merely . . . disagree[ing] with the [A]rbitrator's findings of fact in light of the evidence presented to him."[16] The Agency claims that, in fact, it is challenging the Arbitrator's interpretation of the *Act*.[17] Second, the Agency challenges the Union's statement that the grievant testified that she lost $250 as a result of being bypassed for the overtime assignment.[18] The Agency contends that transcript testimony cited by the Union demonstrates that the grievant "*never testified that she lost money* as a result of not receiving the overtime assignment in question; she merely testified that she

[11] *E.g., Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004).
[12] *See id.*
[13] *See, e.g., U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006).
[14] *See Bremerton Metal Trades Council*, 64 FLRA 103, 104 (2009) (Authority did not consider the union's supplemental submission to address the agency's alleged misstatements of the union's arguments or the agency's supplemental submission to address the union's misstatements of the agency's arguments); *U.S. Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543, 543 n.1 (2001) (Authority did not consider agency's reply to union's opposition where the agency claimed the union's arguments were a misreading of applicable law).
[15] Agency's Resp. at 1.
[16] *Id.* at 3.
[17] *Id.* at 3-5.
[18] *Id.* at 2 (citing Opp'n at 12).

should have received an overtime assignment worth approximately $250."[19]

The Agency's first argument contends that the Union's opposition mischaracterized the Agency's position, and its second argument does not respond to an issue that was raised for the first time in the Union's opposition. As such, consistent with the principles set forth above, we decline to consider the Agency's supplemental submission.

IV. Analysis and Conclusions

A. The backpay award is not contrary to the Act.

The Agency contends that the backpay award is contrary to law.[20] Specifically, the Agency argues that the Arbitrator's interpretation of the Act is not supported by the wording of the Act and is not consistent with congressional intent, federal regulations implementing the Act, or administrative and judicial decisions interpreting the Act.[21]

The Act provides, in pertinent part:

> An employee of an agency who . . . is found . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee . . . is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.[22]

The Agency's exceptions hinge on the contention that the Arbitrator failed to consider whether the grievant actually suffered a reduction in pay.[23] The Agency asserts that, instead of limiting his inquiry to a specific time period, the Arbitrator should have reviewed the whole record, including events that occurred after the missed overtime assignment, to determine whether the grievant suffered a reduction in pay.[24] Because the Act requires an award of backpay to be reduced by "any amounts earned by the employee through other employment during th[e] period" when the unjustified or unwarranted personnel action was in effect,[25] the Agency argues that any overtime backpay should be mitigated by compensation that the grievant earned while retaining her low-earner preference for additional overtime assignments, in order to prevent her from receiving a "windfall."[26] However, in cases involving backpay for missed overtime, the Authority has routinely found backpay appropriate under the Act without requiring mitigation.[27] Further, nothing in the award requires the Agency to retain the grievant's low-earner status, and the Agency does not contend that the grievant subsequently used her low-earner status to work an additional overtime opportunity.

The Agency cites 5 C.F.R. §§ 550.801(a), 550.804(a), and 550.805(a) to show that the determination of whether an employee has suffered a reduction of pay need not be limited to what the employee received during the time period of the unjustified or unwarranted personal action.[28] Specifically, the Agency states that § 550.801(a) provides that the Act exists "for the purpose of making an employee financially whole," and that § 550.804(a) provides that "the employee shall be entitled to [backpay] . . . only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay . . . otherwise due the employee."[29] The Agency also states that § 550.805(a) provides that the "agency shall compute for the period covered by the corrective action the pay . . . [that] the employee would have received if the unjustified or unwarranted personnel action had not occurred."[30] The Agency cites nothing in these regulations that required the Arbitrator to consider events that occurred after the missed overtime assignment. Therefore, the Agency's reliance on those regulations provides no basis for finding the award contrary to the Act.

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[19] *Id.*
[20] Exceptions at 22-23.
[21] *Id.*
[22] 5 U.S.C. § 5596(b)(1).
[23] Exceptions at 25.
[24] *Id.*
[25] 5 U.S.C. § 5596(b)(1)(A)(i).
[26] Exceptions at 28.
[27] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 692 (2014) (*Brownsville*); *see also NTEU, Chapter 231*, 66 FLRA 1024, 1026 (2012); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045-46 (2011); *U.S. Dep't of the Treasury, U.S. Customs Serv., Portland, Or.*, 54 FLRA 764, 769-71 (1998).
[28] Exceptions at 30-31.
[29] *Id.* at 30 (quoting 5 C.F.R. §§ 550.801(a), 550.804(a)).
[30] *Id.* at 31 (quoting 5 C.F.R § 550.805(a)).

Moreover, the Agency argues that "mistakes . . . are inevitable"[31] and that remedying missed overtime assignments with backpay will have a "devastating impact on the Agency budget."[32] However, this argument does not address the requirements of the Act or any other law. Accordingly, the argument provides no basis for finding the award contrary to law.

The Agency also interprets the Arbitrator's award to mean that "every missed overtime assignment results in a reduction of the aggrieved employee's pay, and must therefore be remedied with an award of backpay."[33] The Agency asserts that the Authority has repeatedly upheld arbitrators' awards that denied backpay despite findings that agencies had committed unwarranted personnel actions resulting in missed overtime assignments.[34] For support, the Agency cites[35] *NTEU, Chapter 98* (*Chapter 98*);[36] *AFGE, Local 916* (*Local 916*);[37] *U.S. Department of the Navy, U.S. Marine Corps Logistics Base, Albany, Georgia* (*Marine Corps*);[38] and *Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia* (*Warner Robins*).[39] Further, the Agency requests that, if the Authority denies the Agency's exception, then the Authority "should do so clearly, on the ground[] that missed overtime assignment[s] can no longer be remedied with makeup assignments," and should explicitly overrule Authority precedent that allegedly held to the "contrary."[40]

In *Chapter 98* and *Local 916*, the Authority found that there is "nothing in the [Act] that requires a monetary award for every unjustified or unwarranted personnel action."[41] However, in *NTEU, Chapter 231*,[42] the Authority later clarified that *Chapter 98* and *Local 916* had involved situations in which arbitrators found that the requirements of the Act were not met.[43] In contrast to *Chapter 98* and *Local 916*, here, the Arbitrator found that the requirements of the Act were met. As for *Marine Corps* and *Warner Robins*, the issues before the Authority in those decisions did not involve the requirements of the Act.[44] Therefore, the Agency's reliance on those decisions is misplaced. For all of these reasons, the Agency does not demonstrate that denying the exceptions in this case would require overruling any Authority precedent.

For the foregoing reasons, we find that the Agency has not demonstrated that the award of backpay is contrary to the Act.

B. The award is not based on a nonfact.

The Agency argues that the Arbitrator's award is also deficient because it is based on a nonfact.[45] In particular, the Agency claims that the Arbitrator's misinterpretation of the Act resulted in an erroneous finding of fact that the grievant suffered a reduction in pay.[46]

The Agency's nonfact argument is premised on its claim that the award is contrary to the Act. Because we have rejected that claim, we also reject the nonfact argument.[47]

C. It is unnecessary to address the Agency's challenges to the other "identifiable bases" that the Arbitrator relied on.

The Agency argues that, in the award, the Arbitrator relied on three "analytically identifiable bases":[48] (1) his construction of the Act; (2) a suggestion that arbitrators have the inherent authority, independent of the Act, to award backpay for missed overtime assignments; and (3) his reliance on other arbitrators' awards awarding backpay.[49] With respect to the Arbitrator's suggestion that he had authority to award backpay independent of the Act, the Agency contends that this assertion of "inherent authority" is contrary to the doctrine that the federal government is immune from money damages unless a federal statute waives that immunity.[50]

[31] *Id.* at 36.
[32] *Id.*
[33] *Id.* at 41.
[34] *Id.*
[35] *Id.*
[36] 60 FLRA 448 (2004).
[37] 57 FLRA 715 (2002).
[38] 39 FLRA 576 (1991).
[39] 25 FLRA 969 (1987).
[40] Exceptions at 55.
[41] *NTEU, Chapter 231*, 66 FLRA 1024, 1026 (2012) (citing *Chapter 98*, 60 FLRA at 450; *Local 916*, 57 FLRA at 717 n.7).
[42] *Id.*
[43] *Id.* (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 7-8 (2007)).
[44] *See Marine Corps*, 39 FLRA at 576-79; *Warner Robins*, 29 FLRA at 971.
[45] Exceptions at 35 n.14.
[46] *Id.*
[47] *See, e.g., Brownsville*, 67 FLRA at 692 (rejecting an exceeded-authority claim because it was premised on a rejected argument that the award was contrary to the Act).
[48] Exceptions at 22.
[49] *Id.*
[50] *Id.* at 37.

An arbitrator's remedy is based on separate and independent grounds when more than one ground independently would support the remedy.[51] The Authority recognizes that when an arbitrator bases an award on separate and independent grounds, the excepting party must establish that all of the grounds are deficient in order to have the Authority find the award deficient.[52] If the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[53]

Here, the Arbitrator found that the prerequisites under the Act had been met. And that finding is a separate and independent basis for the award of backpay. Because we have concluded that that finding is not contrary the Act, we further find it is unnecessary to address the Agency's challenges to the other "identifiable bases"[54] that the Arbitrator identified as supporting his award.

D. It is unnecessary to resolve the Agency's essence exception.

The Agency argues that, "[t]o the extent that . . . [the] [a]ward may be seen as suggesting that the [backpay] awards in . . . other . . . arbitrators' decisions were based upon the [parties' agreement], rather than the . . . Act, and concluding that the [agreement] authorizes [backpay] awards for missed overtime assignments," the Arbitrator's award fails to draw its essence from the agreement.[55] Even assuming that the Arbitrator relied on the parties' agreement as a separate basis for his backpay award, as stated previously, the Arbitrator's reliance on the Act provides a separate and independent basis for the award. Accordingly, we find it unnecessary to resolve the Agency's essence exception.[56]

V. Decision

We deny the Agency's exceptions.

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[51] *SSA, Region VI*, 67 FLRA 493, 496 (2014) (*SSA*); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (*Guaynabo*).
[52] *SSA*, 67 FLRA at 496; *Guaynabo*, 66 FLRA at 86; *see also U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000).
[53] *SSA*, 67 FLRA at 496; *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011).
[54] Exceptions at 22.
[55] *Id.* at 40.
[56] *E.g.*, *SSA*, 67 FLRA at 496.