

**74 FLRA No. 40**

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

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2366  
NATIONAL BORDER PATROL COUNCIL  
(Union)

0-AR-5987

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DECISION  
May 9, 2025  
\_\_\_\_\_

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Susan Tsui Grundmann and Anne Wagner,  
Members

**I. Statement of the Case**

Arbitrator T. Zane Reeves issued an award finding an employee (the grievant) entitled to backpay under the Back Pay Act (the Act).<sup>1</sup> The Agency filed exceptions to the award on several grounds, including that the award is contrary to law. For the reasons discussed below, we set aside the award as contrary to the Act, and we find it unnecessary to resolve the remaining exceptions.

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

The grievant, a border patrol officer, was arrested while off-duty at his home for domestic violence. As a result, the grievant was criminally charged. Separately, the Agency issued the grievant a letter (the administrative-duty letter) that (1) revoked his law-enforcement authority and firearm authorization, and (2) placed him on administrative duties, which made him ineligible to work overtime. The Department of Homeland Security’s Office of Professional Responsibility (OPR)

initiated an administrative inquiry to investigate the grievant’s alleged misconduct.

In November 2021, a court dismissed the criminal charges against the grievant. In March 2022, the Union filed a grievance alleging the Agency violated Agency policy when it failed to reinstate the grievant’s law-enforcement authority after the criminal charges were dismissed. The Union sought the grievant’s restoration to full duty and make-whole relief, including backpay for lost overtime. The Agency denied the grievance.

On April 25, 2022, the OPR issued its final Report of Investigation (OPR Report), which sustained two allegations against the grievant: (1) failure to properly secure his Agency-issued firearm while off-duty at home, and (2) domestic violence.

The U.S. Customs and Border Protection (CBP) Discipline Review Board (DRB) reviewed the OPR Report and, in a June 13, 2022 letter to the grievant, a DRB member proposed the grievant’s removal based on charges of: (1) “Conduct Unbecoming a Border Patrol Agent,” (2) “Failure to Provide Honest and Complete Information” (dishonesty charge), and (3) “Failure to Safeguard Government-Issued Property,” specifically, his firearm.<sup>2</sup>

On March 20, 2023,<sup>3</sup> the Union replied to the proposed removal and sought mitigation of the penalty. On April 5, the Agency notified the grievant that his authority to carry a firearm was being reinstated and that he could return to full duty immediately. On April 6, the Agency proposed mitigating the removal to a thirty-calendar-day suspension, if the grievant agreed to sign an abeyance agreement, which provided that sixteen calendar days of the suspension would be held in abeyance for two years. The grievant signed the abeyance agreement and served a fourteen-day suspension.

Subsequently, the grievance over the failure to timely reinstate the grievant’s law-enforcement authority went to arbitration. The parties did not stipulate to the issues, so the Arbitrator framed the pertinent issue as “whether the Agency’s decision denying the [g]rievant’s request for [backpay] was arbitrary, capricious, an abuse of discretion, or other[wise] not in accordance with law and therefore amounted to an unjustified or unwarranted personnel action entitling the [g]rievant to [backpay] under the . . . Act.”<sup>4</sup> The Arbitrator stated that, “[i]n essence, the question is whether [the g]rievant has proven, by a preponderance of the evidence, that the Agency committed the violation.”<sup>5</sup> The Arbitrator noted that the grievant’s

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Award at 10.

<sup>3</sup> All dates in this paragraph are from 2023.

<sup>4</sup> Award at 2-3. The Arbitrator also framed a procedural-arbitrability issue, and he found the grievance arbitrable.

<sup>5</sup> *Id.* at 3.

fourteen-day suspension and the abeyance agreement were not issues before him. Rather, the Arbitrator found the grievant argued the Agency should have returned him to full duty on April 25, 2022, when the OPR Report issued.

The Arbitrator reviewed an Agency policy that required “[t]emporary . . . revocations will be based on *reliable evidence*.”<sup>6</sup> The Arbitrator found there was reliable evidence that the grievant committed domestic violence. However, the Arbitrator stated that the Agency’s authority to revoke employees’ law-enforcement authorizations “must be ‘reasonably exercised.’”<sup>7</sup> In this regard, the Arbitrator noted a Union claim that the length of the grievant’s administrative duty was not a “reasonabl[e] exercise[.]” of this authority because it was contrary to the administrative-duty letter.<sup>8</sup> Further, the Arbitrator stated that “[m]anagement did not review [the grievant’s] administrative[-]duty status monthly,” as the administrative-duty letter stated they would.<sup>9</sup> The Arbitrator found that the monthly-review process was derived from a CBP directive.<sup>10</sup>

Additionally, the Arbitrator determined that the DRB member “arbitrarily added” the dishonesty charge, which was not included in, or supported by, evidence in the OPR Report, and which was later dropped from the final charges.<sup>11</sup> The Arbitrator found that, “[u]nless there is an egregious error by” the OPR investigator, “the reviewer” – DRB – “should refrain from ‘second guessing’ [OPR’s] investigation.”<sup>12</sup> The Arbitrator further found the inclusion of the dishonesty charge in the proposed-removal recommendation “drastically altered the investigative process and delayed the [g]rievant’s return to” full duty as a border patrol agent.<sup>13</sup> The Arbitrator then concluded:

[T]he Arbitrator finds that the Union met its burden of proof. It demonstrated through the preponderance of evidence that the [DRB] member acted arbitrarily and without reasonable evidence to recommend *removal* for the [g]rievant on June 13[,], 2022. This unwarranted action is not supported by the

investigator’s findings and conclusions in the OPR Report of Investigation of April 25, 2022. The DRB action delayed the [g]rievant’s reinstatement of law[-]enforcement duties. The Agency is ordered to compensate [the grievant] for the loss of overtime and associated benefits from April 25, 2022[,] to April 6, 2023, based on the unjustified and unwarranted personnel action in denying [the grievant’s] request for [back]pay under the . . . Act[.] . . . The [backpay] should be paid, with interest.<sup>14</sup>

On September 5, 2024, the Agency filed exceptions to the award, and the Union filed an opposition to the Agency’s exceptions on October 4, 2024.

### III. Preliminary Matter: We have jurisdiction to resolve the exceptions.

In the award, the Arbitrator made various statements regarding the grievant’s proposed removal.<sup>15</sup> Under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute), the Authority lacks jurisdiction to resolve exceptions to awards “relating to” matters described in § 7121(f) of the Statute.<sup>16</sup> Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. §§ 4303 or 7512.<sup>17</sup> However, the Authority does not lack jurisdiction to resolve exceptions to an arbitration award where (1) the claim advanced in arbitration concerns a *proposed* removal; and (2) the award does not resolve, and is not inextricably intertwined with, any resulting action covered under §§ 4303 or 7512.<sup>18</sup> Even assuming the Arbitrator’s award “relat[es] to” a proposed removal within the meaning of § 7121(f) of the Statute,<sup>19</sup> the award does not resolve, and is not inextricably intertwined with, an action under §§ 4303 or 7512. Therefore, we have jurisdiction to resolve the Agency’s exceptions.

<sup>6</sup> *Id.* at 11; see Exceptions, Attach. F(2), CBP Use of Force Handbook at 126.

<sup>7</sup> Award at 13.

<sup>8</sup> *Id.* at 14.

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

<sup>10</sup> CBP Directive No. 51735-014 provides, in relevant part, “Management will periodically review and decide if full-duty authority can be restored when management determines that an employee’s action(s) prompts restricted duties. At a minimum, this review must be made on a monthly basis.” *Id.* at 6 (emphasis omitted).

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 15.

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

<sup>14</sup> *Id.* at 16.

<sup>15</sup> See, e.g., *id.* (finding the Union “demonstrated through the preponderance of evidence that the [DRB] member acted arbitrarily and without reasonable evidence to recommend *removal* for the [g]rievant on June 13, 2022”).

<sup>16</sup> 5 U.S.C. § 7122(a).

<sup>17</sup> *NFFE, Loc. 1998*, 73 FLRA 111, 112 (2022).

<sup>18</sup> *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 662, 663-64 (2022) (Chairman DuBester concurring).

<sup>19</sup> 5 U.S.C. § 7121(f).

#### IV. Analysis and Conclusion: The award is contrary to the Act.

The Agency argues the award is contrary to the Act because, in finding that the Agency committed an unjustified or unwarranted personnel action, the Arbitrator did not identify what authority the Agency violated or how it violated such authority.<sup>20</sup> 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*.<sup>21</sup> In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>22</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.<sup>23</sup>

The Authority has held that, under the Act, a backpay award is authorized only where an arbitrator finds that (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.<sup>24</sup> A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act.<sup>25</sup>

It is unclear from the award what, if anything, the Arbitrator found violated. He framed the pertinent issue as “whether the Agency's decision denying the [g]rievant's request for [backpay] was . . . an unjustified or unwarranted personnel action . . . under the . . . Act,”<sup>26</sup> and he ultimately concluded that the Agency committed an “unjustified and unwarranted personnel action in denying [the grievant's] request for [backpay] under the . . . Act.”<sup>27</sup> He also determined the Agency, through the DRB, committed an “unwarranted action” when the DRB member “arbitrarily added”<sup>28</sup> the dishonesty charge and, consequently, “acted arbitrarily and without reasonable evidence to recommend *removal* for the [g]rievant”<sup>29</sup> – which delayed the restoration of the grievant's

law-enforcement duties. Further, the Arbitrator stated that Agency revocations of law-enforcement authority “must be ‘reasonably exercised.’”<sup>30</sup> However, in making all of these statements, the Arbitrator did not find a violation of any applicable law, rule, regulation, or provision of a collective-bargaining agreement. Therefore, the Arbitrator's statements do not satisfy the first requirement for backpay under the Act.<sup>31</sup>

The Arbitrator also found that “[m]anagement did not review [the grievant's] administrative-duty status monthly,” as the administrative-duty letter stated they would,<sup>32</sup> and he determined that the monthly-review process was derived from a CBP directive.<sup>33</sup> Even assuming the Arbitrator's findings were intended to be a determination that the Agency violated the CBP directive – and that such a violation was an unjustified and unwarranted personnel action under the Act – the Arbitrator did not find the violation resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials. Instead, the Arbitrator based the award of backpay on the DRB member's addition of a dishonestly charge and proposed removal, which the Arbitrator found delayed the restoration of the grievant's law-enforcement duties.<sup>34</sup> As such, the Arbitrator's statements regarding the monthly-review process do not satisfy the second requirement under the Act.<sup>35</sup>

For the above reasons, we find the award is contrary to the Act. Therefore, we set the award aside on this basis,<sup>36</sup> and we find it unnecessary to resolve the Agency's remaining exceptions.<sup>37</sup>

#### V. Decision

We set aside the award.

<sup>20</sup> Exceptions Br. at 13-16.

<sup>21</sup> *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Se. Fisheries Sci. Ctr.*, 74 FLRA 205, 206 (2025) (*Fisheries*).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 73 FLRA 865, 867 (2024) (*McCreary*)).

<sup>25</sup> *McCreary*, 73 FLRA at 867.

<sup>26</sup> Award at 2-3 (emphasis added).

<sup>27</sup> *Id.* at 16 (emphasis added).

<sup>28</sup> *Id.* at 14.

<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *See, e.g., Fisheries*, 74 FLRA at 206-07 (setting aside backpay award where arbitrator did not specify the basis for finding an agency violation).

<sup>32</sup> Award at 14.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *See, e.g., U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 72 FLRA 455, 457 (2021) (Chairman DuBester concurring) (setting aside backpay award where arbitrator did not find, and record did not establish, that the failure to comply with collective-bargaining agreement resulted in a loss of pay).

<sup>36</sup> *See, e.g., Fisheries*, 74 FLRA at 206.

<sup>37</sup> *Id.* (citing *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 619 n.22 (2023)) (vacating award and finding it unnecessary to resolve remaining exceptions).