

63 FLRA No. 188

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
SALT LAKE CITY, UTAH
(Agency)

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
(Union)
0-AR-4101

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DECISION

August 14, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Daniel M. Winograd filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated Article 38, Section 8 of the parties' collective bargaining agreement by cancelling the grievant's scheduled overtime assignment without proper notice. He awarded the grievant 4 hours of pay as a remedy. For the following reasons, we conclude that the remedy is deficient and remand the award to the parties for resubmission to the Arbitrator, absent settlement, for determination of an appropriate remedy. Otherwise, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant was scheduled to work an overtime shift on one of her regularly scheduled days off to replace another employee who was expected to attend a meeting of a labor-management committee. Less than 24 hours before she was to begin that overtime shift, she was informed that the other employee's meeting had been cancelled and that she would not be permitted to work the shift. Because she was "involuntarily removed from the overtime assignment," she "was not charged

with having received an overtime opportunity for purposes of determining her position on the overtime availability list." Award at 5.

The grievant filed a grievance alleging that the Agency's failure to give her at least 7 days' notice of the cancellation of her overtime violated Article 38, Section 8 of the parties' agreement.¹ The grievance was not resolved and was submitted to arbitration on the issue of whether the Agency violated the agreement.

The Arbitrator found that "cancellation of scheduled overtime should be considered normal if the occurrence giving rise to the cancellation is within the control of the Agency." *Id.* at 26. In this regard, he found that the labor-management committee meeting "was a normal function of the Agency and, therefore, the decision to cancel the meeting also was within the normal activities of the Agency." *Id.* at 27. Accordingly, he concluded that the Agency's decision to cancel the grievant's scheduled overtime violated Section 8.

In addition, he concluded that Section 8 was enforceable as an appropriate arrangement under § 7106(b)(3) of the Statute. In this regard, the Arbitrator concluded that Section 8 is an arrangement because it is "intended to address the adverse effects of management's exercise of its right to require employees to work overtime and the concomitant right to cancel overtime assignments." *Id.* at 20. The Arbitrator further concluded that Section 8 constitutes an appropriate arrangement because it "reflects an appropriate balancing of the interests and practical needs of the employees against those of the Agency." *Id.* at 21. More specifically, the Arbitrator found that, although Section 8 imposes a burden on the Agency, it "minimizes the burden to a substantial extent." *Id.* The Arbitrator explained that, under Section 8, "management retains the sole and absolute right to decide whether to cancel overtime or not to cancel it." *Id.* at 25. He further explained that, by providing that management will not normally cancel overtime on less than 7 days' notice, Section 8 "allows for the possibility that the Agency may find it necessary to give less than [seven] days' notice in some circumstances." *Id.* The Arbitrator stated that the effect of Section 8 on the Agency's management of overtime

1. Section 8 of the parties' agreement provides as follows:

Section 8. Overtime shall not normally be cancelled without seven (7) days notice. However, if an employee cancels or returns from annual or sick leave, any overtime scheduled to cover that absence may be cancelled, provided that such overtime had been scheduled as a direct result of the returning employee's absence.

Award at 3.

“occurs only in those few instances where overtime is cancelled on short notice and only in those few instances where the cancellation of overtime is not ‘normal’ and is not attributable to the early return of an employee from sick or annual leave.” *Id.* at 23. Moreover, the Arbitrator noted that the parties agree that “the imposition of overtime expenses, standing alone, is not an excessive burden on management’s operations.” *Id.* at 22. For all these reasons, the Arbitrator concluded that enforcement of Section 8 does not excessively interfere with management’s rights. *Id.* at 23.

As to the remedy, the Arbitrator noted that the grievant did not lose the opportunity to work overtime altogether because she “remained in the same location on the overtime equalization list [that] she occupied before the overtime [at issue in the grievance] was assigned.” *Id.* at 27. Accordingly, the Arbitrator concluded that, if the grievant were to be paid 8 hours at time and a half, then she would receive a “windfall to the extent that she will have received a second overtime opportunity to which she would not have been entitled had she worked the original overtime.” *Id.* at 28. However, he determined that the grievant should be compensated for the disruption and inconvenience due to the cancellation of the overtime. He found that, under the Fair Labor Standards Act (FLSA) and the agreement, a premium of 50 percent of normal pay compensated employees for working at a time they normally would have been off-duty. Consequently, he awarded the grievant 4 hours of pay at her normal hourly rate.

III. Agency’s Exceptions

The Agency contends that the award is deficient as based on nonfacts because “it relies heavily on a past practice alleged by the Union, but without foundation in the hearing.” Exceptions at 21. Specifically, the Agency argues that “the evidence fails to establish that a past practice exists [at this particular facility] of paying employees for overtime when scheduled overtime is cancelled with less than seven days notice.” *Id.* at 22.

The Agency also contends that “the remedy provided by the Arbitrator does not draw its essence from the collective bargaining agreement.” *Id.* at 24. In this regard, the Agency asserts that the award constitutes “punitive or compensatory damages for her inconvenience.” *Id.* at 25. According to the Agency, “[n]either the [c]ollective [b]argaining [a]greement nor the Back Pay Act contains any provisions or entitlements for inconvenience.” *Id.* Further, the Agency maintains that the Arbitrator erred by relying on the FLSA, as well as Section 8, because “neither of them reflect payment for time not worked[.]” *Id.* at 26.

The Agency further contends that the award is contrary to management’s right to assign work under § 7106(a)(2)(B). The Agency argues that the assignment and cancellation of overtime are encompassed within the right to assign work and that, by the use of the term “normally[.]” Section 8 imposes a “substantive limitation” on the exercise of that right. *Id.* at 9. The Agency also argues that the Arbitrator’s enforcement of Section 8 is deficient because it excessively interferes with the right to assign work. The Agency maintains that it is forced to make unacceptable choices of either assigning the employee overtime work when there is no need for overtime work to be performed or paying the employee for the scheduled overtime. *Id.* at 17. The Agency contends that, to “efficiently manage its resources[.]” it must be able to cancel overtime “when the underlying need for [the] anticipated overtime no longer exists.” *Id.* For these reasons, the Agency claims that the benefits to employees under the Arbitrator’s interpretation of Section 8 are outweighed by the burden on management’s right to assign work. *Id.* at 18.

Finally, the Agency contends that the Arbitrator’s award conflicts with § 7101 of the Statute.² The Agency asserts that, by requiring the Agency to pay the grievant for time not worked, the award does not safeguard the public interest. *Id.* at 20. The Agency also asserts that, under the award, “management’s ability to react to events beyond [its] control, and thus serve the public, will be diminished.” *Id.* at 21.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact under-

2. § 7101(a) of the Statute provides, in relevant part, as follows:

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

...

(B) contributes to the effective conduct of public business; and

...

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the . . . Government.

lying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g.*, *United States Dep't of the Treasury, Internal Revenue Serv., Andover, Mass.*, 63 FLRA 202, 205 (2009) (*IRS*). 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. *Id.*

The Agency claims that the Arbitrator erroneously found a past practice of paying employees for overtime when scheduled overtime is cancelled with less than 7 days notice. However, the record indicates that the parties disputed this matter before the Arbitrator. Award at 8; Exceptions at 22-24. Consequently, the Agency's exception provides no basis for finding the award deficient as based on a nonfact. *IRS*, 63 FLRA at 205. Accordingly, we deny this exception.

B. The award does not fail to draw its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the collective bargaining agreement, it must be established that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Arbitrator found that, by providing that scheduled overtime will not normally be cancelled without 7 days' notice, Section 8 permits the Agency to cancel overtime with less than the required notice and provides the Agency discretion to cancel or not cancel overtime for any reason. The Arbitrator also found that Section 8 allows the Agency to cancel scheduled overtime without the required notice in circumstances that are not normal or when an employee returns early from sick or annual leave.

The Agency has failed to demonstrate that the Arbitrator's interpretation of Section 8 is irrational, implausible, unfounded, or evidences a manifest disregard of the collective bargaining agreement. *See AFGE Local 2703*, 59 FLRA 81, 83 (2003). Accordingly, we deny this exception.

C. The award is not contrary to § 7106(a)(2)(B) or § 7101 of the Statute.

When a party's exception challenges an arbitration award's consistency with law, we review *de novo* the

questions of law raised in the exception and the arbitrator's award. *E.g.*, *NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, we assess whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g.*, *United States Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). When a party contends that an award is contrary to a management's right under § 7106(a) of the Statute, we first assess whether the award affects the asserted right. *E.g.*, *United States Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maintenance Facility, Bremerton, Wash.*, 62 FLEA 4, 5 (2007). If the award affects the exercise of a management right, we examine whether the award provides a remedy for a violation of a contract provision negotiated under § 7106(b). *United States Dep't of the Treasury, Bureau of Engraving & Printing, Wash. D.C.*, 53 FLRA 146, 153 (1997).

It is undisputed that the award affects management's right to assign work under § 7106(a)(2)(B) of the Statute. Accordingly, we must examine whether the award provides a remedy for a violation of a contract provision negotiated pursuant to § 7106(b). The Arbitrator concluded that Section 8 was enforceable as an appropriate arrangement under § 7106(b)(3) of the Statute. In this regard, the Agency does not dispute the Arbitrator's conclusion that Section 8 is an arrangement for employees adversely affected by the exercise of management's right to assign work. However, the Agency does argue that the Arbitrator's enforcement of Section 8 excessively interferes with the right to assign work.

To determine whether an arrangement excessively interferes with management's rights, we weigh the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights. *E.g.*, *AFGE Council 215*, 60 FLRA 461, 464 (2004). In this regard, the Agency does not dispute the Arbitrator's finding that Section 8 benefits employees by requiring adequate notice to employees when overtime is cancelled so that employees can readjust their personal lives. The Agency does dispute the Arbitrator's conclusion that this benefit outweighs the effect of Section 8 on management's rights.

As to the Agency's argument with respect to the cost of paying an employee for work not performed, the Agency has provided no evidence as to the cost of compensating employees for cancelling scheduled overtime and has not shown how that cost would impose an excessive burden on the Agency. In this regard, the Arbitrator noted that the parties agreed that overtime

expenses, standing alone, were not an excessive burden. Award at 22. Further, the Agency's statement that overtime is rarely cancelled at the facility supports the conclusion that the cost of cancelling overtime without sufficient notice is not be significant. Moreover, the Arbitrator found that Section 8 does not preclude management from cancelling overtime and does not limit the reasons for such cancellation. The Arbitrator found that the burden imposed by Section 8 was limited to the "few instances" where overtime was cancelled on short notice because it did not preclude management from cancelling overtime in circumstances that are not normal or where an employee returns early from sick or annual leave. *Id.* at 23. Moreover, nothing in Section 8 requires management to assign work to employees when overtime is cancelled.

Based on the foregoing, the Agency has not shown that, as interpreted and applied by the Arbitrator, the effect of Section 8 on management's exercise of its right to assign work outweighs the benefits afforded employees. Accordingly, as found by the Arbitrator, Section 8 constitutes an appropriate arrangement that is enforceable under § 7106(b)(3) of the Statute. Consequently, the Agency fails to establish that the award is contrary to § 7106(a)(2)(B) of the Statute, and we deny this exception. See *United States Dep't of Veterans Affairs, West Palm Beach VA Medical Ctr., West Palm Beach, Fla.*, 61 FLRA 712, 714 (2006).

Likewise, because Section 8, as interpreted and applied by the Arbitrator, is enforceable under § 7106(b)(3) of the Statute, the award is not contrary to § 7101 of the Statute. See *United States Dep't of the Treasury, Internal Revenue Serv., Austin Tex.*, 60 FLRA 606, 608 (2005) (where award is otherwise consistent with law, § 7101 does not provide a basis for finding an award deficient). Accordingly, we deny this exception.

D. The remedy is deficient.

We construe the Agency's reference to the Back Pay Act as a contention that the award is contrary to law. See *United States Dep't of the Air Force, 81st Training Wing, Keesler AFB, Miss.* 60 FLRA 425, 428 (2004). Under the Back Pay Act, an award of backpay is authorized only when 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 grievant's pay, allowances, or differentials." *E.g., United States Dep't of Health & Human Servs., Gallup Indian Medical Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 211 (2004) (*Indian Health Serv.*) (Chair-

man Cabaniss and Member Pope dissenting in part on other grounds).

The Agency argues that the remedy is deficient because it does not constitute pay, allowances, or differentials within the meaning of the Back Pay Act. "[P]ay, allowances, and differentials" are defined as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." 5 C.F.R. § 550.803; *accord Indian Health Serv.*, 60 FLRA at 212. Given this definition, a monetary award does not constitute "pay, leave, [or] other employment benefits" unless the award is something to which the employee "is entitled by statute or regulation." *Indian Health Serv.*, 60 FLRA at 212. The Arbitrator did not cite any statutory or regulatory authorization for the payment of 4 hours of straight-time pay in the circumstances of this case. See *United States Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (*Minot AFB*). Although he referred to the FLSA, it was only for the purpose of calculating an appropriate basis for a remedy, not as the basis of an entitlement. His reference to the parties' agreement is likewise unavailing. See *Minot AFB*, 61 FLRA at 370 ("a collective bargaining agreement may require monetary payments to employees only where there is an underlying statutory [or regulatory] basis for the payment."). Consequently, the Arbitrator's remedy is not authorized and must be set aside. See *Indian Health Serv.*, 60 FLRA at 212. As setting aside the Arbitrator's remedy leaves the contract violation without a remedy, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy.

V. Decision

The remedy is set aside. The Agency's remaining exceptions are denied. The award is remanded to the parties consistent with this decision.