69 FLRA No. 92

UNITED STATES
DEPARTMENT OF THE AIR FORCE
47TH FLYING TRAINING WING
LAUGHLIN AIR FORCE BASE
DEL RIO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1749
(Union)

0-AR-5156

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DECISION

September 29, 2016

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

I. Statement of the Case

Arbitrator Louise B. Wolitz found that the Agency violated the parties' agreement when it failed to provide seventeen aircraft-simulator instructors (the grievants) paid lunch and rest breaks on days when the grievants conducted flight simulations. The Arbitrator determined that the grievants were entitled to backpay under the Back Pay Act (BPA).[1] We must decide three questions.

The first question is whether the award is contrary to law because the Arbitrator erroneously failed to find that a past practice existed that modified the parties' agreement. Because the Agency does not support its contrary-to-law exception, the answer is no.

The second question is whether the award's remedy of backpay for the failure to afford the grievants paid breaks is contrary to the BPA. Because the failure to receive a paid break does not result in the loss of pay, which is a requirement for backpay under the BPA, the answer is yes.

The third question is whether the award's remedy of backpay is contrary to the Fair Labor Standards Act (FLSA)[2] or is based on a nonfact. Because we set aside the award of backpay as contrary to the BPA, it is unnecessary to resolve the Agency's contrary-to-the-FLSA and nonfact exceptions concerning the award's remedy.

We therefore set aside the Arbitrator's backpay remedy and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy.

II. Background and Arbitrator's Award

The grievants are aircraft-simulator instructors who train student pilots assigned to the Agency. As relevant here, the grievants conduct flight-simulation training one to five days per week.

A flight-simulation exercise takes approximately six continuous hours to complete during the eight-hour workday. During the flight simulation, the grievants may not deviate from the Agency's syllabus, for example by taking a break, and any deviation may result in "serious penalties for [the grievants] . . . and . . . create[] problems for the students."[3] As a result, the Agency does not allow the grievants to take their contractually mandated, paid twenty-minute lunch break, and one of their fifteen-minute paid rest breaks, when they conduct flight simulations. The Union filed a grievance. The parties could not resolve the grievance and submitted the matter to arbitration.

At arbitration, the parties stipulated to the following issues, in pertinent part: "Whether the Agency violated Article 33, Section[s] 3(a) and . . . (b) of the [parties'] agreement . . . , and if so, what is the appropriate remedy?"[4] As set forth by the Arbitrator, Article 33 guarantees employees a paid twenty-minute lunch break and two paid fifteen minute rest breaks per day. Article 33 provides that the lunch break cannot "begin earlier than three and one-half . . . hours after the start of the shift, or terminate later than three hours before the end of the shift [and that a]n employee directed to work through the lunch period will be compensated accordingly."[5] Article 33 also provides that the grievants take one of their paid fifteen-minute rest breaks "during each half of the . . . work[day]."[6]

[1] 5 U.S.C. § 5596.

[2] 29 U.S.C. §§ 201-19.
[3] Award at 4.
[4] *Id.* at 3.
[5] *Id.* at 1-2 (quoting Art. 33 of the parties' agreement).
[6] *Id.*

The Arbitrator found that the Agency "clearly violated . . . Article 33" of the parties' agreement when it denied the grievants their contractually mandated paid breaks.[7] She found in this regard that "[t]here is no ambiguity" to Article 33, and that the provision's application to the facts of the case is "clear."[8]

In finding that the Agency violated Article 33, the Arbitrator "reject[ed] the Agency's argument that a past practice replaced [Article 33's] clear contractual language."[9] Specifically, she rejected the Agency's claim that "the [Union's] failure to file a grievance until December of 2013 indicated acquiescence to the violation of [Article 33's] clear contractual requirements in a way that removed the contractual language."[10] Rather, based on various factual findings, she found that "[t]he Union never acquiesced" to the Agency's violation of Article 33 of the parties' agreement.[11]

The Arbitrator then assessed whether an award of backpay was appropriate under the BPA. The Arbitrator concluded that "the [grievants] were affected by an unjustified and unwarranted personnel action," within the meaning of the BPA, when the Agency violated Article 33 of the parties' agreement, satisfying the BPA's first requirement.[12] Applying the BPA's second requirement, the Arbitrator found that the contract violation "resulted in the withdrawal or reduction of [the grievants'] pay"[13] because "[they] worked through . . . breaks when they were supposed to be duty free."[14] Finding that the grievants were deprived of their paid lunch break and one of their paid rest breaks, she reasoned that this "meant that they actually were working their eight[-]hour day, . . . plus [thirty-five] minutes of overtime when they had to work through the contractually mandated breaks."[15]

As a remedy, the Arbitrator awarded the grievants thirty-five minutes of overtime pay for every day that the grievants conducted a flight simulation, from the date of the grievance "to as long as this situation continue[s]."[16]

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

[7] *Id.* at 13.
[8] *Id.*at 11.
[9] *Id.* at 12.
[10] *Id.* at 11-12.
[11] *Id.* at 12.
[12] *Id.* at 13.
[13] *Id.*
[14] *Id.* at 12.
[15] *Id.* at 12-13.
[16] *Id.* at 13.

III. Analysis and Conclusions

A. The Agency's argument – that the award is contrary to law because the Arbitrator erroneously failed to find that a past practice existed that modified the parties' agreement – does not provide a basis for finding the award deficient.

The Agency argues that the Arbitrator's finding that the Agency violated Article 33 is contrary to law because the Arbitrator failed to correctly apply Authority "[p]ast[-p]ractice [l]aw."[17] Specifically, the Agency argues that it did not violate Article 33 because the parties established a "past practice" of not following Article 33 on days when the grievants conduct flight simulations.[18]

We find that the Agency's contrary-to-law exception is unsupported. Although the Agency argues that the award is contrary to law, because the Arbitrator misapplied Authority case law in finding that no past practice existed, the Agency does not explain the Arbitrator's legal error. Instead, the Agency merely reargues its claim that based on the facts of the case, as the Agency views them, a past practice existed and modified Article 33.[19]

Accordingly, we deny the exception.

B. The award is contrary to the BPA.

The Agency claims that the award's backpay remedy is contrary to the BPA.[20] 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.[21] 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.[22] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[23]

[17] Exceptions Br. at 16-19; *see* Exceptions Form at 4.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 13-14.
[21] *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)).
[22] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[23] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014).

The Agency claims that the award's backpay remedy is contrary to the BPA because the award does not meet the BPA's requirements.[24] The Agency concedes for purposes of this exception that the award meets the first requirement of the BPA – that the grievants were affected by an unjustified or unwarranted personnel action when the Agency violated Article 33 of the parties' agreement.[25] But the Agency claims that the award does not meet the BPA's second requirement because the grievants "did not suffer a loss of pay, differential[s], or allowance[s]."[26]

The BPA authorizes an award of backpay only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action, and (2) the personnel action resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials.[27] The violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action within the meaning of the BPA.[28]

The Arbitrator found that the BPA's first requirement for an award of backpay was met. Specifically, she found that the Agency committed an unwarranted or unjustified personnel action because it violated Article 33 of the parties' agreement when it denied the grievants their paid breaks.[29]

The Arbitrator also found that the BPA's second requirement was satisfied because the contract violation caused the grievants to "work through the contractually mandated breaks."[30] However, the Authority has considered, and rejected, similar arguments.[31] Most recently, in *U.S. DHS, U.S. Citizenship & Immigration Services* (*USCIS*),[32] the Authority rejected this argument because employees denied paid breaks continued to be compensated for an eight-hour workday, and the arbitrator did not find that the employees' pay decreased, as the BPA requires for an arbitrator to award backpay.[33] In *USCIS*, an agency violated a memorandum of agreement (MOA) guaranteeing paid breaks.[34] The arbitrator found that the violation of the MOA satisfied the BPA's second requirement because "when an employee is deprived of a paid break, he or she has been deprived of a paid benefit and has been forced to work, and has worked, when he should have been on paid break."[35] But the Authority set aside the award because the affected employees continued to be compensated for an eight-hour day, with no decrease in pay.

Like the employees in *USCIS*, the grievants here continued to be compensated for their eight-hour workday, and the Arbitrator did not find that the grievants' pay decreased as the result of the contract violation. Thus, the Arbitrator's award of backpay does not satisfy the BPA's second requirement. We therefore find that the Arbitrator's remedy is contrary to law and set it aside.

C. It is not necessary to address the Agency's contrary-to-the-FLSA or nonfact exceptions.

The Agency also claims that the award's remedy of backpay is contrary to the FLSA[36] and based on the nonfact that the employees "worked . . . overtime."[37] As we have set aside the award of backpay as contrary to the BPA, it is unnecessary to resolve the Agency's remaining exceptions,[38] both of which challenge the award's backpay remedy.[39]

The Union argues that we should dismiss the Agency's contrary-to-the-FLSA exception under § 2429.5 of the Authority's Regulations[40] because the Agency could have, but did not, present the issue to the Arbitrator.[41] But as we find it unnecessary to address the Agency's exception, we also find it unnecessary to resolve the Union's claim regarding § 2429.5.

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[24] Exceptions Form at 4.

[25] Exceptions Br. at 13 ("The failure of the Agency to follow the provisions of the [parties' agreement,] as it relates to lunch periods and breaks[,] meets the first prong of the [BPA's] two[-]part test.").

[26] Exceptions Form at 4.

[27] *E.g.*, *U.S. Dep't of HHS, Wash., D.C.*, 68 FLRA 239, 243 (2015) (citing *U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014) (*CBP*)).

[28] *E.g.*, *id.* (citing *CBP*, 67 FLRA at 464).

[29] Award at 12.

[30] *Id.* at 13.

[31] *U.S. DHS, U.S. Citizenship & Immigration Serv.*, 68 FLRA 1074, 1074 (2015) (Member DuBester dissenting); *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 56 FLRA 434 (2000) (*Travis*).

[32] 68 FLRA 1074 (2015) (Member DuBester dissenting) (citing *Travis*, 56 FLRA 434).

[33] *Id.* at 1077.

[34] *Id.* at 1074-75.

[35] *Id.* at 1075.

[36] Exceptions Br. at 14-15.

[37] Exceptions Form at 9.

[38] *See* Exceptions Br. at 14-15 (alleging award is contrary to the FLSA), 19-20 (alleging Arbitrator's finding that employees worked overtime is a nonfact).

[39] *See, e.g.*, *USCIS*, 68 FLRA at 1077.

[40] 5 C.F.R. § 2429.5.

[41] Opp'n at 10.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy.[42] Because we set aside the entire remedy ordered by the Arbitrator, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

IV. Decision

We deny, in part, and grant, in part, the Agency's exceptions. We set aside the award of backpay and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

[42] *USCIS*, 68 FLRA at 1077 (citing *U.S. Dep't of HUD*, 65 FLRA 433, 436 (2011)).

Member DuBester, concurring, in part, and dissenting, in part:

I agree with the decision's determination to deny the Agency's contrary-to-law exception challenging the Arbitrator's finding that no past practice existed, because the Agency does not support its exception.

I do not agree with the majority that the award is contrary to the Back Pay Act (BPA)[1] for the same reasons that I gave in my dissent in *U.S. DHS, U.S. Citizenship & Immigration Services* (*USCIS*).[2] In *USCIS*, the Authority erred in finding that *U.S. Department of the Air Force, Travis Air Force Base, California* (*Travis AFB*)[3] controlled the outcome in that case. The majority makes the same mistake here by relying on *USCIS*' faulty premise to set aside the remedy in a second arbitrator's well-reasoned award.

As I noted in my dissent in *USCIS*,[4] *Travis AFB* is distinguishable from the circumstances of that case. For the same reasons, *Travis AFB* does not apply to this case, either. In *Travis AFB*, employees worked an eight-hour workday, which included a paid, working-lunch period.[5] The agency eliminated employees' paid lunch period and replaced it with an unpaid lunch period during which employees were not required to work.[6] But employees continued to work eight hours each day. The arbitrator found that the agency violated the parties' agreement, and ordered the agency "to compensate employees . . . at the 'appropriate overtime rate for the additional time they were required to work beyond their eight-hour workday.'"[7]

The Authority in *Travis* set aside the arbitrator's backpay remedy.[8] The Authority reasoned that employees suffered no loss of pay as a result of the change.[9] Before the agency eliminated employees' paid, working-lunch period, employees were paid for eight hours of work each day. After the agency eliminated the paid, working-lunch period and replaced it with an unpaid lunch period, employees were still paid for eight hours of work each day.[10] Therefore, there was no loss of pay.

This case, like *USCIS*, is different from *Travis AFB* because it concerns the deprivation of contractually mandated, paid breaks. Here, the Arbitrator found that the Agency violated Article 33 of the parties' agreement when it denied the grievants their contractually mandated paid, nonworking-lunch and rest breaks.[11] She found that the grievants were denied "[thirty-five] minutes of duty[-]free break time [during] their eight[-]hour day" on days when they conducted flight simulations.[12] The Arbitrator reasoned that "[the grievants] worked through these breaks when they were supposed to be duty free, mean[ing] that they actually were working their eight[-]hour day, which should have included the [paid, nonworking] breaks, plus [thirty-five] minutes of overtime when they had to work through the contractually mandated breaks."[13] The Arbitrator concluded that an award of backpay in those circumstances "meets the requirements of the [BPA] because the [grievants] were affected by an unjustified and unwarranted personnel action . . . [that] resulted in the withdrawal or reduction of . . . pay . . . [because they] work[ed thirty-five] minutes of uncompensated overtime."[14]

As I explained in *USCIS*, the math is simple. "Employees who were not afforded their paid rest breaks worked eight hours each day. For those employees, adding *paid* breaks to a workday during which they already worked eight compensable hours would extend their paid workday by the number of paid breaks they were denied."[15]

Because the Arbitrator's award merely compensates those employees for the compensable time of which they were deprived, I would find that the award is not contrary to the BPA.

[1] 5 U.S.C. § 5596.
[2] 68 FLRA 1074, 1078 (2015) (Dissenting Opinion of Member DuBester).
[3] *See* 56 FLRA 434 (2000).
[4] 68 FLRA at 1078.
[5] *Travis AFB*, 56 FLRA at 434-35.
[6] *Id.* at 437.
[7] *Id.* at 435 (quoting the arbitrator's award).
[8] *Id.* at 437-38.
[9] *Id.* at 438.
[10] *Id.*
[11] Award at 13.
[12] *Id.* at 12
[13] *Id.* at 12-13.
[14] *Id.* at 13.
[15] *USCIS*, 68 FLRA at 1078.