70 FLRA No. 72

FRATERNAL ORDER OF POLICE
LODGE No. 168
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
87TH AIR BASE WING
JOINT BASE
MCGUIRE-DIX-LAKEHURST, NEW JERSEY
(Agency)

0-AR-5299

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DECISION

November 27, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency initiated an investigation into an officer's (the grievant's) misconduct, temporarily revoked his authorization to carry a firearm, and assigned him to a limited-duty position. Arbitrator Joyce M. Klein issued an award finding that the Agency violated procedural requirements in the parties' collective-bargaining agreement (parties' agreement) and in Air Force Instruction 31-117 (the instruction). However, the Arbitrator concluded that those violations did not result in the grievant losing pay, and, therefore, she did not award backpay or attorney fees. There are two main questions before us.

The first question is whether the Arbitrator's failure to award backpay or attorney fees is contrary to the Back Pay Act (the Act).[1] Because the Agency's violations did not directly result in a loss of pay, allowances, or differentials – which is a requirement for an award of backpay or attorney fees under the Act – the answer is no.

The second question is whether the award is contrary to the instruction. Because the award is not inconsistent with the plain wording of – or otherwise impermissible under – the instruction, the answer is no.

[1] 5 U.S.C. § 5596.

II. Background and Arbitrator's Award

After a meeting with management, the grievant swore at one of his supervisors (the initial misconduct). The Agency sent the grievant a memorandum informing him that it was initiating an investigation into that misconduct, reassigning him to a limited-duty position, and temporarily revoking his authorization to carry a firearm by placing him on the Agency's do-not-arm list. Approximately three months later, the Agency proposed to suspend the grievant. Around that time, the grievant engaged in some other misconduct. The Agency, considering both incidents of misconduct together, suspended the grievant for ten days. The grievant served the suspension roughly seven months after the initial misconduct. Shortly after the grievant served the suspension, the Agency reinstated his authorization to carry a firearm by removing him from the do-not-arm list.

The Union did not challenge the grievant's suspension but filed a grievance alleging that the Agency violated the parties' agreement and the instruction by placing the grievant on the do-not-arm list. The parties could not resolve the grievance, and the Union submitted the dispute to arbitration.

The Arbitrator found that the Agency had sole discretion to place the grievant on the do-not-arm list and, therefore, that its decision to do so was not subject to review. Accordingly, the Arbitrator addressed only whether the Agency had complied with the procedural requirements of the parties' agreement and the instruction.

Before the Arbitrator, the Union argued that the Agency violated Article 54 of the parties' agreement (Article 54) and § 2.3.3.1 of the instruction. Article 54 requires the Agency to "promptly initiate[]" disciplinary actions,[2] and § 2.3.3.1 requires the Agency to review an employee's status on the do-not-arm list every 180 calendar days "to either reaffirm that [employee's] status or take other appropriate action."[3]

The Arbitrator concluded that the Agency violated Article 54 because it had developed the facts necessary to discipline the grievant within a few days of the initial misconduct, but had delayed proposing discipline until three months later. The Arbitrator also concluded that the Agency violated § 2.3.3.1 by "fail[ing] to review" the grievant's status on the do-not-arm list within 180 days of placing him on that list.[4] However, the Arbitrator found that neither of those violations directly resulted in the grievant losing pay. Specifically,

[2] Award at 20 (quoting Collective-Bargaining Agreement Art. 54, § 54.04).
[3] *Id.* at 5 (quoting Instruction, § 2.3.3.1).
[4] *Id.* at 20.

she stated that although the grievant would have received eight hours of overtime pay per week in his normal position, any loss of pay resulted from his reassignment, not the Agency's violations. Accordingly, the Arbitrator did not award backpay or attorney fees.

The Union also alleged, at arbitration, that the Agency violated § 2.3.1.2 of the instruction. As relevant here, that section provides that the Agency may not deny an employee an assignment "solely because" it has temporarily revoked that employee's authorization to carry a firearm.[5] The Arbitrator found that the Agency denied the grievant his normal assignment because, without authorization to carry a firearm, he was unqualified. The Arbitrator also observed that the Agency reassigned the grievant due to its investigation into the initial misconduct. Accordingly, the Arbitrator concluded that the Agency did not violate § 2.3.1.2.

As a remedy for the Agency's violations of Article 54 and § 2.3.3.1, the Arbitrator directed the Agency to comply, prospectively, with the parties' agreement and the instruction.

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

III. Analysis and Conclusions

A. The award is not contrary to the Act.

The Union argues that the Arbitrator erred by not awarding backpay and attorney fees under the Act.[6] In particular, the Union alleges that the grievant lost at least eight hours of overtime pay per week as a direct result of the Agency's violations.[7]

The Act authorizes an award of backpay only when an arbitrator finds that an unjustified or unwarranted personnel action "directly result[s]" in a withdrawal or a reduction of an employee's pay, allowances, or differentials.[8] The causal connection between the violation and a loss of pay, allowances, or differentials must be "clear."[9]

Concerning the violation of § 2.3.3.1, the Union argues that the Agency's failure to review the grievant's status on the do-not-arm list directly resulted in the grievant losing pay for each day that he remained on that list in excess of 180 days.[10] However, § 2.3.3.1 did not require the Agency *to remove* the grievant from the do-not-arm list after 180 days; it merely required the Agency *to review* the grievant's status on that list and, then, take some "appropriate action."[11] And even if the Agency had complied with that section, it could have chosen to prolong the grievant's placement on the do-not-arm list beyond 180 days by "reaffirm[ing]" his status on that list.[12] Therefore, any connection between the violation of § 2.3.3.1 and the grievant losing pay from remaining on the do-not-arm list past 180 days is speculative. Accordingly, the Union has not provided any basis for finding that, as a matter of law, the Arbitrator erred in concluding that the violation did not directly result in the grievant losing pay.[13]

The Union also asserts that the Agency's violation of Article 54 directly resulted in the grievant losing pay.[14] As noted above, the Arbitrator found that the Agency violated Article 54 by failing to promptly initiate discipline against the grievant.[15] But even if the Agency had done so, the Arbitrator did not find that the Agency was then obligated to immediately remove the grievant from the do-not-arm list and reassign him to his normal position.[16] Moreover, it is unclear what effect the grievant's other misconduct[17] had on the length of his reassignment or placement on the do-not-arm list. Because backpay is available "only where it is clear" that a causal connection exists,[18] there is no basis to find that the Arbitrator erred by concluding that the violation of Article 54 did not directly result in the grievant losing pay.

As the Union failed to establish that either of the Agency's violations directly resulted in the grievant losing pay, we find that the Arbitrator did not err by

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[5] *Id.* at 5 (quoting Instruction, § 2.3.1.2).
[6] *See* Exceptions Br. at 5-10, 13.
[7] *Id.* at 9-10.
[8] *E.g.*, *AFGE, Local 916*, 57 FLRA 715, 717 (2002) (*Local 916*) (citing *U.S. Dep't of HHS*, 54 FLRA 1210, 1218 (1998)).
[9] *See, e.g., U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 56 FLRA 434, 437-38 (2000) (*Travis*) (citation omitted).
[10] Exceptions Br. at 5-6.
[11] Award at 5 (quoting Instruction, § 2.3.3.1).
[12] *Id.* (quoting Instruction, § 2.3.3.1); *see also id.* at 18 (noting that the Agency has sole discretion to place employees on the do-not-arm list).
[13] *See Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1533 (1994) (where the effect of a violation is "totally speculative," the Authority will deny backpay under the Act (quoting *U.S. Dep't of HHS, SSA, Balt. Md. & U.S. Dep't of HHS, SSA, Hartford Dist. Office, Hartford, Conn.*, 37 FLRA 278, 292 (1990))).
[14] Exceptions Br. at 8-9.
[15] Award at 23.
[16] *Cf. id.* at 18 (noting that the Agency has sole discretion to place employees on the do-not-arm list); *id.* at 10 (under § 2.3.3.5 of the instruction, the Agency "may" reinstate an employee's authority to carry a firearm after either a completed investigation *or* a corrective action).
[17] *Id.* at 9.
[18] *Local 916*, 57 FLRA at 717 (quoting *Travis*, 56 FLRA at 437-38; *U.S. Dep't of the Treasury, Customs Serv., S. Cent. Region, New Orleans. La.*, 43 FLRA 337, 340 (1991)).

denying the grievant an award of backpay.[19] And without an award of backpay, there is no basis under the Act for an award of attorney fees.[20] Consequently, we deny the Union's contrary-to-law exceptions.

Regarding attorney fees, we note, as we have before,[21] that in an appropriate case, the Authority should reconsider its reliance on the interest-of-justice factors established in *Allen v. U.S. Postal Service* (*Allen*).[22] In *Allen*, the Merit Systems Protection Board (MSPB) created the interest-of-justice factors in the context of an adverse-action appeal;[23] as such, most of *Allen's* interest-of-justice factors relate to an award of attorney fees in circumstances where an adverse action is being either challenged, overturned, or modified.[24] But, unlike the MSPB, the Authority cannot review adverse actions.[25] Thus, the Authority, as it has stated before, needs interest-of-justice factors "that are better adapted . . . to the types of cases that the Authority is called upon to review"[26] – such as in this case, where an adverse action is not at issue.[27] As Congress established the Authority and the MSPB for "very different purposes,"[28] the Authority should develop interest-of-justice factors that serve the purposes of *its* organic statute – not the MSPB's.[29] And when the Authority reconsiders the interest-of-justice factors, it "should consider, as appropriate, the views of the federal labor-management community, to truly ensure that the interest of justice is served."[30]

[19] *See id.* (finding that an arbitrator's denial of backpay was not deficient where there was no causal connection between a violation and a loss of pay); *see also Crimaldi v. United States*, 651 F.2d 151, 154 (2d Cir. 1981) (denying backpay because agency's procedural violation was a harmless error that did not prejudice the employee).

[20] *See AFGE, Local 1156*, 68 FLRA 531, 533 (2015) ("[A]ttorney fees may not be awarded [under the Act] if backpay is not awarded." (quoting *U.S. Dep't of VA, Med. Ctr., Detroit, Mich.*, 60 FLRA 306, 310 (2004))).

[21] *See U.S. DHS, U.S. CBP*, 70 FLRA 73, 76 (2016) (*CBP*); *NAIL, Local 5*, 69 FLRA 573, 577-78 (2016) (*Local 5*).

[22] 2 M.S.P.R. 420 (1980); *see Local 5*, 69 FLRA at 575 (reciting *Allen* factors).

[23] *Allen*, 2 M.S.P.R. at 423 (noting that the employee had been removed).

[24] *See id.* at 434-35 (listing the factors).

[25] *U.S. DHS, U.S. CBP*, 66 FLRA 91, 93 (2011) (noting that "[c]onsistent with the plain wording of [5 U.S.C. § 7122(a)], the Authority lacks jurisdiction not only over awards that resolve adverse actions, but those that resolve issues *related* to adverse actions" (citation omitted)).

[26] *Local 5*, 69 FLRA at 577-78.

[27] *See* 5 U.S.C. § 7512 (adverse actions include removals, reductions in grade, reductions in pay, suspensions for more than fourteen days, and furloughs of thirty days or less).

[28] *Local 5*, 69 FLRA at 577.

[29] *Allen*, 2 M.S.P.R. at 435 (noting that the *Allen* factors are merely "directional markers").

[30] *CBP*, 70 FLRA at 76 (citation omitted).

B. The award is not contrary to the instruction.

The Union argues that the award is contrary to § 2.3.1.2 of the instruction.[31] That section provides that the Agency may not deny an employee an assignment "solely because" it has temporarily revoked that employee's authorization to carry a firearm.[32] When evaluating an exception asserting that an award is contrary to a governing agency rule or regulation, such as the instruction, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[33]

The Union argues that the Arbitrator erred by finding that the Agency denied the grievant his normal assignment based on his qualifications.[34] According to the Union, the grievant was unqualified to work his normal assignment only because the Agency had placed him on the do-not-arm list.[35] Thus, in the Union's view, the sole reason for the grievant's reassignment was the revocation of his authorization to carry a firearm.[36] However, as noted above, the Arbitrator also found that the Agency reassigned the grievant because of the investigation into the initial misconduct.[37] Therefore, there is no basis to conclude that the Agency reassigned the grievant "solely because" of the revocation of his firearm.[38] Accordingly, the award is not inconsistent with the plain wording of, or otherwise impermissible under, § 2.3.1.2, and we deny this exception.[39]

Finally, we note that in its exceptions form, the Union indicates that it is excepting to the award because it is "contrary to public policy"[40] and "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."[41] However, the Union fails to support either of those exceptions with any arguments, so

[31] Exceptions Br. at 10-12.

[32] Award at 5 (quoting Instruction, § 2.3.1.2).

[33] *E.g.*, *NTEU, Chapter 215*, 67 FLRA 183, 185 (2014) (*Chapter 215*) (citing *SSA, Region IX*, 65 FLRA 860, 863 (2011)).

[34] Exceptions Br. at 10-11.

[35] *Id.*

[36] *Id.* at 11.

[37] Award at 7 (stating that the grievant was reassigned "until an investigation could be completed"); *see also id.* at 7-8 (noting that the memo that the Agency provided to the grievant stated that the grievant was "placed in a limited[-]duty position and listed on the [d]o[-n]ot[-a]rm list" "[w]hile th[e] investigation [was ongoing]").

[38] *Id.* at 5 (quoting Instruction, § 2.3.1.2).

[39] *See Chapter 215*, 67 FLRA at 185.

[40] Exceptions Form at 7.

[41] *Id.* at 5.

we deny these exceptions, as unsupported, under § 2425.6(e)(1) of the Authority's Regulations.[42]

IV. Decision

We deny the Union's exceptions.

[42] 5 C.F.R. § 2425.6(e)(1) (stating that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c)); *see, e.g.*, *NTEU*, 70 FLRA 57, 60 (2016) (denying unsupported arguments that a party raised in its exceptions form).