70 FLRA No. 88

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
(69 FLRA 639 (2016))

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DECISION

March 12, 2018

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Before the Authority: Colleen Duffy Kiko Chairman, and James T. Abbott and Ernest DuBester, Members
(Member DuBester dissenting)

I. Statement of the Case

This is the second time this matter has come before the Authority. In a previous award (the first award), Arbitrator Louise B. Wolitz found that (1) 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; and (2) the grievants were entitled to backpay "at the . . . overtime rate"[1] under the Back Pay Act (BPA).[2]

After the Agency filed exceptions to the first award, the Authority, in *U.S. Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Texas* (*Air Force*),[3] found that the backpay remedy was contrary to the BPA because there was no loss of pay – a requirement under the BPA – and remanded the award for the Arbitrator to order an appropriate remedy. In her award following the remand (the remand award), the Arbitrator modified the first award to remove the reference to "overtime" pay[4] and again awarded the grievants backpay under the BPA – but this time "at the straight time rate."[5] The Agency excepts to the remand award.

The only question before us is whether the Arbitrator corrected the deficiency for which the Authority found it necessary to remand the original award. The Arbitrator did not. The failure to receive a paid break does not result in a loss of pay – the same reason that the Authority found the remedy contrary to the BPA in *Air Force*. Accordingly, we once again set aside the remedy of backpay.

II. Background and Arbitrator's Awards

1. The first award and *Air Force*.

As *Air Force* sets forth the facts of this case in detail, we will only briefly summarize them here.

The grievants are aircraft-simulator instructors who train student pilots, and conduct flight-simulation training one to five days per week.

When the grievants conduct these – approximately six hour-long – flight simulations, 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.

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?"[6] The Arbitrator found that the Agency violated Article 33 of the parties' agreement when it denied the grievants their contractually mandated paid breaks.

The Arbitrator found that the contract violation also violated the BPA. Finding that the grievants were deprived of their paid lunch break and one of their paid rest breaks, the Arbitrator reasoned that the grievants were working eight hours in addition to thirty-five minutes of overtime when they had to work through their breaks. As a remedy, the Arbitrator

[1] *U.S. Dep't of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Tex.*, 69 FLRA 639 (2016) (*Air Force*) (Member DuBester dissenting).
[2] 5 U.S.C. § 5596.
[3] 69 FLRA 639.
[4] Remand Award at 1.
[5] *Id.*
[6] *Air Force*, 69 FLRA at 639.

awarded the grievants thirty-five minutes of overtime pay for every day that the grievants conducted a flight simulation.

In *Air Force*, the Authority sustained the Union's grievance, but determined that the award's remedy was contrary to the BPA.[7] Specifically, the Authority found that the award of backpay did not satisfy the BPA's second requirement – that the personnel action "resulted in the withdrawal or reduction" of an employee's pay, allowances, or differentials[8] – because "the grievants . . . 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."[9] The Authority, thus, set aside the award of backpay and remanded the award to the parties for resubmission to the Arbitrator to formulate an alternative remedy.[10]

2. The remand award.

In the remand award, the Arbitrator amended one paragraph in the first award by removing any reference to the word "overtime."[11] As such, instead of awarding the grievants thirty-five minutes of pay "at the overtime rate" as indicated in the first award, the Arbitrator awarded the grievants thirty-five minutes of pay "at the straight time rate" for every day that the grievants conducted a flight simulation, from the date of the grievance "to as long as this situation continue[s]."[12]

The Agency filed a contrary-to-law exception.

III. Analysis and Conclusion: The remand award is contrary to the BPA.

The Agency claims that the remand award is contrary to the BPA because – like the first award – the award of backpay does not meet the second requirement of the BPA.[13] For the same reasons that the Authority found the first award contrary to the BPA in *Air Force*, we agree.

The Arbitrator's modification of the award – removing references to "overtime"[14] pay and awarding backpay "at the straight time rate"[15] – does not cure the first award's deficiency that the Authority identified in *Air Force*.[16] As the Authority held in *Air Force*, an award of backpay does not satisfy the BPA's second requirement because the grievants were "compensated for their eight-hour workday, and the Arbitrator did not find that the grievants' pay decreased as the result of the contract violation."[17] Under these circumstances – where there is no finding that the affected employee's pay decreased[18] – the Arbitrator may not award backpay, at either the "overtime" or "straight time"[19] rate. We therefore find that the Arbitrator's remedy is contrary to the BPA, and set aside the award of backpay.

We also do not find it appropriate to remand the award for a second time to the Arbitrator to fashion an alternative remedy. As the case came before the Authority originally, the Union did not request any remedy other than money. In these circumstances, we will not give the Union yet another "bite at the apple" by remanding again for a possible, alternative, non-monetary remedy.[20]

IV. Decision

We grant the Agency's exception, and set aside the award of backpay.

[7] *Id.* at 641.
[8] 5 U.S.C. § 5596.
[9] *Air Force*, 69 FLRA at 641.
[10] *Id.* at 641-42.
[11] Remand Award at 1.
[12] *Id.*
[13] Exceptions Br. at 2-3.
[14] Remand Award at 1.
[15] *Id.*
[16] 69 FLRA at 641.
[17] *Id.*
[18] *Id.*
[19] Remand Award at 1.
[20] Member Abbott notes that the Authority remanded this matter to Arbitrator Wolitz to fashion an "alternative remedy," *Air Force*, 69 FLRA at 642, because "the grievants here continued to be compensated for their eight-hour workday [and there was no evidence that] the grievants' pay decreased as the result of the contract violation." *Id.* at 641. But Arbitrator Wolitz simply ignored the Authority's remand decision that a monetary remedy was not appropriate and changed the word "overtime" to "straight time rate." To remand this matter to the same arbitrator a second time, as Member DuBester suggests, would serve no purpose and most certainly does not comport with our mandate to interpret the Statute "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b).

Member DuBester, dissenting:

I do not agree with the majority that the remand award is contrary to the Back Pay Act (BPA)[1] for the same reasons that I gave in my dissents in *U.S. Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Texas* (*Air Force*),[2] the first time this matter came before the Authority, and in *U.S. DHS, U.S. Citizenship & Immigration Services* (*USCIS*).[3] In *USCIS*, the Authority erred in finding that *U.S. Department of the Air Force, Travis Air Force Base, California* (*Travis AFB*)[4] controlled the outcome in that case. In *Air Force*, the Authority erred in relying on *USCIS's* faulty premise to set aside the remedy in the Arbitrator's well-reasoned award. The majority makes the same mistake here.

As I noted in my dissent in *Air Force*,[5] *Travis AFB* is distinguishable from the circumstances of that case. For the same reasons, *Travis AFB* does not apply to this case. In *Travis AFB*, employees worked an eight-hour workday, which included a paid, working-lunch period.[6] The agency eliminated employees' paid lunch period and replaced it with an unpaid lunch period during which employees were not required to work.[7] 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.'"[8]

The Authority in *Travis AFB* set aside the arbitrator's backpay remedy.[9] The Authority reasoned that employees suffered no loss of pay as a result of the change.[10] 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.[11] 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.[12] 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.[13] 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."[14] 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."[15]

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 one or two *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 not afforded.'"[16]

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.

I also do not agree with the majority's decision not to remand the award for the Arbitrator to formulate an alternative remedy. Although I am generally reluctant to remand awards where the Authority can resolve the outstanding issues in the Authority's decision, this case involves issues within the special

[1] 5 U.S.C. § 5596.
[2] 69 FLRA 639, 643 (2016) (Dissenting Opinion of Member DuBester).
[3] 68 FLRA 1074, 1078 (2015) (Dissenting Opinion of Member DuBester).
[4] 56 FLRA 434 (2000).
[5] 69 FLRA at 643.
[6] *Travis AFB*, 56 FLRA at 434-35.
[7] *Id.* at 437.
[8] *Id.* at 435 (quoting the arbitrator's award).
[9] *Id.* at 437-38.
[10] *Id.* at 438.
[11] *Id.*
[12] *Air Force*, 69 FLRA at 640.
[13] *Id.* at 643.
[14] *Id.*
[15] *Id.*
[16] *USCIS*, 68 FLRA at 1078 (Dissenting Opinion of Member DuBester).

province of the Arbitrator. The Authority, and the courts from the Supreme Court on down, have recognized that arbitrators have broad remedial discretion.[17] And this broad discretion is not limited by the remedies a party has explicitly requested in the grievance. Rather, an arbitrator may formulate a remedy taking into account other considerations such as what would be equitable, or otherwise appropriate to remedy the contract violation.[18] Thus, even if a party limits its remedial requests to monetary compensation, this does not mean that an arbitrator is restricted from exercising broad remedial discretion to award other relief. Because the effect of the majority's decision not to remand is to deny the Union any remedy whatsoever for the Agency's contract violation, and because the Arbitrator has broad remedial discretion to award non-monetary relief, I would remand the award to the parties for resubmission to the Arbitrator or a different arbitrator, absent settlement, to order an appropriate non-monetary remedy.

[17] *E.g.*, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("When an Arbitrator is commissioned to interpret and apply the collective[-]bargaining agreement, he is to bring his informed judgement to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."); *Local 369, Bakery & Confectionary Workers Int'l Union v. Cotton Baking Co.*, 514 F.2d 1235, 1237 (5th Cir. 1975) (arbitrator has power to choose any appropriate remedy unless it is expressly precluded by the parties' agreement); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 552, 554 (2014) (citing established Authority precedent finding that "arbitrators have broad discretion to fashion remedies"); *see generally* Elkouri & Elkouri, How Arbitration Works Ch.18-8, Scope of Remedial Power (Kenneth May ed., 8th ed. 2016) ("most collective[-]bargaining agreements leave a 'gaping void' on the topic of arbitral remedies, and, in the absence of language limiting the scope of a remedy in the agreement itself, arbitrators generally have been considered to possess broad discretion to fashion an appropriate remedy.") (citations omitted).

[18] *U.S. Dep't of VA, Med. Ctr., Perry Point, Md.*, 68 FLRA 83, 86 n.45 (2014) ("broad remedial discretion may properly take account of other principles, like the principle of unjust enrichment – by addressing the Agency's unjust enrichment when it failed to pay the grievant for higher-graded work performed at the Agency's direction") (citations omitted).