

70 FLRA No. 128

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3408
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
LOMPOC, CALIFORNIA
(Agency)

0-AR-5331

DECISION

June 22, 2018

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

I. Statement of the Case

In this case, Arbitrator Jerome T. Barrett's conclusions are so unsupported by the record that we cannot determine whether his award is deficient on the grounds raised by the Union's exceptions. Therefore, we remand the award for further action.

II. Background and Arbitrator's Award

The Agency employs custody employees and non-custody employees. When custody employees are given special assignments outside of their regular work duties, the Agency often backfills by using other custody employees on overtime. Under certain circumstances, however, the Agency "augment[s]" – reassigns non-custody employees to temporarily perform the custody employees' duties – in order to avoid using overtime.¹ The parties have a memorandum of understanding (MOU) that addresses the circumstances under which augmentation can be used instead of assigning overtime.

The Union filed a grievance, claiming that the Agency changed the established overtime procedures by

using non-custody employees to work shifts that previously would have been available to custody employees on overtime. The grievance went to arbitration.

The Arbitrator noted that the Union's "invocation to arbitration" identified the issue, in pertinent part, as: "Did the Agency . . . violate Article 4, [S]ection b or Article 18, [S]ection p of the [parties' master agreement], [the MOU] regarding [a]ugmentation . . . , the [Fair] Labor Standards Act (FLSA), . . . and/or Office of Personnel Management . . . regulations implementing the FLSA in [the] federal sector, when assigning work and duties beginning August 16, 2016?"²

At arbitration, the Union made various arguments in favor of the grievance, particularly with regard to the alleged violation of the MOU. The Arbitrator characterized these arguments as "worthy of examination," but found that they "[fell] short of carrying the Union's 'burden of proof.'"³ For support, the Arbitrator only cited Article 3, Section a of the parties' agreement, which states: "Both parties mutually agree that this [a]greement takes precedence over any [Agency] policy, procedure, and/or regulation which is not derived from higher government[-]wide laws, rules, and regulations."⁴ The Arbitrator stated that this contractual wording "successfully counter[ed]" all of the Union's arguments, and he found that the MOU had "no standing to challenge Article 3, [S]ection a."⁵ Thus, the Arbitrator denied the Union's grievance.

On December 5, 2017, the Union filed exceptions, and, on January 10, 2018, the Agency filed an opposition.

III. Analysis and Conclusion: We remand the award for further action.

In its exceptions, the Union argues that the award is contrary to law and government-wide regulations, fails to draw its essence from the parties' agreements, and that the Arbitrator denied the Union a fair hearing and exceeded his authority.⁶ In particular, the Union contends that the Arbitrator "provided no meaningful discussion, analysis, or opinion as to why he reached the decision" to deny the grievance.⁷ And the Union asserts that an arbitrator, "when making a decision,

² Award at 2.

³ *Id.* at 7.

⁴ *Id.*

⁵ *Id.*

⁶ See Exceptions at 2; see also *Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325 (2017) (treating argument that arbitrator failed to address all the issues presented as raising an exceeded-authority exception).

⁷ Exceptions at 7.

¹ Exceptions at 3.

must provide an opinion and discussion in enough specificity [for the Authority] to ascertain whether or not the arbitrator's award properly considered the law applicable in a particular case."⁸ In the event we cannot reach a decision on the merits, the Union requests that we remand the award to the parties.⁹

The Authority has held that where an award is unclear and the arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award.¹⁰ Here, the Arbitrator's cursory analysis does not provide a sufficient basis for us to assess whether the award is deficient on the grounds raised by the Union's exceptions. Although the Arbitrator stated that he considered the Union's arguments, he proceeded to conclude, without further analysis or rationale, that Article 3, Section a of the parties' agreement "counter[ed]" those arguments.¹¹ Additionally, the Arbitrator held, again without any explanation or support, that the MOU had "no standing to challenge Article 3, Section a" of the parties' agreement.¹² Finally, although the Arbitrator included in the issue statement violations of law and government-wide regulations,¹³ the award contains neither findings relating to those alleged violations, nor any explanation for the absence of such findings.

The Arbitrator's conclusions are so unsupported that we are unable to determine whether the award is deficient on the grounds raised by the Union's exceptions. Accordingly, we remand the award to the parties for resubmission to the Arbitrator. On remand, the Arbitrator should, consistent with this decision, explain the statutory or contractual bases for his various conclusions; apply any relevant legal standards; explain any interpretations of the parties' agreement; and support his conclusions with factual findings.¹⁴

IV. Decision

We remand the award for further action consistent with this decision.¹⁵

⁸ *Id.* at 6-8 (citations omitted).

⁹ *Id.* at 7-8.

¹⁰ *See, e.g., AFGE, Local 3506*, 64 FLRA 583, 584 (2010); *AFGE, Local 2054*, 63 FLRA 169, 172 (2009) (*Local 2054*).

¹¹ Award at 7.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *See, e.g., Local 2054*, 63 FLRA at 173 (remanding award where arbitrator had not made sufficient findings for the Authority to assess the arbitrator's conclusions).

¹⁵ We note that nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand.

Member DuBester, concurring:

I will not oppose the majority's decision to remand this case.