

70 FLRA No. 129

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
SAN DIEGO HEALTHCARE SYSTEM
SAN DIEGO, CALIFORNIA
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES/SEIU
LOCAL R12-228
(Union)

0-AR-5330

DECISION

June 22, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Authority vacates an award wherein Arbitrator Gerald Burke orders, for a sympathetic grievant, what amounts to ten-years-worth of monetary awards without ever finding that the Agency violated any law or the parties' agreement.

Specifically, the Arbitrator found that, over the course of ten years, the grievant, a program support analyst, performed duties outside of her position description. Although the Arbitrator recognized that he did not have any authority to award the grievant a quality step increase, time-off award, or backpay, he nonetheless awarded the grievant \$5000 as a "special contribution" or "spot" award.¹ We grant the Agency's exceptions and vacate the Arbitrator's award because it is contrary to the Back Pay Act (BPA).²

¹ Award at 11.

² 5 U.S.C. § 5596.

II. Background and Arbitrator's Award

The grievant worked as a program support analyst for the Veterans Health Administration for over a decade. Program support analysts are generally responsible for ensuring that medical equipment is properly delivered to, and assembled in, patient homes, and for trouble-shooting any problems patients may have with the equipment.

In 2016, the grievant filed a grievance because she believed that many of the duties she had been instructed to perform by her supervisor were not a part of her position description. The matter went to arbitration. Because the parties did not stipulate to an issue, the Arbitrator framed the issue, in his November 2, 2017 decision, as whether the Agency assigned the grievant duties outside of her position description, and if so, what remedy was proper under the agreement.³

As relevant here, the Arbitrator found that the grievant's supervisor had instructed her to perform duties⁴ not contained in her position description; that she was unaware that she was not responsible to perform the extra duties; and that she performed the duties in order to be a "team player."⁵ The Arbitrator also found that, in effect, the grievant performed some of the duties of a nurse when she took blood pressures, some of the duties of an electrician when she did electrical work, and some of the duties of a technician when she moved furniture.

Although the Arbitrator concluded that a time-off award or quality step increase was not warranted,⁶ the Arbitrator fabricated a remedy which awarded the grievant ten years of "special contribution" or "spot" awards in the amount of \$500 for each year.⁷

The Agency filed exceptions on December 4, 2017, and the Union filed an opposition on January 17, 2018.

³ Award at 1.

⁴ *Id.* at 7, 10-11 (converting two-prong electrical outlets to three-prong electrical outlets from 2007-2016; moving furniture that was heavier than 50 pounds from 2007-2016; documenting patient wounds by: wrapping and unwrapping the wounds, measuring the wounds, and using a camera to take pictures of the wounds from 2007-2008; performing blood pressure tests, blood pressure cuff sizing, and arm girth measurements from 2007-2016; and performing diabetes testing from 2008 to 2015).

⁵ *Id.* at 11.

⁶ *Id.*

⁷ *Id.*

III. Analysis and Conclusion: The Arbitrator's award is contrary to law.⁸

The Agency argues that the award is contrary to the BPA.⁹

A grievant may be entitled to compensation, under the BPA, "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 the grievant's pay, allowances, or differentials."¹⁰ This test is met only where the arbitrator finds that there is a causal connection between an agency's violation of the agreement or law and a grievant's injury.¹¹ The BPA's requirements have not been met in this case.

Although the Arbitrator found that the grievant performed certain duties not listed in her position description, he never determined that the performance of those duties constituted an "unjustified or unwarranted personnel action."¹² Nor did the Arbitrator conclude that the Agency violated any contractual provision or statute. Therefore, the Arbitrator's creative fabrication of "special contribution" and "spot" awards to justify an award of \$5000 to the grievant for being a "team player" is not consistent with the BPA.¹³

The Union cites several cases to support the Arbitrator's award,¹⁴ but those cases are distinguishable from this matter. Some are not comparable because they involved agency exceptions that an award interfered with management rights.¹⁵ And, the others are not comparable because in those cases a connection was established

between a grievant's loss of pay and a proven unjustified or unwarranted personnel action.¹⁶

We thus find that the Arbitrator's award cannot be sustained under the BPA.¹⁷ Because we set aside the Arbitrator's award as contrary to law, we do not address the Agency's remaining exceptions.¹⁸

IV. Decision

We vacate the Arbitrator's award.

⁸ The Agency attaches to its exceptions a memorandum dated December 4, 2017, in support of its argument that the grievant's performance of nursing duties did not save the Agency money. Exceptions at 15-16; Exceptions, Attach. 6, Memorandum at 1. The Agency did not submit that memorandum to the Arbitrator. Therefore, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, we will not consider this evidence.

⁹ Exceptions at 6.

¹⁰ *NTEU, Chapter 143*, 68 FLRA 871, 873 (2015) (citing *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 347 (2011)).

¹¹ *Id.* at 873-74.

¹² *Id.* at 873.

¹³ Award at 11.

¹⁴ See Opp'n at 3-4.

¹⁵ See, e.g., *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107-08 (2010) (*FDIC*) (management rights not infringed), *abrogated by U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018); see also *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 53 FLRA 146, 151-57 (1997) (management rights not infringed), *abrogated by, FDIC*, 65 FLRA at 104-07.

¹⁶ See, e.g., *U.S. Dep't of the Navy, Naval Air Depot, Cherry Point, N.C.*, 61 FLRA 38, 40 (2005) (violation of agreement provisions concerning shift assignment remedied by back pay of shift differential).

¹⁷ Under the doctrine of sovereign immunity, the United States is immune to lawsuits except to the extent that the government waives that immunity. *U.S. DOJ, Fed. BOP Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015) (citing *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996)). Consequently, "an award from an arbitrator that requires an agency to provide monetary damages to a union or employee must be supported by statutory authority" by which the government has permitted itself to be sued. *Id.* at 963 (citing *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005)). In this case, the BPA is the only law identified by the parties in which the United States waived its sovereign immunity. As the Agency correctly argues, the Arbitrator's award is improper under the BPA. In the absence of evidence that the Agency violated another law that permits suit against the government, the award must be set aside. *AFGE, Local 2145*, 66 FLRA 911, 912 (2012) (upholding decision that monetary remedy would be contrary to law where union "has not provided any statutory authority [that] would authorize a waiver of sovereign immunity").

¹⁸ The Agency also argues that: (1) the award is contrary to law on other grounds; (2) the award is contrary to an agency-wide regulation; (3) the award is based on nonfacts; and (4) the Arbitrator exceeded his authority. See Exceptions at 4-12, 15-18.

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

I concur in the majority's decision, to the extent the decision sets aside the award's monetary remedy to the grievant. The Arbitrator found that the Agency improperly assigned the grievant "duties which, in actuality, should have been done by individuals outside of her job classification."¹ Nothing in the majority's decision disturbs that finding. But the Arbitrator does not identify any statute, regulation, or collective-bargaining agreement provision that the Agency violated in making these improper assignments, and none is clearly apparent.

Because the Back Pay Act's waiver of sovereign immunity requires a finding that an agency committed an "unjustified or unwarranted personnel action," to provide a basis for a monetary remedy,² and the award does not meet this requirement by finding that the Agency violated a statute, regulation, or contract provision, the award's monetary remedy lacks a legal basis. Accordingly, I would set aside the award's monetary remedy and reach the Agency's remaining exceptions. However, the majority's decision to set aside the entire award is overly broad.

¹ Award at 11.

² *E.g.*, *AFGE, Local 1592*, 64 FLRA 861, 861-62 (2010).