

71 FLRA No. 61

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VAMC
(Agency)

0-AR-5431

DECISION

September 26, 2019

Before the Authority: Collen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, Arbitrator Anthony R. Orman found that the Agency violated Article 21, Section 4 (Art. 21) of the parties' collective-bargaining agreement by failing to distribute overtime in a "fair and equitable manner."¹ But he denied the Union's requested backpay remedy because the Union failed to show which employees were available and would have accepted the opportunity to work the overtime. We find that the Arbitrator's denial of backpay is not contrary to the Back Pay Act (BPA).²

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of employees who were allegedly denied overtime work. The Union asserted that the Agency violated Art. 21 by failing to distribute overtime in a fair and equitable manner.³ As a remedy, the Union requested backpay for "all overtime opportunities missed as a result of unfair and unequal distribution of overtime."⁴

The parties could not resolve the grievance and invoked arbitration. The Arbitrator framed the issue as

whether the Agency violated Art. 21 "when it made overtime assignments."⁵

The Arbitrator found that the Agency admitted that it had failed to utilize a roster to manage overtime, as required by Art. 21. Consequently, he determined that the Agency had violated the overtime provision of the parties' agreement "for years"⁶ but he found the Union's request for a backpay remedy problematic for two reasons. First, he found that some of the Union's requests for overtime were untimely because the parties' agreement requires that grievances be filed within thirty calendar days of the date that the employee or Union "became aware" of the incident giving rise to the grievance.⁷ But here, the Arbitrator found that the Union included overtime assignments that occurred as many as six years before the Union filed the grievance.

Second, the Arbitrator found that the Union failed to provide sufficient evidence to support a backpay award. Specifically, he found that the Union did not explain how it had calculated backpay or provide evidence of "which [of the listed] employees were available to work at the specific hours of the assigned overtime"⁸ and would have accepted the overtime assignments. He concluded that he could not grant backpay without evidence of "specific injury" to a "specific employee."⁹

Based on these reasons, the Arbitrator denied the Union's request for backpay, but he ordered the Agency to meet with the Union to negotiate rosters to distribute and record overtime in a fair and equitable manner as required by Art. 21.

On October 31, 2018, the Union filed exceptions to award. The Agency filed an opposition on November 28, 2018.

III. Analysis and Conclusions: The award is not deficient.

The Union argues that the award is contrary to the BPA because the Arbitrator did not award backpay even though he found a violation of the parties' agreement.¹⁰

¹ Award at 4.

² 5 U.S.C. § 5596.

³ Article 21 provides that "[o]vertime shall be distributed in a fair and equitable manner." Award at 4.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 18.

⁷ *Id.* at 19.

⁸ *Id.* at 21.

⁹ *Id.*

¹⁰ Exceptions at 1, 3-4.

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.¹¹ In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹²

An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of the grievant's pay, allowances, or differentials.¹³

Here, the first requirement is met – the Agency's violation of the parties' agreement constitutes an unjustified and unwarranted personnel action.¹⁴ As to the second requirement, the Authority has found that when an arbitrator cannot determine which employees would have performed the overtime assignments at issue, had the assignments been offered, backpay cannot be awarded under the BPA.¹⁵

The Arbitrator did not award backpay because he found that the Union did not present evidence showing which employees were available to work overtime and would have accepted the overtime work if it had been made available to them.¹⁶ That is, the Union failed to provide evidence of "specific injury" to any "specific employee."¹⁷ The Union did not challenge this

finding.¹⁸ Therefore, consistent with the BPA and Authority precedent, and deferring to the Arbitrator's factual findings, we find that the Union fails to show that the award is contrary to the BPA.

The Union also argues that the Arbitrator's failure to award backpay does not draw its essence from the parties' agreement.¹⁹ The Union contends that it only has to prove a contract violation and that proving which specific employees were available for overtime work is not required by parties' agreement.²⁰ The Union, however, does not cite to any contract provision to support this contention. Moreover, a collective-bargaining agreement may only authorize monetary awards where the requirements for a statutory waiver of sovereign immunity – such as under the BPA – have been satisfied.²¹ And here, the Union provides no evidence or argument that the parties' agreement contains such authorization. Because the BPA is the only authority for a backpay award in this case, and the Union did not meet the BPA's second requirement, the Union's essence exception provides no basis for finding the award deficient.²²

¹¹ *E.g.*, *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012) (citations omitted).

¹² *Id.* Although the Union argues that the Arbitrator made various "inaccurate assertions," this argument does not raise a recognized ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations or otherwise demonstrate a legally recognized basis for setting aside the award. Exceptions at 1-3; 5 C.F.R. § 2425.6. Accordingly, we dismiss this argument. *AFGE, Local 3254*, 70 FLRA 577, 581 n.47 (2018).

¹³ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010) (*Beckley*).

¹⁴ *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 568 (2012) (citing *U.S. Dep't of VA Med. Ctr., Coatesville, Pa.*, 56 FLRA 829, 834 (2000)).

¹⁵ *E.g.*, *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 130 (2015) (arbitrator properly denied backpay remedy where insufficient evidence of which employees were bypassed for overtime assignments); *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 347 (2011) (*IRS*) (citations omitted) (setting aside backpay award); *Beckley*, 64 FLRA at 776 (2010) (setting aside award where arbitrator awarded backpay to all eligible employees on overtime roster despite his finding that "there [was] no certain way to know which employees would have received the [overtime] payments").

¹⁶ Award at 20-21.

¹⁷ *Id.* at 21; *see IRS*, 66 FLRA at 347.

¹⁸ In its exceptions, the Union claims that the Arbitrator should have awarded "the specific amounts [of overtime] to the specific employees" referenced in payroll records it provided to the Arbitrator in its post-hearing brief. Exceptions at 4. However, the Union does not challenge the Arbitrator's finding that this evidence failed to explain which employees were available and would have worked any particular overtime assignment and therefore was insufficient to award backpay under the BPA.

¹⁹ Exceptions at 3-4. The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *E.g.*, *AFGE, Nat'l Citizenship & Immigration Serv. Council, Local 2076*, 71 FLRA 115, 116 n.15 (2019) (Member DuBester concurring) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

²⁰ Exceptions at 4.

²¹ *U.S. Dep't of Transp. FAA, Detroit, Mich.*, 64 FLRA 325, 328-29 (2009) (finding collective-bargaining agreement may require monetary payments only where there is a statutory waiver of sovereign immunity, and that the BPA is a limited waiver of sovereign immunity authorizing backpay if its requirements are met).

²² The Union also argues that the Arbitrator erroneously determined that some complaints were untimely because Article 43 provides that a grievance of a continuing nature can be filed at any time. Exceptions at 3. We do not address this argument because even if all aspects of the grievance are timely, the Union still fails to meet the BPA's second requirement.

IV. Decision

We deny the Union's exceptions.