

71 FLRA No. 185

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3854
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
MARCH AIR RESERVE BASE, CALIFORNIA
(Agency)

0-AR-5542

DECISION

September 9, 2020

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

I. Statement of the Case

Arbitrator Jan Stiglitz found that the Agency committed an unjustified and unwarranted personnel action when it failed to pay the grievants environmental differential pay (EDP). However, he denied the Union's grievance seeking backpay for the grievants. The Union filed exceptions on the ground that the award is contrary to law. Because the Agency's failure to pay EDP directly resulted in the withdrawal, reduction, or denial of differentials otherwise due to the grievants, the Arbitrator's denial of backpay is contrary to the Back Pay Act (the Act). Accordingly, we grant the Union's exception.

II. Background and Arbitrator's Award

The grievants are fuel systems aircraft mechanics. Their work entails repairing fuel tanks and fuel systems within confined spaces. Article 28 of the parties' collective-bargaining agreement provides for EDP to be paid "in accordance with applicable laws, rules, and regulations" if employees perform duties that involve "physical hardship or hazard."¹ The grievants' initial EDP request for their fuel tank work in 2014 was denied by the Agency. The grievants persisted and, on November 18, 2017, the Agency issued a memorandum granting the grievants EDP effective January 1, 2018.

After the Agency approved the EDP request, the Union requested backpay for the grievants. The Union noted that the Agency had records of the grievants' fuel tank work for the previous years in which it alleged the Agency was required to pay EDP. After receiving no response, the Union filed a grievance requesting backpay totaling \$383,258.06. The Agency denied the grievance, claiming that the request for backpay was unsubstantiated, and the Union invoked arbitration.

At arbitration, the parties stipulated that the issue was whether the grievants who currently receive EDP for work in fuel storage tanks were entitled to backpay for the time they performed those duties without receiving that EDP.

The Arbitrator determined that the Agency committed an unjustified personnel action under the Act by denying the grievants' request for EDP. However, relying on *U.S. Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Texas (Laughlin)*,² he found that the unjustified personnel action did not result in the withdrawal or reduction of the grievants' pay, allowances, or differentials, as required for an award of backpay under the Act. Consequently, he denied the Union's grievance.

On September 11, 2019, the Union filed exceptions to the award, and on October 11, 2019, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusion: The award is contrary to law.

The Union argues that the Arbitrator's denial of backpay is contrary to the Act and 5 C.F.R. § 550.804(a).³ When an exception challenges an award's consistency with law, the Authority reviews any question

¹ Award at 7.

² 69 FLRA 639 (2016) (Member DuBester concurring, in part, and dissenting, in part); *see* Award at 14-16.

³ Exceptions at 8.

of law raised by the exception and the award de novo.⁴ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.⁵ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.⁶

The Act authorizes an award of backpay 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 an employee's pay, allowances, or differentials.⁷ The Authority has held that the loss of a differential, such as EDP, constitutes a withdrawal or reduction of an employee's pay, allowances, or differentials for purposes of the Act.⁸ Additionally, the Act states that an employee is entitled to all or any part of the pay, allowances, or differentials that the employee would have earned or received during the period if the personnel action had not occurred.⁹

The Arbitrator correctly found that the Act's first requirement for an award of backpay was met because the Agency's denial of the grievants' initial request for EDP was an "unjustified 'omission' within the meaning of the Back Pay Act, and as a result, there was an 'unjustified personnel action.'"¹⁰

As to the second requirement, the Arbitrator erroneously found that the unjustified personnel action did not result in the withdrawal or reduction of the grievants' pay, allowances, or differentials. *Laughlin*, the case relied on by the Arbitrator, is inapposite.¹¹ There, the Authority found that denial of a paid lunch break did

not constitute a decrease in pay because the employees continued to receive the same pay for an eight-hour day as they would have absent the unjustified personnel action.¹²

Here, however, the grievants' compensation was decreased because they were not paid the EDP to which they were legally entitled for working in the fuel tanks. When the Agency approved the grievants' EDP request, it effectively conceded that the grievants' work in the fuel tanks warranted EDP.¹³ Absent the unjustified and unwarranted personnel action – the Agency's initial denial of EDP for working in fuel tanks – the grievants would have received EDP for that work.¹⁴ Therefore, we find that the award is contrary to the Act.

IV. Decision

We grant the Union's exception, and remand the award to the parties to resubmit to the Arbitrator, absent settlement, to determine the appropriate amount of backpay.

⁴ *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).

⁵ *Id.*

⁶ *Id.*

⁷ *E.g., U.S. Dep't of HHS, Wash., D.C.*, 68 FLRA 239, 243 (2015) (citing *U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014)); *see also U.S. Dep't of HHS*, 54 FLRA 1210, 1219 (1998) (the required finding that the pay loss would not have occurred but for the unwarranted action is not a separate, independent requirement of the Act, but merely amplifies the causal connection requirement of the Act).

⁸ *U.S. Dep't of VA, Med. Ctr., Ann Arbor, Mich.*, 56 FLRA 216, 223 (2000); *U.S. Dep't of VA*, 43 FLRA 207, 213 (1991).

⁹ 5 U.S.C. § 5596(b)(1)(A)(i); *see also* 5 C.F.R. § 550.804(a) ("When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.")

¹⁰ Award at 13.

¹¹ 69 FLRA 639.

¹² *Id.* at 641.

¹³ The Arbitrator rejected the Agency's argument that it had not paid the grievants EDP before 2018 because the grievants had not requested it. *See* Award at 12-13.

¹⁴ 5 C.F.R. § 550.804(a).