

72 FLRA No. 17

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION HAWAII,
FEDERAL FIRE DEPARTMENT
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS
LOCAL F-263
(Union)

0-AR-5660

DECISION

February 19, 2021

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

I. Statement of the Case

In this case, the question before us is whether an award of attorney fees under the Back Pay Act (BPA) is contrary to law without an accompanying backpay award. Arbitrator Thomas E. Crowley found that the Agency violated the parties’ national agreement (agreement) when it unilaterally modified the staffing at particular posts. However, he found that he could not retroactively determine which employees would have received overtime so he was unable to award backpay. Nevertheless, he directed the Agency to pay the Union’s attorney fees. The Agency filed a contrary-to-law exception challenging the award of attorney fees. Because the Arbitrator’s award of attorney fees under the BPA lacks the requisite award of pay, allowances, or differentials, the Arbitrator’s award is contrary to law. Accordingly, we grant the Agency’s exception.

II. Background and Arbitrator’s Award

The grievants are firefighters at three fire stations covered by the agreement. On February 26, 2015, the Union filed a grievance alleging that the Agency violated the agreement when it implemented a policy that unilaterally modified the staffing at certain posts. The Agency did not immediately reply to the

Union’s grievance and it took more than two years for the grievance to advance to arbitration.

The Arbitrator found that the Agency did violate the agreement which caused the grievants to lose overtime opportunities. However, the Arbitrator did not award the grievants backpay. According to the Arbitrator, the Agency’s delay in responding to the class grievance and its violations of the agreement proximately caused the inability to retroactively calculate lost overtime and directly resulted in the inability to award backpay. The Arbitrator found that he could not award the grievants overtime backpay but that the requirements for awarding attorney fees under the BPA were “constructively satisfied because the inability to . . . calculate back[pay] was caused by the [Agency’s violation of the parties’ agreement].”¹ The Arbitrator ordered the Agency to pay the attorney fees incurred by the Union.

On July 30, 2020, the Agency filed its exception to the award.² The Union filed its opposition on August 10, 2020.³

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

According to the Agency, an arbitrator may not award damages such as attorney fees absent an applicable waiver of sovereign immunity.⁴ Although the Arbitrator awarded attorney fees under the BPA, the Agency argues that the award is contrary to law because “an award of attorney[] fees under the [BPA] can be made only in conjunction with an award of [backpay].”⁵

When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.⁶ In applying the standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.⁷ The Authority has long held that an award of attorney fees must be pursuant to specific statutory authorization⁸ because the United States, as sovereign, is immune from liability in legal proceedings

¹ Award at 35, 36.

² Exceptions at 1.

³ Opp’n at 25.

⁴ Exceptions at 8.

⁵ *Id.* at 9.

⁶ *U.S. Dep’t of the Navy, Commander, Navy Region Sw., San Diego, Cal.*, 70 FLRA 978, 978 (2018) (*U.S. Dep’t of the Navy*) (Member Abbott concurring).

⁷ *Id.*

⁸ *U.S. Dep’t of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (*Naval Surface Warfare Ctr.*).

except to the extent that it consents.⁹ The BPA does specifically authorize awards of attorney fees.¹⁰ However, “awards of attorney fees under the [BPA] *must* be in conjunction with an award of pay, allowances, or differentials.”¹¹

The Agency asserts that the Arbitrator’s award “cites no legal authority that would allow for his substitution of the [BPA’s] requirements.”¹² The Arbitrator found that “there is no certain way to determine . . . which employees would have received [backpay] . . . or the amount of [that backpay]”¹³ but also that the requirements of the BPA “have been constructively satisfied”¹⁴ without citing any legal authority for that conclusion.¹⁵ In this case, it is clear that the Arbitrator awarded attorney fees without an accompanying award of backpay or other monetary relief. Therefore, the award of attorney fees is not authorized by the BPA.¹⁶ Further, the Arbitrator did not specify, and the Union did not claim, any other statutory authorization for attorney fees.

Accordingly, we conclude that the award of attorney fees is contrary to law.

IV. Decision

We grant the Agency’s exception and set aside the award of attorney fees.

⁹ *U.S. Dep’t of the Navy*, 70 FLRA at 978.

¹⁰ See 5 U.S.C. § 5596(b)(1)(A)(ii).

¹¹ *Naval Surface Warfare Ctr.*, 60 FLRA at 532 (emphasis added).

¹² Exceptions at 10.

¹³ Award at 34.

¹⁴ *Id.* at 35.

¹⁵ *But see Naval Surface Warfare Ctr.*, 60 FLRA at 532 (“[A]wards of attorney fees under the Back Pay Act must be in conjunction with an award of pay, allowances, or differentials.”); *U.S. Dep’t of VA, Veterans Integrated Serv. Network 7, Network Bus. Off., Duluth, Ga.*, 60 FLRA 122, 123 (2004) (holding award of attorney fees is contrary to law where there is no award of backpay and no other specific statutory authorization despite arbitrator finding attorney fees authorized under the parties’ agreement).

¹⁶ See *Naval Surface Warfare Ctr.*, 60 FLRA at 532.

Chairman DuBester, dissenting:

Under the unique circumstances of this case, I do not agree that the award of attorney fees is contrary to law. Accordingly, I dissent.

The majority concludes that the requirements of the Back Pay Act (BPA) were not satisfied because the Arbitrator found he was unable to determine which employees would have received overtime payments, or the amount of those overtime payments.

But in reaching this conclusion, the majority fails to consider, much less mention, that the Arbitrator explicitly found the grievants were “*entitled*” to receive backpay in “an amount equal to the pay, allowances[,] or differentials [they] normally would have earned during March 1, 2015 through October 4, 2018 if the [Agency’s] violations and delay had not occurred.”¹

In my view, the dilemma posed by the award is whether the Agency’s delay in processing the Union’s grievance should be allowed to absolve the Agency of its obligation to pay the Union’s attorney fees. Addressing this question, the Arbitrator found that the Agency failed to conduct a grievance meeting or render a written decision upon receiving the Union’s grievance, and also failed to raise any defenses to the grievance for “approximately [four and one-half] years” after the grievance was filed.² He further found that this “excessive delay vitiated the intended purpose and application of the [BPA],”³ and “defeated a fundamental purpose” of the parties’ negotiated grievance procedure.⁴

Most importantly, the Arbitrator found that the Agency’s delay “proximately caused the inability to retroactively calculate [the grievants’] lost overtime, which directly resulted in the inability to award backpay to correct the [Agency’s] unjustified or unwarranted personnel actions.”⁵ And, on this basis, he concluded that the backpay requirements of the BPA had been met.⁶

Based on these findings, I do not agree that the precedent cited by the majority renders the Arbitrator’s award of attorney fees contrary to law.⁷ And because the Arbitrator clearly found that the grievants were entitled to backpay – and that this backpay would have been awarded but for the Agency’s own actions – I would find that this requirement of the BPA has been met.⁸

¹ Award at 37-38 (emphasis added).

² *Id.* at 32.

³ *Id.* at 35.

⁴ *Id.* (quoting Exceptions, Ex. D, Partial Final Award at 99 (noting that the grievance procedure “provide[s] an orderly procedure for ‘the prompt and equitable settlement of grievances’” (quoting Art. XX, § 1 of the parties’ agreement))).

⁵ *Id.* at 31.

⁶ *Id.* at 36 (further concluding that “[t]o find otherwise would unfairly reward the [Agency] for its violations of the [parties’ agreement] and excessive delay in proceeding to arbitration, and unfairly penalize the Union, which had no alternative but to incur necessary attorney fees in an attempt to correct the [Agency’s] unjustified or unwarranted personnel actions”).

⁷ See Majority at 3 (citing *U.S. Dep’t of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004); *U.S. Dep’t of VA, Veterans Integrated, Serv. Network 7, Network Bus. Off., Duluth, Ga.*, 60 FLRA 122, 123 (2004)). Although it is true that these decisions set aside the attorney fee awards because the arbitrators did not award backpay or any other monetary relief, there is nothing in either decision suggesting that the arbitrator’s inability to award the backpay was caused by the agency’s actions.

⁸ Given the unique circumstances of this case, I would also find it appropriate, in the alternative, to remand this case to the Arbitrator for the purpose of determining the backpay amounts owed to the grievants.