

72 FLRA No. 136

UNITED STATES
DEPARTMENT OF THE AIR FORCE
11TH WING
JOINT BASE ANDREWS, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1092
(Union)

0-AR-5724

DECISION

March 14, 2022

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

I. Statement of the Case

The Union grieved the Agency's unilateral implementation of a new uniform policy for certain dual-status employees. Arbitrator Homer C. La Rue found that the Agency failed to bargain in good faith over the implementation of the policy, which caused the employees to spend their own money to acquire uniforms. The Arbitrator awarded the grievants backpay and stated that the Union may submit a petition for attorney fees. The Agency filed exceptions on the ground that the award is contrary to the Back Pay Act (the Act).¹ Because the Agency does not demonstrate that the award is contrary to the Act, we deny the exceptions.

II. Background and Arbitrator's Award

The grievants are Air Reserve Technicians (technicians). Technicians perform both military and civilian assignments. Article 1, Section 3 of the parties' collective-bargaining agreement (Article 1) provides that when technicians are "performing duty in a civilian service status, the choice between wearing civilian attire and military attire is at the option of the individual."² On October 2, 2018, the Agency notified the Union of its intent to implement a new uniform policy requiring

technicians to wear military uniforms regardless of whether they are performing civilian or military duties.³

A week later, the Union requested to bargain over the proposed changes. Subsequently, the parties met and exchanged proposals in December and January. On January 30, 2019, the Agency rejected the Union's request to meet in February and provided the Union with its final proposals. On February 11, the Agency notified the Union that it would implement the uniform policy. The Agency implemented the uniform policy eight days later.

The Union then filed a grievance alleging that the Agency violated § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute),⁴ Article 1, and Air Force Instruction 36-801⁵ by implementing the uniform policy before completing bargaining. The grievance proceeded to arbitration.

At arbitration, the Arbitrator framed the issue as whether the Agency engaged in "bad faith" bargaining during impact and implementation negotiations "pertaining to the implementation" of the uniform policy in violation of the parties' agreement, past practice, other relevant law, regulations, and Agency policy; and if so, what shall be the remedy?⁶

As relevant here, the Arbitrator found that the Agency failed to complete bargaining with the Union before implementing the uniform policy. Therefore, the Arbitrator concluded that the Agency violated § 7114(b)(4) of the Statute, the parties' agreement, and Agency regulation by failing to bargain in good faith.

The Arbitrator further found that there was evidence in the record that technicians had spent their own money on military-issued weather gear, uniforms, and other equipment as a result of the Agency's unilateral implementation of the uniform policy.⁷ And the Arbitrator found that such expenditures are an "allowance[]" under the Act, Agency regulation, and government-wide regulation.⁸ He also found that the Agency's failure to bargain in good faith was "the cause-in[-]fact" of those expenditures.⁹ Consequently, as relevant here, the Arbitrator awarded backpay, directed the Union to submit a petition for attorney fees to the Agency, and retained jurisdiction to

³ *Id.*

⁴ 5 U.S.C. § 7114(b)(4).

⁵ *See* Award at 13.

⁶ *Id.* at 4.

⁷ *Id.* at 37.

⁸ *Id.*

⁹ *Id.* at 37-38.

¹ 5 U.S.C. § 5596.

² Award at 10.

resolve the attorney-fee issue “should the parties be unable to reach agreement.”¹⁰

The Agency filed exceptions to the award on March 26, 2021, and the Union filed a timely opposition on July 20, 2021.¹¹

III. Analysis and Conclusion: The award is not contrary to the Act.

The Agency asserts that the Arbitrator’s award of backpay and attorney fees are contrary to the Act.¹² To justify an award of backpay under the Act, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of any employee’s pay, allowances, or differentials.¹³ Additionally, the threshold requirement for an award of attorney fees under the Act is a finding that both elements are met.¹⁴

The Agency argues that the award is contrary to law because the technicians were not affected by an unjustified or unwarranted personnel action.¹⁵ However, the Arbitrator found that the Agency violated the Statute, a conclusion that the Agency does not challenge. And under Authority precedent, a violation of the Statute constitutes an unjustified or unwarranted personnel

action.¹⁶ Thus, the Agency has not demonstrated that the award fails to satisfy the Act’s first requirement.

As to the Act’s second requirement, the Agency argues that the Union presented “no evidence that any [technicians] suffered a loss of pay, allowances or differentials.”¹⁷ But the Arbitrator found that the record demonstrated that technicians had spent money “for military-issued winter gear and uniforms.”¹⁸ Because the Agency does not challenge this finding as a non fact, we defer to it.¹⁹ Moreover, the Arbitrator found that the Agency’s failure to complete bargaining was the “cause-in[-]fact” of the technicians’ expenditures.²⁰ Although the Agency argues that the technicians’ expenditures were a result of their failure to follow Agency procedures to obtain uniforms, rather than its failure to bargain, the Agency did not raise this argument to the Arbitrator.²¹ Therefore, we do not consider it.²² Consequently, the Agency has not demonstrated that the award fails to satisfy the Act’s second requirement.²³

The Agency further asserts that the award is deficient because the Arbitrator failed to make specific findings about whether attorney fees would be in the interest of justice as required under 5 U.S.C.

¹⁰ *Id.* at 39.

¹¹ The Authority’s Regulations provide that “[a]ny opposition must be filed within thirty . . . days after the date the exception is served on the opposing party.” 5 C.F.R. § 2425.3(b). On April 15, 2021, the Union filed a motion for proper service and on June 10, 2021, the Authority’s Office of Case Intake and Publication directed the Agency to serve the Union with a complete copy of its exceptions. The Agency served a complete copy of its exceptions on June 24, 2021. Accordingly, we find that the Union’s opposition filed on July 20, 2021 is timely.

¹² Exceptions Br. at 11-14. The Authority reviews questions of law raised by the exceptions *de novo*. *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)). 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, based on the underlying factual findings. *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes they are based on nonfacts. *Id.* at 307 (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

¹³ *U.S. DOJ, Fed. BOP, Fed. Corr. Cr., Petersburg, Va.*, 72 FLRA 477, 479-80 (2021) (Chairman DuBester concurring; Member Abbott concurring) (citing *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019)).

¹⁴ *AFGE, Council of Prison Locs., Loc. 1010*, 70 FLRA 8, 9 (2016) (citing 5 U.S.C. § 5596(b)(1)); *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 131 (2015); *NAGE, SEIU, Loc. 551*, 68 FLRA 285, 289 (2015).

¹⁵ Exceptions Br. at 13.

¹⁶ See, e.g., *U.S. Marine Corps, Marine Corps Air Station Miramar*, 71 FLRA 1017, 1018 (2020) (then-Member DuBester dissenting on other grounds) (“A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an unjustified or unwarranted personnel action.”); *SSA, Balt., Md.*, 64 FLRA 306, 309 (2009) (citing *Dep’t of the Interior, Bureau of Reclamation, Wash., D.C.*, 33 FLRA 671, 680-81 (1988)).

¹⁷ Exceptions Br. at 12.

¹⁸ Award at 37.

¹⁹ See *Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 (2021); see also *NTEU*, 72 FLRA 182, 187 n.67 (2021).

²⁰ Award at 38.

²¹ See Exceptions Br. at 13 (arguing that because it issued original and replacement uniforms to technicians at no cost, any monetary expenditures by technicians were not caused by the Agency, but instead were caused by the technician’s failure to follow the Agency’s procedure to acquire uniforms). A review of the record demonstrates that the Agency failed to raise this claim to the Arbitrator.

²² Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c); 2429.5. Because the Agency could have raised this argument before the Arbitrator, but did not do so, we dismiss it. See *U.S. Dep’t of the Army, White Sands Missile Range*, 72 FLRA 435, 439 & n.66 (2021) (Chairman DuBester concurring); *U.S. DHS, U.S. CBP*, 71 FLRA 1155, 1157 (2020) (Member Abbott dissenting on other grounds).

²³ See *U.S. DHS, U.S. CBP*, 66 FLRA 198, 204 (2011) (Member Beck dissenting in part) (finding that the Act’s second requirement was satisfied because the grievants suffered a reduction in allowance by not receiving a “full complement of daily uniforms”).

§ 7701(g)(1).²⁴ While the Agency is correct that arbitrators must make specific findings in awarding fees, the Agency's argument is without merit. Here, the Arbitrator merely retained jurisdiction to allow the Union to submit the issue of attorney fees to him should the parties be unable to reach an agreement; he did not award fees.²⁵ Therefore, we deny this exception.²⁶

IV. Decision

We deny the Agency's exceptions.

²⁴ Exceptions Br. at 14-15.

²⁵ Award at 39.

²⁶ See, e.g., *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 445 (2021) (finding arbitrator was not required to engage in interest-of-justice analysis when arbitrator referred to deciding attorney-fees issue, but did not make any determination on the merits of that issue); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 296 (2021) (Member Kiko concurring on other grounds; Member Abbott concurring on other grounds) (dismissing as premature agency's exception that arbitrator unlawfully awarded attorney fees because arbitrator did not grant or deny attorney fees but merely retained jurisdiction to consider a fee petition); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (same); *U.S. Dep't of VA, Med. Ctr., Coatesville, Pa.*, 56 FLRA 829, 835 (2000) (same).