65 FLRA No. 119

UNITED STATES
DEPARTMENT OF THE ARMY
FORT CARSON, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1345
(Union)

0-AR-4711

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DECISION

February 25, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Dorothy A. Fallon filed by the Agency under § 7122(a) of the Federal Service Labor- Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exception.

The Arbitrator found that: (1) the Agency did not have just cause to issue the grievant a Letter of Reprimand and (2) the Agency had not issued the Letter of Reprimand within a reasonable period of time after the occurrence of the alleged offense. Award at 11-14. Accordingly, she ordered that: (1) the Letter of Reprimand be removed from the grievant's personnel file and (2) the Agency pay the grievant the "lost overtime and premium pay [that the grievant] would likely have earned for the period from [the date that the letter should have issued] up to the date he was returned to his normal assignments." *Id.* at 14. For the reasons set forth below, we deny the Agency's exception.

II. Background and Arbitrator's Award

The grievant, a civilian police officer, works in the Department of Emergency Services at Fort Carson, Colorado. *Id.* at 2. The grievant's assignments primarily involve escorting Absent Without Leave (AWOL) military personnel to their required locations. *Id.* During one such assignment, the person whom the grievant was escorting escaped. *Id.* at 5-6.

The Agency conducted an investigation into the incident. *Id.* at 6-7. While the incident was being investigated, the grievant "was assigned to administrative duties and restricted from his normal prisoner transport duties." *Id.* at 7. After completing its investigation, the Agency drafted a Letter of Reprimand in late November; however, the letter was not finalized and issued to the grievant until early January. *Id.* at 6-7. The grievant was then returned to his prisoner transport duties. *Id.* at 13.

The Union presented a grievance alleging that the Letter of Reprimand was not issued for just cause and that the Agency committed "an unjust and unwarranted action" by removing the grievant from his normal duties for three months before issuing the letter. *Id.* at 7. The grievance was unresolved and submitted to arbitration. *Id.* at 1-2. The issue before the Arbitrator was: "Did the Agency have just cause to issue a Letter of Reprimand when it did so [in January]? If not, what shall be the remedy?" *Id.* at 2.

The Arbitrator determined that the Agency failed to prove that the grievant had acted improperly during his transport of the prisoner. *Id.* at 11. The Arbitrator also found that the Agency violated Article 20, Section 2 of the parties' agreement, which requires that "'[]notices will be given to the employee within a reasonable period of time after the occurrence of the alleged offense[.]'" *Id.* at 11-12 (quoting parties' agreement). The Arbitrator found that the record showed that the investigation and draft Letter of Reprimand were completed by the last week in November; however, the grievant was not issued the letter until early January. *Id.* at 12. The Arbitrator found that the grievant's "discipline was delayed for no acceptable reason and caused [the grievant] harm beyond the" letter itself – "a more punitive financial result." *Id.* at 12-13.

In this regard, the Arbitrator found that, had the grievant been issued the letter in late November -- "a reasonable period from the date" of the incident -- "he would have been returned to his normal duties"

and worked the "typical overtime required of all members of the unit." *Id.* at 13; *see also id.* at 7 (noting that grievant's assignment to administrative duties "resulted in his loss of all overtime opportunities while awaiting a decision on the level of discipline being imposed for the incident"). Although noting that overtime is not "guaranteed," the Arbitrator found that "officers of the AWOL unit are regularly required to transport prisoners over great distances, make regular determinations about how to go about their duties, and are regularly required to work beyond a normal forty-hour week." *Id.* at 13.

Accordingly, the Arbitrator sustained the grievance and ordered that: (1) the Letter of Reprimand be removed from the grievant's personnel file and (2) the Agency pay the grievant the "lost overtime and premium pay [that the grievant] would likely have earned for the period from [the date that the letter should have issued] up to the date he was returned to his normal assignments." *Id.* at 14.

III. Agency's Exception

The Agency contends that the award is contrary to the Back Pay Act, excepting only to "the [A]rbitrator's award of an undetermined quantum of back overtime and premium pay for lost opportunity, rather than for any overtime actually worked."* Exception at 3. The Agency notes that an award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) an employee was "affected by an unwarranted personnel action" and (2) the "unwarranted action directly resulted in the withdrawal or reduction of overtime pay that the employee[] would otherwise have received." *Id.* at 3 (quoting *Immigration & Naturalization Serv., U.S. Dep't of Justice*, 18 FLRA 412, 414 (1985)).

The Agency contends that, because the Arbitrator "did not find that the grievant would have been offered specific overtime assignments[,]" or that, even if he had been offered the work, he "would have been available to perform it or would have worked the amount of time necessary to receive overtime pay during the relevant time period[,]" the award of overtime pay fails to satisfy the second requirement of the Back Pay Act. *Id.* Citing *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Beaumont, Texas*, 59 FLRA 466, 467-68 (2003) (*Beaumont*); *United States Department of the Air Force, Warner Robins Air Force Base, Georgia*, 56 FLRA 541, 543 (2000) *(Warner Robins), American Federation of Government Employees, Local 1857*, 35 FLRA 325, 328 (1990) (*AFGE, Local,1857*)), *Navy Public Works Center, Norfolk, Virginia*, 33 FLRA 592, 599 (1988) (*Navy Public Works*), the Agency maintains that such findings "are precisely those that would be required for the Authority to sustain the [A]rbitrator's award of back overtime or premium pay." *Id.* at 3-4.

IV. The award is not contrary to the Back Pay Act.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

An award of backpay is authorized under the Back Pay Act only 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 an employee's pay, allowances, or differentials. *See Warner Robins*, 56 FLRA at 543 (citing *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998)).

The Agency contends that the award fails to satisfy the second requirement of the Back Pay Act because the Arbitrator "did not find that the grievant would have been offered specific overtime assignments[,]" or that, even if he had been offered the work, he "would have been available to perform it or would have worked the amount of time necessary to receive overtime pay during the relevant time period." Exception at 3.

*. The Agency refers to the "back overtime and premium pay" awarded by the Arbitrator as "overtime pay." Exception at 3.

A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. *See U.S. Dep't of Def., Dep't of Def. Dependents Sch.*, 54 FLRA 773, 785 (1998)). The Agency fails to challenge the Arbitrator's finding that it violated Article 20, Section 2 of the parties' agreement by delaying issuance of the Letter of Reprimand. *See* Award at 11-12. Accordingly, we find that the award satisfies the first requirement of the Back Pay Act.

The Arbitrator also found that the unwarranted and unjustified personnel action resulted in a reduction of the grievant's pay. *See id.* at 13. Although the Arbitrator did not enumerate the exact amount of the loss incurred by the grievant, the Arbitrator did find that the Agency's delay in issuing the letter "caused [the grievant] harm beyond" the letter itself -- "a more punitive financial result." *Id.* In this regard, the Arbitrator found that, had the grievant been issued the letter in late November, "he would have been returned to his normal duties" and worked the "typical overtime required of all members of the unit." *Id.*; *see also id*. at 7 (noting that grievant's assignment to administrative duties "resulted in his loss of all overtime opportunities while awaiting a decision on the level of discipline being imposed for the incident"). Moreover, although noting that overtime is not "guaranteed," the Arbitrator found that "officers of the AWOL unit are regularly required to transport prisoners over great distances, make regular determinations about how to go about their duties, and are regularly required to work beyond a normal forty-hour week." *Id.* at 13. These findings indicate that the Arbitrator found that the Agency's unjustified personnel action resulted in a loss of pay to the grievant. *See U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59 (2008) (arbitrator's finding that the unwarranted and unjustified personnel action resulted in grievant's loss of pay was sufficient to satisfy the requirement under the Back Pay Act).

Further, because the Arbitrator conditioned an award of backpay on the existence of a causal connection as required by the Back Pay Act, the award is unlike the awards in *Beaumont*, 59 FLRA at 468, *Warner Robins*, 56 FLRA at 543, *AFGE, Local 1857*, 35 FLRA at 328, and *Navy Public Works*, 33 FLRA at 599, where the arbitrators awarded backpay without finding the causal connection required under the Back Pay Act. Accordingly, we find that the Arbitrator's award satisfies the second requirement of the Back Pay Act.

Moreover, an employee is only entitled to receive compensation "equal to all or any part of the pay, allowances, or differentials, as applicable, which the employee normally would have earned or received during the period if the personnel action had not occurred[.]" 5 U.S.C. § 5596(b)(1)(A)(i). The Arbitrator's award provides that the grievant should be paid for the loss of any "overtime and premium pay he would likely have earned" due to the Agency's delay in the issuing the Letter of Reprimand. Award at 14. The award, thus, does not provide that the grievant be compensated for any losses not actually sustained as a result of the Agency's unjustified action.

Accordingly, we find that the Agency has failed to demonstrate that the Arbitrator's award violates the Back Pay Act and deny the Agency's exception.

V. Decision

The Agency's exception is denied.