66 FLRA No. 137

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
ATWATER, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1242
(Union)

0-AR-4794

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DECISION

June 19, 2012

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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 exceptions to an award of Arbitrator Joe H. Henderson 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 filed an opposition to the Agency's exceptions.

In an initial award (merits award), the Arbitrator awarded backpay for the Agency's violations of the overtime provisions of the parties' collective bargaining agreement (CBA). And he directed the parties to meet and determine which employees were entitled to backpay and the amount owed them. When the parties were unable to agree, the Arbitrator directed in a second award (remedy award) that the Agency pay a lump sum of backpay divided equally among certain employees.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In the merits award, the Arbitrator found that the Agency violated Article 18, Section P of the CBA when it failed to: (1) distribute and rotate overtime opportunities fairly and equitably; and (2) retain overtime records for a two-year period.[1] Remedy Award at 2 (quoting Merits Award). The Arbitrator ordered the parties to meet within thirty calendar days of his decision to determine to whom and in what amount the Agency owed backpay for its violations. *Id.* He retained jurisdiction to assist the parties with any disputes. *Id.* at 3. When the parties were unable to mutually agree on which employees were due backpay or the amount owed to them, they requested the Arbitrator's assistance.

In the remedy award, the Arbitrator found, in relevant part, that information provided by the Union in the form of "[a]ppendices" was "sufficient to establish the [b]argaining [u]nit [employees] who would have been available for [overtime] work assignment[s] and be[en] paid" during times that overtime records were not available.[2] *Id.* at 12-13. He incorporated the "[a]ppendices," into his award and ordered the following remedy:

> For the period . . . where "overtime offers" and "sign up list" records were not provided, the Agency pursuant to Append[ices] B and C . . . will disburse the aggregate of $200,000 in back pay. . . . Each employee listed in Appendix C shall receive an amount equal to $200,000, divided by the total number of "qualified employees" listed in Appendix C.

Id. at 14.[3]

[1] The Agency does not challenge the Arbitrator's finding of a contractual violation.

[2] The Union submitted to the Arbitrator several "[a]ppendices" containing information related to overtime opportunities and employee availability for the relevant time period. Remedy Award at 7-9. As relevant here, Appendix B identifies the total number of "overtime instances" assigned by the Agency, *id.* at 7, and Appendix C lists the available bargaining unit employees by pay period, *id.* at 8.

[3] The Arbitrator also awarded backpay for the period for which there are existing overtime records. Remedy Award at 13-14. As the Agency does not except to that portion of the award, we do not address it further.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the backpay award is contrary to: (1) the Back Pay Act (BPA), 5 U.S.C. § 5596;[4] and (2) 5 C.F.R. § 550.111, "Authorization of overtime pay."[5] Exceptions at 3.

As to the BPA, the Agency states that, although employees need not have actually worked overtime in order to recover backpay, a union must show that the grievants would have worked the overtime had the agency not engaged in improper conduct. *Id.* at 4 (citation omitted). The Agency claims that the BPA requires arbitrators to find that grievants affected by an unwarranted personnel action "actually suffered a monetary loss." *Id.* (citation and internal quotation marks omitted). In this regard, the Agency asserts that an award of backpay is "contrary to law" unless "it is clear that the violation of the parties' [CBA] resulted in the loss of some pay." *Id.* at 4-5 (citations and internal quotation marks omitted).

According to the Agency, in this case, the Arbitrator improperly substituted his "own sense of equity" for the legal requirements of the BPA, and the award "lacks any factual foundation" in the record. *Id.* at 5. Specifically, the Agency argues that there is neither evidence that the employees "awarded a proportionate share" of the overtime money were actually "ready, willing[,] and able" to work the overtime assignment, nor any indication of how much overtime they actually would have worked. *Id.* at 5-6. As such, the Agency asserts that this case is similar to *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Beckley, West Virginia*, 64 FLRA 775, 776 (2010) (*Beckley*). According to the Agency, in that case, the Authority found an award contrary to the BPA where the arbitrator awarded backpay despite finding that "'there [wa]s no certain way'" to know which employees would have worked overtime. Exceptions at 6 (quoting *Beckley*, 64 FLRA at 776). The Agency argues that there is similarly "no certain way" to determine which employees would have worked overtime in this case. *Id.* According to the Agency, a lump-sum overtime award distributed among a number of employees based on a lack of records is "legally insufficient, speculative, and must be set aside." *Id.* at 6.

B. Union's Opposition

The Union contends that the Authority should deny the Agency's exceptions as untimely. Opp'n at 5-6. The Union asserts that rather than excepting to the Arbitrator's remedy award, the Agency's exceptions challenge the Arbitrator's merits award. *Id.* at 5. As the Agency did not file timely exceptions to the merits award, the Union maintains that it became final and binding. *Id.* at 6. According to the Union, as there is no new finding in the remedy award regarding entitlement to backpay, the Agency's exceptions are untimely. *Id.*

Assuming the Agency's exceptions are timely, the Union argues that the remedy award is not contrary to the BPA because the evidence and testimony presented at the hearing and in the parties' reply briefs convinced the Arbitrator that the employees were entitled to backpay. *Id.* at 7. The Union further claims that *Beckley* is distinguishable from this case because there, unlike here, the arbitrator found that there was "'no certain way to know'" which employees would have received overtime. *Id.* at 8 (quoting *Beckley*, 64 FLRA at 776).

IV. Preliminary Matter

The Union claims that the Agency's exceptions challenge the merits award and not the remedy award. Opp'n at 5-6. As the period for filing exceptions to the merits award expired, the Union asserts that the Agency's exceptions are untimely. *Id.*

The time limit for filing exceptions to a final arbitration award "is thirty (30) days after the date of service of the award." 5 C.F.R. § 2425.2(b). An award is final when an arbitrator orders backpay, even if the arbitrator directs the parties to meet and determine the appropriate payment of backpay, and retains jurisdiction to assist the parties in resolving any dispute. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA

[4] The BPA, 5 U.S.C. § 5596, provides, in pertinent part:

> (b)(1) An employee of an agency who . . . is found . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> > (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
> >
> > > (i) an amount equal to all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned or received during the period if the personnel action had not occurred . . . .

[5] 5 C.F.R. § 550.111 sets forth various rules for determining when overtime pay is authorized.

1168, 1170 (2010), *recons. denied*, 65 FLRA 76 (2010). Thus, the merits award is final.

But the merits award's finality does not establish that the Agency's exceptions are untimely. The situation here is analogous to when a party seeks clarification of an award, and the arbitrator in rendering the clarification "modifies [the] award so as to give rise to the deficiencies alleged in the exceptions." *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 596 (2005) (*Army*). In such a situation, the filing period begins with service of the modified award. *Id.* Thus, the question here is whether the remedy award gave rise to the deficiency alleged in the Agency's exceptions.

In the remedy award, the Arbitrator found that the Union provided sufficient evidence to determine which employees would have been available for the overtime assignments, and, for the first time, he ordered the Agency to pay a $200,000 lump-sum payment divided equally among the affected employees. Remedy Award at 12-13. In its exceptions, the Agency claims that the lump-sum award is "legally insufficient, speculative, and must be set aside." Exceptions at 6.

As the deficiency claimed in the Agency's exceptions – the lump-sum award's legal sufficiency – arises only from the Arbitrator's remedy award, the period for filing exceptions began with service of the remedy award. *See Army*, 60 FLRA at 596. As there is no dispute that the Agency filed its exceptions within thirty days of service of the remedy award, we find that the Agency's exceptions are timely.

V. Analysis and Conclusions

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions 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 unless the appealing party establishes that those factual findings are deficient as nonfacts. *See, e.g., AFGE, Local 1164*, 66 FLRA 74, 78 (2011) (*Local 1164*).

A. The award is not contrary to 5 C.F.R. § 550.111.

The Agency argues that the award is contrary to 5 C.F.R. § 550.111. Exceptions at 3. Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in 5 C.F.R. § 2425.6(a)-(c). 5 C.F.R. § 2425.6(e)(1); *AFGE, Local 405*, 66 FLRA 437, 437 n.1 (2012). As the Agency does not provide any arguments for finding that the remedy award is contrary to 5 C.F.R. § 550.111, the Agency fails to support its claim. Accordingly, we deny this exception under § 2425.6(e)(1) of the Authority's Regulations.

B. The award is not contrary to the BPA.

An award of backpay is authorized under the BPA 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 U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (citing *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998)).

As to the first requirement, a violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action within the meaning of the BPA. *See, e.g., AFGE, Local 2608*, 56 FLRA 776, 777 (2000). The Arbitrator found, and the Agency does not dispute, that the Agency violated Article 18, Section P of the CBA. Thus, the first requirement of the BPA is satisfied. *Id.*

With respect to the second requirement, even if employees did not actually work overtime, they may receive backpay under the BPA if a contract violation resulted in the failure to work overtime. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Laredo, Tex.*, 66 FLRA 567, 568 (2012) (*Customs*). If an arbitrator makes such a finding, and an agency does not challenge it as a nonfact, then the Authority will not find an award deficient under the second BPA requirement. *Id.* And a direct causal connection between the contract violation and the loss of pay may be "implicit" from the record and the award. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 (2011) (*Coleman*). In this regard, where an agency disputes before an arbitrator a grievant's availability to work overtime, but the arbitrator nevertheless awards backpay for overtime, the Authority will find that the arbitrator "implicitly rejected" the agency's argument and found that, but for the agency's unjustified or

unwarranted personnel action, the grievant would have worked the overtime and received the backpay awarded. *Id.*

Here, the Agency argues that the remedy award does not satisfy the BPA's second requirement. In the Agency's view, there is neither evidence that the employees awarded overtime pay were actually "ready, willing[,] and able" to work the overtime assignments, nor any indication of how much overtime they actually would have worked. Exceptions at 5-6.

Contrary to the Agency's claims, the Arbitrator found that the Union provided information "sufficient to establish the [b]argaining [u]nit [employees] who *would have been available* for [overtime] work assignment[s] and *be[en] paid* for the time[s] that the [overtime] records [were] not available." Remedy Award at 12-13 (emphasis added). Relying on that information and incorporating it into his remedy award, the Arbitrator thus made factual findings that the employees would have been available and would have been paid the overtime. Because the Authority defers to an arbitrator's factual findings, and because the Agency does not challenge these findings as nonfacts, the Agency fails to demonstrate that the Arbitrator's determinations are deficient. *See Customs*, 66 FLRA at 568; *Local 1164*, 66 FLRA at 78; *Coleman*, 65 FLRA at 1046.

In addition, the parties disputed before the Arbitrator the grievants' readiness, willingness, and availability to work the overtime assignments. That is, both parties offered arguments and evidence to the Arbitrator concerning the number of available overtime opportunities, and the affected employees' willingness and readiness to work the overtime assignments. *See* Exceptions, Attach., Agency's Reply Brief on Remedy at 2-3 ("we do not know which employees would have been willing, ready, and able to work on a particular day"); Opp'n, Attach., Union's Brief on the Remedy Implementing the Backpay Award (Union's Brief) at 3-6 (explaining its "formula and calculations" for determining the amount of backpay owed to each employee); Union's Brief, Attach., Guide to Appendices A, B, C, D[,] and E at 1 (explaining determination of whether employees were "qualified, available, and ready to accept [each] instance of each overtime assigned"). As noted above, based on the evidence before him, the Arbitrator found that the information provided by the Union "[was] sufficient to establish the [b]argaining [u]nit [employees] who *would have been available* for [overtime] work assignment[s] and *be[en] paid* for the time[s] that the [overtime] records [were] not available." Remedy Award at 12-13 (emphasis added). Thus, the Arbitrator "implicitly rejected" the Agency's claim that there was no way to know which employees would have been ready, willing, and able to work on any particular day. *See Coleman*, 65 FLRA at 1045. Because the Authority defers to an arbitrator's factual findings, and because the Agency does not challenge these findings as nonfacts, the Agency fails to demonstrate that the Arbitrator's determinations are deficient. *See Customs*, 66 FLRA at 568; *Local 1164*, 66 FLRA at 78; *Coleman*, 65 FLRA at 1046.

Moreover, this case is distinguishable from *Beckley*. In *Beckley*, the Authority set aside the arbitrator's award because he awarded backpay despite finding that "there [was] no certain way to know which employees would have received the [overtime] payments." 64 FLRA at 776. By contrast, here, the Arbitrator specifically found that the information provided by the Union was "sufficient to establish the [b]argaining [u]nit [employees] who *would have been available* for [overtime] work assignment[s] and *be[en] paid* for the time[s] that the [overtime] records [were] not available." Remedy Award at 12-13 (emphasis added). Thus, unlike in *Beckley*, the Arbitrator's factual findings support his conclusion that employees would have been available for overtime assignments and entitled to backpay. As the Agency does not challenge the Arbitrator's factual findings as nonfacts, the Authority defers to them. *See Customs*, 66 FLRA at 568; *Local 1164*, 66 FLRA at 78; *Coleman*, 65 FLRA at 1046.

Based on the foregoing, we find that the Agency has failed to establish that the Arbitrator's remedy award is deficient under the BPA's second requirement, and deny the Agency's exception.[6]

VI. Decision

The Agency's exceptions are denied.

[6] As the Agency does not except to the rate of pay used by the Arbitrator in his calculation of backpay for the grievants' overtime pay, we do not address it. *See Coleman*, 65 FLRA at 1045 n.10.