

67 FLRA No. 120

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4989

DECISION

June 23, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The parties' collective-bargaining agreement provides for an annual bidding process through which employees may request to be assigned to particular "work units" within the Agency ("bid-to" work units).¹ Arbitrator Jay D. Goldstein found that the Agency violated the parties' agreement by regularly reassigning employees to perform duties outside their bid-to work units. To remedy the violation, as relevant here, he directed the Agency to compensate employees for any overtime opportunities that the employees could establish they lost as a result of the violation. There are four substantive issues before us.

The first issue is whether the Arbitrator erred as a matter of law by treating prior arbitration awards as "controlling precedent."² Because the Arbitrator did not treat prior awards as controlling precedent, the award is not contrary to law in this respect.

The second issue is whether the remedy is contrary to the Back Pay Act (the Act).³ As the Arbitrator merely established a process through which employees may demonstrate their entitlement to overtime compensation, and such a remedy is not contrary to the Act, the award is not contrary to the Act.

¹ Award at 9-11; *id.* at 7-8 (quoting Collective-Bargaining Agreement (CBA), Art. 13, Part A).

² Exceptions at 8.

³ 5 U.S.C. § 5596.

The third issue is whether the award is contrary to the legal doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity). As the award is consistent with the Act, and the Act waives sovereign immunity, the award is not contrary to the doctrine of sovereign immunity.

The fourth issue is whether the award is so ambiguous as to make its implementation impossible. Because the Agency does not assert that the award is impossible to implement, the award is not deficient in that regard.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement by regularly assigning employees to perform duties outside their designated work units. The grievance went to arbitration. As the parties did not stipulate the issues, the Arbitrator determined that his "charge was to determine the meaning and intent" of the article of the parties' agreement that concerns employees bidding for assignments (the bidding article).⁴ "In the interest of providing opportunities for employees to receive work assignments in accordance with their preferences," the bidding article establishes "an annual opportunity to bid on specific assignments or work units,"⁵ and it specifies bidding procedures. "[C]onsistent with [his] charge,"⁶ the Arbitrator examined the parties' arguments regarding the bidding article.

The Arbitrator noted that the Union relied on several prior arbitration decisions that interpreted the bidding article as requiring the Agency to permit "employees [to] remain in [their] bid-to work unit[s] for the duration" of the annual "bid cycle."⁷ In connection with that argument, the Arbitrator quoted a footnote from the Union's post-hearing brief that characterized those prior arbitration decisions as "binding" on the parties in their dispute before the Arbitrator.⁸ Although he found that the prior decisions were "*not binding*,"⁹ the Arbitrator agreed with the Union that – with "some

⁴ Award at 9.

⁵ Exceptions, Attach., Joint Ex. 1 (CBA) at 32.

⁶ Award at 9.

⁷ *Id.* at 2 (quoting Exceptions, Attach., Union's Post-Hr'g Br. at 6) (italics and underlining omitted).

⁸ *Id.* at 2 n.1 (quoting Exceptions, Attach., Union's Post-Hr'g Br. at 6 n.5).

⁹ *Id.* at 8 (emphasis added); *see also id.* at 11 (finding that "awards from other arbitrators do not constitute controlling precedent" (italics and quotation mark omitted)), 13 (although "*not . . . bound* by other arbitral findings" concerning the bidding article, Arbitrator agreed with them in relevant part (emphasis added)).

limited exceptions”¹⁰ not relevant here – employees could “bid into a [work] unit and rely upon not being reassigned to another unit” until the next annual bid cycle.¹¹ Thus, he found that the Agency’s regular reassignment of employees to work outside their bid-to work units violated the bidding article. But the Arbitrator also acknowledged the Agency’s contention that it must be able to reconfigure work units “to meet . . . its operational needs.”¹² In that regard, the Arbitrator found that the “bidding process” under the agreement “changed annually, [so] . . . the Agency could . . . reconfigure [work] units on an annual basis,”¹³ provided that it notify the Union of “any[/]all proposed changes” from prior years.¹⁴

Having found that the Agency violated the agreement, as relevant here, the Arbitrator addressed the Union’s request for compensation for those employees who lost overtime opportunities due to the Agency’s violation. In that regard, the Arbitrator stated that the “Union’s arguments do merit an award of overtime back[pay] in the majority of instances raised.”¹⁵ Accordingly, he directed that “[o]vertime back[pay] shall be awarded to an employee [who] can establish he/she was adversely affected by the assignment of [an employee] from a non-bid[-to] unit to another unit.”¹⁶ In addition, the Arbitrator directed the parties to exchange certain information within specific timeframes to identify potential backpay recipients and the amounts due to them, and he retained jurisdiction to resolve any disputes over the “implementation of any remedy or process inherent to the implementation.”¹⁷

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s essence exception.

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,

¹⁰ *Id.* at 12; *see also id.* at 10 (“[e]xigent[e]mergency [c]ircumstances”).

¹¹ *Id.* at 9; *see also id.* at 11 (finding “obligation . . . to allow . . . [employees] to remain in the work unit they bid to[] for the full cycle of that bid”).

¹² *Id.* at 4 (quoting Exceptions, Attach., Agency’s Post-Hr’g Br. at 1) (italics and underlining omitted).

¹³ *Id.* at 9; *see also id.* at 15 (finding that any work-unit reconfigurations “must occur within the parameters and confines of the [bid-and-rotation] process, i.e., annually”).

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 15.

presented to the arbitrator.¹⁸ The Agency argues that the award fails to draw its essence from Article 39, Section 3 of the parties’ agreement,¹⁹ which concerns “[m]anagement[-d]irected [r]eassignments.”²⁰ According to the Agency, that provision recognizes management’s right “to change unit structure” throughout the year – not once per year, as the Arbitrator found.²¹ The Agency admits that it did not present this argument to the Arbitrator but asserts that whether the Agency could reconfigure work units throughout the year “was not briefed by either side and was not part of the original grievance.”²² The Agency further asserts that, because the Arbitrator’s finding on the timing of work-unit creation was “not properly . . . an issue for decision . . . , it is outside of the scope of the arbitration and should be struck as contrary” to Article 39.²³

At the arbitration hearing, three witnesses testified about whether the Agency could reconfigure work units more than once per year. The Agency called the first of those witnesses (first witness) – an Agency supervisor who previously worked as a nonsupervisory customs officer. The Agency’s counsel asked the first witness, “In your time as a customs officer, were you . . . ever . . . moved from work unit to work unit?”²⁴ The first witness responded affirmatively and explained that, although he was in the tactical unit, “[t]here were times during . . . the holiday season or times where the workload increased in [another unit,] and . . . *all of a sudden*, they . . . would send some . . . or all of the tactical unit out to assist” that other unit.²⁵ The witness then confirmed that, after becoming a supervisor, he had his “subordinates do the same thing . . . move[] from work unit to work unit . . . [u]nder the same conditions” that he just described.²⁶ During cross-examination, the Union’s counsel engaged the first witness in the following exchange:

Q: . . . Is it your position that the Agency can combine functions on more than an annual basis? . . .

A: Have multiple people do different functions? Yes.

Q: Okay, how about combining work units?

¹⁸ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁹ Exceptions at 4.

²⁰ *See id.*, Attach., Joint Ex. 1 at 212 (CBA, Art. 39, § 3).

²¹ Exceptions at 22.

²² *Id.* at 5.

²³ *Id.*

²⁴ Opp’n, Attach., Tr. (Dec. 4, 2012) at 109.

²⁵ *Id.* at 109-10 (emphasis added).

²⁶ *Id.* at 110.

A: Combining work units, we identify our work units on an annual basis.²⁷

The Agency then called a second witness, and on cross-examination, the Union's counsel asked him, "How often are . . . [unit] numbers [changed], is it once per year or . . . more frequently?"²⁸ To which the second witness responded, "We look at the bid and rotation every year and . . . give the announcement to the [Union] for . . . review every year."²⁹

Later, the Union called a "rebuttal witness,"³⁰ and the Union's counsel engaged the rebuttal witness in the following exchange:

Q: Under the provisions of [the bidding article], can management combine work units?

A: They have an opportunity at the beginning of every bid and rotation cycle to set up their work units So, they can set up their work units at the beginning of the year[. I]f they want to combine work units . . . [,] they can do that[,] but their shot is at the beginning of the process

Q: So to clarify, they have an opportunity once a year to modify the work units?

A: Right --³¹

After the rebuttal witness responded, "Right,"³² the Agency's counsel interrupted the testimony to object to its relevance. Specifically, the Agency's counsel asserted, "We are talking about whether or not a work unit can be created[,] not *when* can it be created, [which] is not an issue in dispute in this arbitration."³³ The Union's counsel replied that the rebuttal witness's testimony undermined the account of the first witness, who "testified that the [Agency] can combine work units in the middle of the year."³⁴

The Arbitrator agreed with the Union that the first witness "did give some testimony to that effect,"³⁵ so the Arbitrator denied the Agency's objection. By rejecting the Agency's argument that it was irrelevant

when the parties' agreement permitted the Agency to modify work units, the Arbitrator put the Agency on notice that he might consider that issue in resolving the parties' dispute. Thus, if there were a provision of the agreement authorizing the Agency to change work units at any time throughout the year – as the Agency contends in its essence exception – then the Agency should have raised that provision before the Arbitrator. Because the Agency could have, but did not, raise its arguments regarding Article 39, Section 3 of the agreement before the Arbitrator, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from relying on those arguments to support its exception. Therefore, we dismiss the Agency's essence exception.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in three respects, each of which is discussed separately below. 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*.³⁶ 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.³⁷ In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.³⁸ In addition, exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.³⁹

1. The Arbitrator did not treat prior arbitration awards as controlling precedent and thereby commit an error of law.

The Agency argues that the Arbitrator mistakenly treated prior arbitration awards as controlling in the dispute before him and thereby committed an error of law.⁴⁰ For support, the Agency identifies the Arbitrator's restatement of the Union's post-hearing-brief

²⁷ *Id.* at 159.

²⁸ *Id.* at 189.

²⁹ *Id.*

³⁰ Opp'n, Attach., Tr. (Dec. 5, 2012) at 6.

³¹ *Id.* at 33.

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 34.

³⁶ 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)).

³⁷ See *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

³⁸ *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012) (*CBP*).

³⁹ See *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SATCO*) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010)).

⁴⁰ Exceptions at 7-9.

footnote,⁴¹ which referred to prior arbitration decisions as binding precedent. But, in that section of the award, the Arbitrator set forth the parties' positions, not his own findings.⁴² Moreover, the Arbitrator later expressly found that the prior awards were "not binding" on him,⁴³ and that "arbitration awards . . . do not constitute controlling precedent."⁴⁴ Thus, the Arbitrator did not treat prior arbitration awards as controlling, and the Agency's argument to the contrary is based on a misunderstanding of the award.⁴⁵ Accordingly, this argument does not demonstrate that the award is contrary to law.

2. The award is not contrary to the Act.

The Act authorizes an award of backpay when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action, such as the violation of a collective-bargaining agreement; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials.⁴⁶ The Agency alleges that the award is contrary to the Act's second requirement because: (1) the Arbitrator failed to find a "causal nexus" between the Agency's contract violations and any employee's loss of compensation,⁴⁷ and he did not find that specific employees were ready, willing, and able to work particular overtime assignments;⁴⁸ and (2) the Union's evidence did not demonstrate that "any particular bargaining-unit employee" lost overtime pay,⁴⁹ or show the "dollar figure"⁵⁰ or "amount of money"⁵¹ lost by any employee.

Although the Arbitrator stated that the "Union's arguments do merit an award of overtime back[pay] in the majority of instances raised,"⁵² he did not actually direct the payment of compensation to any specific employees. Rather, he set forth an information-sharing schedule and a process through which "an employee [who] can establish he/she was adversely affected by the assignment of [an employee] from a non-bid[-to] unit to another unit"⁵³ may claim entitlement to backpay. In this

regard, the Authority has previously found that a party's contention that an "[a]rbitrator could not award overtime" consistent with law was "misplaced," where compensation "itself ha[d] not yet been provided, only the ability to request overtime" backpay through a process established by the arbitrator's award.⁵⁴ Consistent with this precedent, because overtime compensation itself has not yet been provided, the Agency's arguments that the Arbitrator awarded backpay contrary to the Act are misplaced,⁵⁵ and the Agency has not shown that the award is contrary to the Act.

3. The award is not contrary to the doctrine of sovereign immunity.

The Agency concedes that the Act waives sovereign immunity for some backpay claims,⁵⁶ but the Agency contends that the Act's waiver does not apply here because the award is not consistent with the Act. In cases where a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the Act, and the Authority finds that the award is consistent with the Act, the Authority denies the sovereign-immunity claim.⁵⁷ Consistent with our finding above that the award is consistent with the Act, the Agency's first sovereign-immunity claim does not show that the award is contrary to law.

The Agency also argues that awarding the grievants backpay would violate the U.S. Supreme Court's decision concerning sovereign immunity in *United States v. Testan*.⁵⁸ In *Testan*, federal employees claimed that they should receive backpay as compensation for the alleged misclassification of their positions,⁵⁹ but the Court found that the employees had no "substantive right . . . to backpay" under the Act "for the period of their claimed wrongful classifications."⁶⁰ The Authority has previously held that *Testan* is inapposite to backpay claims that are not based on alleged classification errors.⁶¹ Consequently, as the employees here are not seeking backpay due to

⁴¹ *Id.* at 7 (citing Award at 2 n.1).

⁴² Award at 2 & n.1.

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 11.

⁴⁵ See *SATCO*, 66 FLRA at 554.

⁴⁶ 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 HHS*, 54 FLRA 1210, 1218-19 (1998)).

⁴⁷ Exceptions at 11, 14, 16, 23; see also *id.* at 12-15.

⁴⁸ *Id.* at 17-18.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 17.

⁵² Award at 13.

⁵³ *Id.* at 14.

⁵⁴ *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 n.8 (2011) (emphasis added).

⁵⁵ *Id.*

⁵⁶ Exceptions at 18.

⁵⁷ E.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).

⁵⁸ Exceptions at 20 (citing *Testan*, 424 U.S. 392, 405-07 (1976)).

⁵⁹ *Testan*, 424 U.S. at 393-95.

⁶⁰ *Id.* at 407.

⁶¹ *U.S. Dep't of the Air Force, 82nd Training Wing, Sheppard Air Force Base, Tex.*, 65 FLRA 137, 140 (2010) (citing *U.S. Dep't of the Air Force, Warner Robins Air Force Logistics Ctr., Robins Air Force Base, Ga.*, 37 FLRA 155, 159 (1990)) ("Because this case does not involve any classification issues, *Testan* does not apply.").

classification errors, the Agency's argument regarding *Testan* does not demonstrate that the award is contrary to law.

- B. The award is not ambiguous so as to make implementation impossible.

The Agency contends that the award is “defect[ive] . . . [because it] is ambiguous as to who is an aggrieved employee” entitled to claim overtime backpay.⁶² The Authority will set aside an award that is so “incomplete, ambiguous, or contradictory *as to make implementation of the award impossible.*”⁶³ In order to prevail on this ground, “the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.”⁶⁴ Because the Agency does not assert that it is impossible to implement the award, the Agency's argument regarding ambiguity does not demonstrate that the award is deficient.

V. Decision

We dismiss the Agency's essence exception and deny the Agency's remaining exceptions.

⁶² Exceptions at 10.

⁶³ 5 C.F.R. § 2425.6(b)(2)(iii) (emphasis added).

⁶⁴ *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011) (citing *NATCA*, 55 FLRA 1025, 1027 (1999)).