68 FLRA No. 115

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1034
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
POLLOCK, LOUISIANA
(Agency)

0-AR-5087

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DECISION

June 29, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester dissenting in part)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by distributing overtime in an inequitable manner. Arbitrator Charles G. Griffin found that the Agency violated the parties' agreement as alleged. The Arbitrator did not award backpay under the Back Pay Act (the Act)[1] as a remedy, because he stated that he could not determine from the overtime records provided by the parties which employees were affected by the Agency's contractual violation. However, the Arbitrator directed the parties to complete an audit, identify the employees affected by the Agency's violation, and offer make-up overtime to the employees identified in the audit.

The main substantive question before us is whether the Arbitrator's failure to award backpay is contrary to the Act. Because the Arbitrator's findings satisfy the requirements for awarding backpay under the Act, and, therefore, the affected employees are entitled to backpay as a matter of law, the answer is yes.

[1] 5 U.S.C. § 5596.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency failed to distribute overtime assignments equitably among bargaining-unit employees, as required by Article 18 of the parties' agreement (Article 18). The grievance went to arbitration.

At arbitration, the Arbitrator framed the issues, in pertinent part, as: "Did the Agency misapply . . . Article 18 . . . when filling overtime assignments? If so, what is the appropriate remedy?"[2]

Article 18 states, in relevant part, that bargaining-unit employees "will receive first consideration for . . . overtime assignments, which will be distributed and rotated equitably among bargaining[-]unit employees."[3] Article 18 also provides, in pertinent part, that "overtime records . . . will be monitored by the [Agency] and the Union to determine the effectiveness of the overtime[-]assignment system and ensure equitable distribution of overtime assignments to members of the unit."[4]

The Arbitrator found that the Agency violated Article 18 by offering overtime to supervisors before offering it to bargaining-unit employees. But the Arbitrator denied the Union's request that he award backpay. In this regard, the Arbitrator explained that, "due to the conflicting and inaccurate records" before him, he could not determine which employees were affected by the Agency's contractual violations.[5] Despite that explanation, however, the Arbitrator found that "[time and attendance] records . . . exist[ed] which would[,] after examination[,] give a reasonable indication of which [e]mployees were affected by the error in overtime distribution."[6] Therefore, as relevant here, the Arbitrator directed the parties to audit the Agency's overtime records to determine: (1) when the misapplication of overtime occurred; (2) how the errors in the Agency's overtime records occurred; and (3) which employees were affected "by [the] misapplication of overtime[,] identifying specific hours."[7] And the Arbitrator directed the Agency to offer affected employees "make-up overtime for the hours determined by the audit."[8]

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

[2] Award at 17.
[3] *Id.* at 6.
[4] *Id.*
[5] *Id.* at 23.
[6] *Id.* at 24-25.
[7] *Id.* at 27.
[8] *Id.*

III. Preliminary Matter: An expedited, abbreviated decision is inappropriate in this case.

The Union asks us to resolve its exceptions in an expedited, abbreviated decision.[9] An expedited, abbreviated decision is a decision that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."[10] Under § 2425.7 of the Authority's Regulations, when a party requests such a decision, the Authority will determine whether such a decision is appropriate by considering "all of the circumstances of the case," including whether the opposing party objects to issuance of such a decision, and "the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues."[11]

Here, in its opposition, the Agency does not address – and, thus, does not object to – the Union's request. However, after considering the circumstances of this case, including its "complexity, potential for precedential value, and [dis]similarity to other, fully detailed decisions involving the same or similar issues,"[12] we find that an expedited, abbreviated decision is inappropriate. Accordingly, we deny the Union's request for an expedited, abbreviated decision.

IV. Analysis and Conclusions: The award is contrary to the Act.

The Union argues that the Arbitrator was required to award backpay under the Act.[13] According to the Union, the Arbitrator's findings satisfy the Act's requirements for awarding backpay because he found that: (1) the Agency violated Article 18; and (2) the employees who were not "allowed to work overtime that they were entitled to work" could be identified by an audit.[14] In this regard, the Union argues that the Act does not require that specific employees be identified in order to support a backpay award.[15]

In contrast, the Agency contends that it "is not correct . . . that in the current case the only thing [that the] Arbitrator . . . was not able to do was identify the specific employees entitled to overtime."[16] Specifically, the Agency argues that because the Arbitrator "could not determine from the evidence the specific dates . . . [and] positions that were involved, what was correct and incorrect in the overtime records, . . . [and that] employees [were] available to work overtime," he did not find the required causal connection between the Agency's contractual violation and any employee's loss of overtime pay.[17]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[18] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[19] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[20]

An award of backpay is authorized under the Act 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 the grievant's pay, allowances, or differentials.[21] Additionally, the Authority has found that, where the requirements of the Act are satisfied, a grievant is entitled to backpay, not make-up overtime, as a remedy.[22]

As to the Act's first requirement, a violation of a collective-bargaining agreement constitutes an unjustified and unwarranted personnel action.[23] Here, the Arbitrator found that the Agency violated Article 18.[24] Thus, we find that the first requirement for awarding backpay under the Act is satisfied.[25]

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[9] Exceptions at 12.
[10] 5 C.F.R. § 2425.7.
[11] *Id.*
[12] *Id.*
[13] Exceptions at 6.
[14] *Id.* at 7-8 (citing *NTEU, Chapter 164*, 67 FLRA 336 (2014); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Ore.*, 55 FLRA 28 (1998)).
[15] *Id.*
[16] Opp'n at 8.
[17] *Id.* at 10.
[18] *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)).
[19] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014).
[20] *Id.* (citation omitted).
[21] *U.S. Dep't of HHS, Wash., D.C.*, 68 FLRA 239, 243 (2015); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (*Pollock*); *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 568 (2012) (*Laredo*); *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008) (*Tinker*).
[22] *E.g.*, *NTEU, Chapter 231*, 66 FLRA 1024, 1026 (*NTEU*) (citing *NAGE, Local R4-45*, 55 FLRA 695, 698-99 (1999)), *recons. denied*, 67 FLRA 67 (2012), *remanded without decision*, No. 13-1024 (D.C. Cir. 2013), *decision on remand*, 67 FLRA 247 (2014), *pet. for review denied sub nom. DHS, CBP, Scobey, Montana v. FLRA*, No. 14-1052 (D.C. Cir. 2015).
[23] *Tinker*, 63 FLRA at 61.
[24] Award at 19.
[25] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012) (*Atwater*).

Regarding the Act's second requirement, the Authority has found that employees who did not actually work overtime may receive backpay under the Act if an arbitrator finds that a contractual violation resulted in their failure to work overtime.[26] But when an arbitrator cannot determine *which* employees would have received the overtime assignments at issue, the Authority has found that backpay cannot be awarded under the Act.[27] For example, where an arbitrator awarded backpay to *all* eligible employees on an overtime roster despite his finding that "there [was] no certain way to know which employees would have received the [overtime] payments," the Authority set aside the award for failing to meet the Act's second requirement.[28]

Nevertheless, the Authority has found that if an award sufficiently identifies the "specific circumstances" under which employees are entitled to backpay, there is no additional requirement that the Arbitrator identify specific employees entitled to the remedy.[29] In particular, the Authority has found that awards were not contrary to the Act where: (1) an arbitrator sufficiently identified the "category of employees entitled to backpay" – namely, those employees who were deprived of overtime opportunities because of an agency's actions;[30] and (2) in the absence of overtime records, other, accessible information established which employees would have been available for the overtime at issue.[31]

Here, the Agency argues that there is "no possible way" that the Act's second requirement can be satisfied with the records provided at arbitration,[32] but the Agency's focus on those particular records is misplaced. Despite the Arbitrator's statement that he could not determine which employees were entitled to overtime based on the records before him, he did not find that there was no way to identify those employees. Rather, he found that records "*did* exist" that "*would* . . . indicat[e] which [e]mployees were affected" by the Agency's contractual violation.[33] In effect, the Arbitrator found that the Agency's contractual violation *did* deprive some employees of overtime opportunities, and that those employees and their losses *could be identified*, but that he could not do so using only the information before him. Thus, the audit ordered by the Arbitrator, not the records produced at arbitration, will identify the "category of employees" entitled to backpay[34] – i.e., those employees who were deprived of overtime opportunities because of the Agency's contractual violation. Accordingly, we find that the second requirement of the Act is satisfied.[35]

For the foregoing reasons, we find that the requirements of the Act were met. And because the Act's requirements were met, the employees affected by the Agency's contractual violation were entitled to backpay as a remedy.[36] Therefore, the Arbitrator's failure to award backpay violates the Act.[37] Where the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.[38] Applying this principle, we modify the award to grant backpay, instead of make-up overtime, to the employees identified by the audit.

The Union also argues that the award fails to draw its essence from the agreement and is incomplete, ambiguous, or contradictory so as to make implementation impossible. Because we find the award deficient as contrary to the Act, we do not find it necessary to resolve the Union's other exceptions.[39]

V. Decision

We grant the Union's contrary-to-law exception. We modify the award to direct the Agency to pay backpay to those employees that the audit identifies as having been affected by the Agency's contractual violation.

[26] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*) (citing *Laredo*, 66 FLRA at 568).
[27] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010) (citing *AFGE, Local 1286, Council of Prison Locals*, 51 FLRA 1618, 1621 (1996)).
[28] *Id.* (internal quotation marks omitted).
[29] *IRS*, 67 FLRA at 105.
[30] *Id.* at 106.
[31] *Atwater*, 66 FLRA at 740.
[32] Opp'n at 9-10.
[33] Award at 24-25 (emphasis added).
[34] *IRS*, 67 FLRA at 106.
[35] *Id.*; *Atwater*, 66 FLRA at 740.
[36] *NTEU*, 66 FLRA at 1026.
[37] *E.g.*, *NTEU, Chapter 164*, 67 FLRA 336, 338 (2014) (citations omitted) (finding that an arbitrator's failure to award backpay when the conditions of the Act were met is contrary to the Act).
[38] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270-71 (2015) (citation omitted).
[39] *See, e.g.*, *Pollock*, 68 FLRA at 152 (declining to address remaining exceptions after finding an award contrary to law); *SSA*, 60 FLRA 150, 153 n.6. (2004) (same).

Member DuBester, dissenting, in part:

I agree with the decision to grant the Union's contrary-to-law exception and modify the award to direct the Agency to pay backpay. I write separately because I disagree with my colleagues' determination not to expedite the resolution of this case by granting the Union's request for an "expedited, abbreviated decision" under the Authority's Regulations.[1] The Authority Regulation involved was specifically "inten[ded] . . . to provide for a mechanism for quickly deciding newly filed [arbitration] cases" in this manner.[2] A party "wish[ing] to receive an expedited Authority decision" in an arbitration case agrees to "a decision that resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, and analysis of those arguments."[3]

Where the filing party has requested such a decision and the opposing party agrees, or does not object, as here, I think that, consistent with the Regulation's intent, the parties' interests in an expedited decision should take priority over our discretion not to grant the request. Accordingly, I disagree with my colleagues' denial of the Union's request.

[1] 5 C.F.R. § 2425.7.
[2] 75 Fed. Reg. 42,283, 42,287 (July 21, 2010).
[3] 5 C.F.R. § 2425.7.