68 FLRA No. 141

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 143
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
COLUMBUS, NEW MEXICO
(Agency)

0-AR-5046

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DECISION

August 31, 2015

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

I. Statement of the Case

The grievant is a customs-and-border-protection officer (officer). She works at a border post in New Mexico. She volunteers for overtime work on a fairly regular basis. The Agency assigned her to work two overtime assignments. The day before the first assignment, her supervisor told her that it was cancelled for budgetary reasons. The supervisor also told her that overtime assignments generally would be cancelled until further notice. But on the day of the second overtime assignment, another supervisor called her and told her she was late for work. The grievant drove the eighty-five miles to her post and worked the remainder of her overtime assignment. The Union grieved and sought backpay, claiming that the Agency violated the parties' agreement by failing to notify the grievant of her overtime assignment at least seventy-two hours in advance.

Arbitrator Michael B. McReynolds sustained the grievance in part. He found that the Agency violated the parties' agreement by failing to notify the grievant of her overtime assignment in a timely manner. However, the Arbitrator did not award the grievant backpay for the part of her overtime assignment that she missed. The Arbitrator found that the grievant was responsible for checking, daily, an overtime schedule the Agency posted, to find out whether her overtime assignment had been reinstated. But the Arbitrator found that the grievant had not done so. The Arbitrator therefore found that the Agency was not responsible for the part of the grievant's overtime assignment that she missed. This case presents the Authority with two questions.

The first question is whether the award fails to draw its essence from the parties' agreement because the award ignores the purpose of the agreement's notice requirement. Because the Union has not demonstrated that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer is no.

The second question is whether the Arbitrator's finding that the grievant is not entitled to backpay is contrary to the Back Pay Act (the Act).[1] Because the Act requires a causal connection between an unjustified or unwarranted personnel action and a loss of pay or benefits, and the Arbitrator found that the Agency's failure to notify the grievant at least seventy-two hours in advance of her overtime assignment did not cause her to lose overtime pay, the answer is no.

II. Background and Arbitrator's Award

The grievant is an Agency officer at the Columbus, New Mexico, port of entry. The grievant volunteered for and was assigned overtime work on December 13 and 15, 2012. But on December 12, her supervisor told her that her overtime assignment for December 13 was cancelled for budgetary reasons, and that overtime assignments in general would be cancelled until further notice. The grievant did not report to work for the December 13 or 15 overtime assignments.

Shortly after the December 15 overtime assignment was scheduled to begin, a different supervisor called the grievant and told her that she was late for work. The grievant immediately drove the eighty-five miles to her post and completed the last hour and fifteen minutes of the four-hour overtime assignment.

The Union filed a grievance, arguing that the Agency violated the seventy-two hour notice requirement in Article 35 of the parties' agreement. As pertinent here, Article 35 provides that "overtime assignments will be scheduled and posted . . . not less than seventy-two . . . hours in advance of an assignment."[2] The Union also asked for backpay for the part of the overtime assignment the grievant missed.

[1] 5 U.S.C. § 5596.
[2] Award at 3.

The Agency denied the grievance and the parties submitted the matter to arbitration. The parties stipulated to the following issues: "Whether the Agency failed to timely notify [the g]rievant of an anticipated overtime assignment . . . in violation of Article 35 of the [parties'] agreement and, if so, what shall be the remedy?"[3]

The Arbitrator sustained the grievance in part, but denied the grievant backpay. The Arbitrator began his analysis by interpreting Article 35's notice provision. He determined that the Agency satisfies the agreement's notice requirement when it "posts" an overtime assignment on a schedule in the supervisor's office.[4] The Arbitrator found that it was undisputed that the officers "received notice of their overtime assignments only by checking the schedule in the supervisor's office."[5] But the Arbitrator found that "the Agency violated the notice provision of Article 35"[6] because the "[g]rievant's overtime assignment scheduled to begin . . . on December 15 [was not] posted or otherwise communicated to the [g]rievant [seventy-two] hours in advance of the assignment."[7] Accordingly, the Arbitrator sustained the grievance in this respect and directed the Agency to cease and desist from untimely notifying employees of overtime assignments.

However, regarding the backpay remedy the Union sought, the Arbitrator was "not persuaded that [the violation of Article 35] demonstrates that the Agency was responsible for [the g]rievant's loss of a portion of an overtime opportunity."[8] Rather, the Arbitrator found that the grievant "knew, or reasonably should have known, before [the overtime-assignment date,] that she had been scheduled for the [overtime] assignment."[9] The Arbitrator found in this regard that although "the [g]rievant understood that there was a real possibility that her overtime assignment could be reinstated[,] . . . she did not check the schedule [in the supervisor's office] every day."[10] Finding "no basis on which to attribute the responsibility for the missed assignment to the Agency," the Arbitrator found further that "the Union cannot show there was any nexus between the untimely notice of the assignment and [the g]rievant's failure to report for the assignment at the scheduled time."[11]

The Union argued in support of its backpay request that the Agency's violation of Article 35's notice requirement relieved the grievant of any responsibility to check the supervisor's schedule for assignments.[12] The Arbitrator disagreed. He found that the Union's interpretation would result in officers being "completely released" from assignments if they did not receive timely notice, and "[t]hat cannot be said to be the intent of Article 35."[13] Moreover, he found that the grievant acknowledged her responsibility to check the overtime schedule, and had formerly checked the schedule for a previously-cancelled overtime assignment – within seventy-two hours of the assignment – "just in case" the overtime was reinstated.[14]

Consequently, the Arbitrator found no evidence "to support the conclusion that the Agency's untimely notice of the [overtime] assignment resulted in a missed overtime opportunity requiring a remedy under the [parties' agreement] or any other authority, including the . . . Act."[15] Accordingly, the Arbitrator denied the grievant backpay.

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

III. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a parties' agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[16] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[17] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[18]

[3] *Id.*
[4] *Id.* at 13.
[5] *Id.* at 12.
[6] *Id.*
[7] *Id.* at 11.
[8] *Id.* at 12.
[9] *Id.*
[10] *Id.* at 13.
[11] *Id.* at 15.
[12] *See id.* at 6-7.
[13] *Id.* at 15.
[14] *Id.* at 14.
[15] *Id.* at 15.
[16] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[17] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[18] *Id.* at 576.

The Union claims that the award fails to draw its essence from Article 35 because the Arbitrator erroneously found that "the [g]rievant had an affirmative obligation to check the schedule . . . to determine if there was an . . . overtime assignment . . . that would have been posted in violation of the [parties a]greement."[19] The Union argues that "[n]o such affirmative obligation can be found in the [parties' a]greement and in fact[,] such an obligation would render the seventy-two . . . hour notice requirement meaningless and a nullity."[20]

Article 35 provides, in relevant part, that "overtime assignments will be scheduled and posted . . . not less than seventy-two . . . hours in advance of an assignment."[21] The Arbitrator interpreted and applied this requirement when he explicitly found that the Agency violated Article 35 by failing to post the grievant's overtime assignment at least seventy-two hours before the assignment.[22] As a remedy for the violation, the Arbitrator directed the Agency to "cease and desist" from posting overtime assignments in an untimely manner.[23] The Union does not challenge this finding.

The Union's essence challenge to the Arbitrator's conclusion that the grievant had an affirmative responsibility to check the overtime schedule is without merit. The Union does not point to any language in Article 35 that addresses officers' responsibility to check the overtime schedule within seventy-two hours of an assignment. Moreover, the Arbitrator's application of Article 35 is not implausible in the circumstances of the case. The Arbitrator found that the grievant "knew there was some possibility that [the overtime assignment] would be reinstated[,]"[24] and had checked the schedule for previously-canceled overtime assignments within seventy-two hours of the assignment "just in case."[25] In addition, the Arbitrator found it "not disputed that during the period relevant to this case[, officers] received notice of their overtime assignments only by checking the schedule in the supervisor's office."[26] Further supporting the Arbitrator's findings, "[t]he Union readily concedes that officers are responsible for checking the schedule to see if they have received anticipated overtime assignments."[27]

Accordingly, because the Union fails to establish that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the Union's essence exception does not provide a basis for finding the award deficient.[28]

We therefore deny the Union's essence exception.

B. The award is not contrary to the Act.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.[29] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[30] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[31]

Under the Act, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials.[32] A violation of a collective-bargaining-agreement provision constitutes an unjustified or unwarranted personnel action under the Act.[33]

The Union argues that the award is contrary to the Act because both prongs are satisfied. Specifically, the Union alleges that (1) the Arbitrator found a violation of the parties' agreement, and (2) that the violation resulted in a loss of overtime pay.[34]

As pertinent here, the second prong under the Act is only met where there is a causal connection between a violation of the parties' agreement and a withdrawal or reduction in pay, allowances, or differentials.[35] However, this connection is established only where "it is clear that the violation of the

[19] Exceptions at 5.
[20] *Id.*
[21] Award at 3.
[22] *Id.* at 12.
[23] *Id.* at 16.
[24] *Id.* at 12.
[25] *Id.* at 13.
[26] *Id.* at 12.
[27] Exceptions at 6 n.2; *see* Award at 12.
[28] *See Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1018 (2012), *pet. for review dismissed*, 752 F.3d 453 (D.C. Cir. 2014).
[29] *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)).
[30] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[31] *Id.*
[32] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 347 (2011).
[33] *Id.*
[34] Exceptions at 13-15.
[35] *AFGE, Local 916*, 57 FLRA 715, 717 (2002).

parties' collective[-]bargaining agreement resulted in the loss of some pay."[36]

Here, the Arbitrator explicitly determined that the Agency's violation of Article 35 did not result in a missed opportunity to earn overtime pay.[37] Although the Arbitrator determined that the Agency violated Article 35 – satisfying the Act's first prong – he concluded that the second prong was not satisfied because the Union failed to "show there was any nexus between the untimely notice of the assignment and [the g]rievant's failure to report for the assignment at the scheduled time."[38] As discussed above, the Arbitrator concluded that the grievant had a responsibility to check the overtime schedule, and that she "knew, or reasonably should have known, before [the overtime assignment] that she had been scheduled for the . . . assignment."[39]

Accordingly, as the second prong under the Act is not satisfied, the Arbitrator's denial of backpay is not contrary to law.

IV. Decision

We deny the Union's exceptions.

[36] *Id.* (quoting *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 56 FLRA 434, 437-38 (2000)) (internal quotation marks omitted).
[37] Award at 15.
[38] *Id.*
[39] *Id.* at 12.

Member Pizzella, concurring:

I join my colleagues to deny the Union's exceptions because the Union has failed to demonstrate that the Arbitrator's award is deficient. I write separately, however, to point out an aspect of this case, which the majority does not even mention, but that I find troubling – the dispute is about nothing more than ***two hours and forty-five minutes of overtime***.

This entire case reminds me of the 1967-film drama, *Cool Hand Luke*, featuring Paul Newman (as Luke) and its now often-quoted phrase: "*What we've got here is a failure to communicate*."[1] In this case, it is unlikely that anyone will die as a result of the parties' failure to communicate, but that failure has resulted in a grievance that has gone on for over three years.

According to the United States Court of Appeals for the District of Columbia Circuit, and as I have previously referenced, this is precisely the type of dispute that "could *only* arise between public employees and a governmental agency."[2]

I do not suggest that the opportunity to work overtime, or its fair apportionment, is a matter that is not significant to federal employees. I also do not suggest that federal agencies should not be held accountable when they fail to provide opportunities for overtime in a fair manner or as they are required by federal law and negotiated agreements. But Congress never intended for taxpayers to be stuck with the bill for the misuse of federal resources − "time, money, and human capital"[3] – so that federal unions and agencies may argue over two hours and forty-five minutes of overtime for three years.

The inability of the National Treasury Employees Union (NTEU) and CBP to resolve this silly misunderstanding has cost the American taxpayer dearly – far more than the cost of the two hours and forty-five minutes Vanessa Chavez wants to be paid. Permitting this disagreement to proceed through the entire grievance process, through arbitration, and now to the Federal Labor Relations Authority thoroughly "undermine[s] 'the effective conduct of [government] business;' and completely fails to take into account the resulting costs to the taxpayers who fund agency operations and pay for the significant costs of union official time used to process such grievances."[4]

[1] https://en.wikipedia.org/wiki/Cool_Hand_Luke (emphasis added).
[2] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (*CBP*) (Concurring Opinion of Member Pizzella) (quoting *SEC v. FLRA*, 568 F.3d 990, 992 (D.C. Cir. 2009) (emphasis added)).
[3] *CBP*, 67 FLRA at 113.
[4] *Id*.

Chavez is still convinced, three years after the fact, that she was not properly notified of an opportunity to work overtime.[5] The United States Department of Homeland Security, Customs and Border Patrol at the Columbus, New Mexico (CBP) point of entry CBP is equally convinced that Chavez was at fault for not re-checking the assignment board after there was some confusion about whether or not overtime was available for the coming weekend.[6]

Arbitrator Michael McReynolds decided that both shared in the blame. He found that, while CBP confused things by vacillating back and forth on whether, how much, and to whom overtime would be available for the upcoming weekend, Chavez further compounded the problem when she did not bother to recheck the overtime board to see if she was on the overtime list.[7]

Chavez serves as a border officer. While the record in this case does not establish Chavez's pay grade, it is a matter of public record that border officers range in grade from GS-5 to GS-11, which equates to an annual salary range from $27,431.00 up to $65,371.00.[8] Therefore, the amount in dispute in this case *could be as low as* ***$72.49***, but it *could be no more than* ***$142.83***.

I doubt that any non-federal union or private-sector employer would allow such a silly dispute to go through an entire grievance procedure and then to arbitration or litigation simply because they would have to foot the bill for those proceedings out of their own bank accounts. It would make no practical sense for them to do so.

In this case, however, NTEU and CBP have no such practical reality. Instead, the American taxpayer gets to pay for the entire three-year argument.

It is not possible for me to capture fully the amount of duty time, and federal resources, which have been devoted to this grievance because the record is devoid of any such reporting (and the parties are under no obligation to share that information). What we do know is this:

- Multiple "[r] *epresentatives*" of the parties met on March 4, 2013 for a step one meeting. They met again on April 26, 2013 for the step two meeting.[9] It is also reasonable to presume that both Chavez and her NTEU steward, Liliana Salazar, would have met several times before, during, and after these meetings, using official time (away from their jobs) to prepare for, and then to attend, these meetings. It is equally reasonable to presume that CBP's "[r]epresentatives" would have met and prepared for the same meetings,[10] using duty time that took them away from more productive endeavors.
- NTEU pursued, and CBP permitted, this dispute to go to arbitration. The arbitration hearing consumed one day of duty time for the parties' multiple representatives, and witnesses.[11]
- After the arbitration, it is apparent that union *representatives* used official time to prepare a forty-two (42) page brief,[12] and that the agency representative also used duty time to prepare CBP's twenty-four (24) page brief,[13] to submit to the Arbitrator.
- After Arbitrator McReynolds prepared his sixteen page decision (for an unspecified fee), NTEU's representatives dutifully prepared, and submitted to the Authority, a sixteen page exceptions brief, followed by CBP's seven (7) page response.

All of these costs – the official time used by Chavez and her NTEU *representatives*, the duty time used by CBP's supervisors, managers, labor-relations specialists, and representatives, and the fees paid to the Arbitrator − are costs that are paid out of taxpayer dollars. Not one dollar of the time spent, or the costs incurred, were paid for out of the pocket of any one of these participants.

Non-federal unions and private-sector employers do not have this luxury. Before engaging in protracted arbitration or litigation, they must consider the real-world costs along with any probable benefit. Here, NTEU and CBP were able to nit-pick at each other for three years over a question concerning two hours and forty-five minutes of overtime that could have been, and should have been, resolved with a fifteen minute discussion.

Consider that, while CBP's officials, Chavez, and NTEU's representatives were all focused on this silly disagreement, CBP was operating under a budget "sequestration" which limited its ability to hire new recruits and "apprehension activity [at the Columbus border crossing] remained at a historic low"[14]

[5] Award at 6.
[6] *Id.* at 15.
[7] *Id.*
[8] https://borderpatroledu.org (2015).
[9] Award at 3.
[10] *Id.*
[11] *Id.*
[12] Exceptions, Attach. B.
[13] *Id.*, Attach. C.
[14] Written Testimony of the U.S. Customs and Border Protection to the House Committee on Appropriations, Subcommittee on Homeland Security hearing on Agency's FY 2014 Budget Request (Apr. 17, 2013).

− forty-two percent (42%) below what it was just five years earlier in 2008.[15] It seems that taxpayers may be more concerned about these implications than about two hours and forty-five minutes of overtime for one border officer, who did not even take the time to recheck the overtime list.

Quite simply, this grievance did nothing to "create [a] positive working relationship [] [and did not] resolve [a] good-faith dispute[]."[16]

Thank you.

[15] CBP FY 2013 in Review (Jan. 17, 2014).
[16] *CBP*, 67 FLRA at 113 (Dissenting Opinion of Member Pizzella).