68 FLRA No. 162

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP
AND IMMIGRATION SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL CITIZENSHIP
AND IMMIGRATION SERVICES
COUNCIL 119
(Union)

0-AR-5105

DECISION

September 30, 2015

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

I. Statement of the Case

This matter is before the Authority on exceptions filed by the Agency to two awards of Arbitrator C. Allen Foster. The Arbitrator issued an award (first award) finding that the Agency was complying with a memorandum of agreement regarding breaks (the MOA), but the Arbitrator found a violation of the MOA because the Agency failed to immediately implement it. The Agency challenged the legality of the Arbitrator's remedy, simultaneously filing both exceptions with the Authority and a motion for reconsideration with the Arbitrator, and the Arbitrator issued a supplemental award that modified the first award. In the supplemental award, the Arbitrator determined that the affected employees were entitled to backpay and ordered further proceedings to determine the amount of backpay that the employees would receive.

We must decide whether the award of backpay for the failure to afford employees paid breaks is contrary to the Back Pay Act (the Act).[1] Because the failure to receive a paid break does not result in a loss of pay, which is a requirement of the Act, the supplemental award is contrary to law. We therefore set aside the Arbitrator's backpay remedy and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy.

II. Background and Arbitrator's Awards

Employees of the Agency receive two paid, fifteen-minute breaks – one in the morning and one in the afternoon – as well as a thirty-minute, unpaid lunch break. In many of the Agency's offices, there was a practice of permitting employees to combine their paid breaks with their unpaid lunch period, giving employees an hour-long lunch period. The Agency determined that this practice violated 5 U.S.C. § 6101, U.S. Office of Personnel Management (OPM) policy, and Comptroller General decisions, and discontinued it. The Union then filed a grievance alleging that the Agency violated the MOA. The grievance was unresolved, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Agency argued that it was required to end the practice because it was unlawful, and that the Agency did not violate the MOA because the MOA did not address combining breaks. Conversely, the Union argued that there was a long-standing and widespread practice of combining breaks and that the OPM and Comptroller General opinions prohibiting the combination of breaks did not carry the force of law. The Union also argued that some employees were not receiving any paid breaks.

In the first award, the Arbitrator found in favor of the Agency on most counts. He found that the MOA did not authorize employees to combine their breaks, and that no remedy was warranted for the Agency's delay in discontinuing the practice of combining breaks, noting that permitting employees to combine their breaks was "the remedy the Union sought."[2] He also agreed that the practice "violate[d f]ederal law and [g]overnment-wide rules or regulations."[3] While the Arbitrator found that, by the time of the hearing, the Agency was complying with the MOA with respect to employees receiving their paid breaks, he found that "the Agency was not successful in immediately implementing the morning and afternoon unpaid breaks in all offices."[4]

The Arbitrator found that some remedy was appropriate because "the Union was forced to bring th[e] arbitration as a result of the Agency's delayed and inconsistent insistence that the paid rest breaks actually be taken."[5] However, the Arbitrator found that it would

[1] 5 U.S.C. § 5596.

[2] First Award at 13 n.6.
[3] *Id.* at 11.
[4] *Id.* at 13.
[5] *Id.*

be impossible to determine the degree to which employees failed to take their paid breaks. The Arbitrator therefore "conclude[d] that the appropriate remedy [wa]s an award of attorney's fees and costs to the Union," and ordered that the Union could either submit a fee petition to the Arbitrator or "elect to receive a liquidated sum of $ 10,000."[6] The Arbitrator also ordered the Agency to pay the full cost of arbitration.

The Agency then filed exceptions to the remedy ordered in first award (first exceptions) with the Authority, as well as a motion for reconsideration with the Arbitrator. Both the first exceptions and the motion for reconsideration contended that the Arbitrator's award of attorney fees or a liquidated sum was contrary to the doctrine of sovereign immunity and that the order to pay the full cost of arbitration was contrary to a provision in the parties' agreement that provided for equal sharing of arbitration costs. Before the Authority could resolve the Agency's first exceptions, the Arbitrator granted the Agency's motion for reconsideration and issued the supplemental award.

In the supplemental award, the Arbitrator modified the remedies that he had granted in the first award. The Arbitrator determined that "the Agency's failure to afford the paid morning and afternoon breaks . . . [wa]s an unwarranted or unjustified personnel action pursuant to [the Act]."[7] The Arbitrator also found that the Agency's failure to enforce the break policy satisfied the Act's requirement that the unjustified or unwarranted personnel action result in "the withdrawal or reduction of the grievants' pay, allowances[,] or differentials" because "when an employee is deprived of the paid break, he or she has been deprived of a paid benefit and has been forced to work, and has worked, when he should have been on paid break."[8] To determine the precise amount of backpay to award, the Arbitrator outlined a procedure by which he would hear representative testimony from ten employees. The Arbitrator also modified the first award to apportion the costs of arbitration equally.

The Agency then filed exceptions to the supplemental award (supplemental exceptions) and requested the Authority to consolidate its first exceptions with its supplemental exceptions. The Union filed oppositions to both exceptions.

[6] *Id.* at 15.
[7] Supplemental Award at 1 (Supp. Award).
[8] *Id.* at 2.

III. Preliminary Matters

A. We grant the Agency's motion to consolidate Case Nos. 0-AR-5105 and 0-AR-5105-SUPP.

The Agency included, in its exceptions to the supplemental award, a motion to consolidate Case Nos. 0-AR-5105 and 0-AR-5105-SUPP.[9] Because both cases arise from the same arbitration proceeding, and in the absence of any opposition from the Union,[10] we grant the Agency's motion to consolidate Case Nos. 0-AR-5105 and 0-AR-5105-SUPP.[11]

B. We dismiss, as moot, the Agency's exceptions to the first award.

Where, after a party files exceptions to an award with the Authority, the arbitrator modifies the award so as to cure the deficiencies raised in the exceptions, the Authority will dismiss the exceptions as moot.[12] Here, the Arbitrator struck all of the remedies that the Agency challenged in its first exceptions,[13] and the Agency concedes that "the[] issues [raised by the first exceptions] are now moot."[14] Accordingly, we dismiss the Agency's first exceptions as moot.

C. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's functus officio exception.

The Agency argues that the Arbitrator exceeded his authority by modifying the first award to provide for backpay under the Act, claiming that the Arbitrator was functus officio.[15] Subject to certain exceptions not relevant here, the doctrine of functus officio prevents an arbitrator from reconsidering a final award.[16]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were

[9] Supplemental Exceptions at 1 n.1 (Supp. Exceptions).
[10] *See* Supplemental Opp'n at 1-2 (Supp. Opp'n).
[11] *See U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 772, 772 (2015) (citing *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012) (*Marshals*)); *SSA, Balt., Md.*, 64 FLRA 306, 306 n.1 (2009).
[12] *See Marshals*, 67 FLRA at 22 (citing *U.S. Dep't of the Army, Army Info Sys. Command, Savanna Army Depot*, 38 FLRA 1464, 1468 (1991)).
[13] *See* Supp. Award at 1.
[14] Supp. Exceptions at 9 n.2.
[15] *Id.* at 15.
[16] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 541 (2015) (Member Pizzella dissenting) (citing *Marshals*, 67 FLRA at 22).

not, presented to the arbitrator.[17] Further, the Authority applies these regulations to bar a party from advancing a position before the Authority that is inconsistent with the position it took before the arbitrator.[18]

Although the Agency claims that its motion for reconsideration "sought only clarification of the statutory authority relied upon by the Arbitrator to award" the remedies he granted in the first award,[19] the Agency's motion actually "request[ed] that [the first award's] remedies be rescinded."[20] Plainly, the Agency was requesting that the Arbitrator modify, as opposed to merely clarify, the first award. Because the Agency requested the Arbitrator to reconsider the first award, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's argument that the doctrine of functus officio prevents the Arbitrator from reconsidering the first award.

D. The Agency's supplemental exceptions are not interlocutory.

The Authority's Regulations provide that "the Authority . . . ordinarily will not consider interlocutory appeals."[21] Thus, the Authority will not resolve exceptions to an arbitration award "unless the award constitutes a complete resolution of all the issues submitted to arbitration"[22] or a party demonstrates extraordinary circumstances warranting review.[23] Exceptions to an award are not interlocutory, however, where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded.[24]

The Union argues that the Agency's supplemental exceptions are interlocutory because the Arbitrator ordered further proceedings to determine the amount of backpay owed to the employees.[25] However, the award addresses the framed issue and announces a remedy, thereby resolving all of the issues submitted to arbitration.[26] Thus, the award is final even though the Arbitrator has ordered further proceedings to determine the amount of backpay to award employees. Accordingly, we find that the Agency's supplemental exceptions are not interlocutory.

E. The Agency's exceptions to the merits determination are untimely.

Although the Agency's exceptions primarily challenge the Arbitrator's determination concerning backpay, the Agency argues that the Arbitrator's merits determination fails to draw its essence from the MOA because "the MOA does not require a morning and afternoon break . . . but rather [employees] are authorized, subject to the assignment of work, up to two fifteen[-]minute rest periods per day."[27]

Under § 2425.2(b) of the Authority's Regulations,[28] the time limit for filing exceptions begins to run when the arbitrator serves a final award on the parties.[29] Neither an arbitrator's retention of jurisdiction to assist in the implementation of an award,[30] nor a party's filing of a motion for reconsideration or clarification,[31] affects an award's finality for purposes of filing exceptions. But where an arbitrator modifies an award in response to a party's motion, the time limit for filing exceptions to the modified award begins upon service of the modified award.[32] However, where a party does not except to the original award, the party's exceptions to the modified award will be timely only as to the deficiencies that arise as a result of the modification.[33]

[17] 5 C.F.R. §§ 2425.4(c), 2429.5.

[18] *E.g., U.S. DHS, U.S. CBP*, 68 FLRA 829, 832 (2015) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 673 (2015)); *Broad. Bd. of Governors*, 65 FLRA 830, 831 (2011) (citing *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009); *U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001)).

[19] Supp. Exceptions at 16 n.4.

[20] *Id.*, Attach. B at 7.

[21] 5 C.F.R. § 2429.11.

[22] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2 (2012) (citing *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567-68 (2010); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002)).

[23] *Id.* (citing *U.S. DOL, Bureau of Labor Statistics*, 65 FLRA 651, 653-54 (2011)).

[24] *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010) (citing *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007)).

[25] Supp. Opp'n at 1.

[26] *See U.S. DHS, U.S. CBP*, 66 FLRA 838, 841 (2012) (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012)) ("[B]ecause the [a]rbitrator resolved all of the issues submitted to arbitration and ordered a remedy, the awards are final and the . . . exceptions are not interlocutory.").

[27] Supp. Exceptions at 13-14.

[28] 5 C.F.R. § 2425.2(b).

[29] *Id.*; *accord* 5 U.S.C. § 7122(b).

[30] *See AFGE, Local 12*, 61 FLRA 628, 630 (2006) (citing *Portsmouth Naval Shipyard*, 15 FLRA 181, 182 (1984)).

[31] *Id.*

[32] *Id.* (citing *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 132 (2003)).

[33] *Id.* (citing *U.S. Customs Serv., Region I, Bos., Mass.*, 15 FLRA 816, 817 (1984)).

Here, the Agency's first exceptions did not challenge the first award's merits[34] and the supplemental award modified only the remedy granted by the first award.[35] If the Agency had challenged the first award's merits in its first exceptions, then the Arbitrator's modification of the first award's remedy would not have mooted the first exceptions in their entirety, and the portions of the first exceptions going to the merits would still be properly before us. But the Agency did not do so. Accordingly, the Agency's exceptions to the Arbitrator's merits determination are untimely, and we therefore dismiss them.

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

The Agency argues that the backpay remedy is contrary to law.[36] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[37] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[38]

The Act authorizes an award of backpay 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.[39] The violation of a collective-bargaining agreement is an unjustified and unwarranted personnel action within the meaning of the Act.[40]

Here, the Arbitrator found that the Act's second requirement was satisfied because the Agency's violation of the MOA "forced [the employees] to work . . . when [they] should have been on paid break."[41] However, the Authority considered, and rejected, a similar argument in *U.S. Department of the Air Force, Travis Air Force Base, California* (*Travis*).[42] In *Travis*, the agency violated a collective-bargaining agreement when it replaced a twenty-minute, working lunch with a thirty-minute, unpaid lunch break.[43] The arbitrator found that "the extra time the grievants were required to remain at their work stations in order to complete their regular workday [wa]s overtime which the grievants were required to work by the [a]gency's violation of the agreement."[44] The Authority rejected this argument because "the grievants continued to be compensated for an eight-hour workday,"[45] explaining that "an award of back pay is available only where it is clear that the violation of the parties' collective[-]bargaining agreement resulted in the loss of *some* pay."[46] As was the case in *Travis*, the Arbitrator here made no finding that employees' compensation decreased because of the Agency's violation of the MOA, and as such, his award of backpay does not satisfy the Act's requirements.

We therefore find that the Arbitrator's remedy is contrary to law and set it aside. In light of this decision, it is unnecessary for us to address the Agency's management-rights, essence, exceeds-authority, or impossible-to-implement exceptions to the supplemental award, all of which challenge the unlawful remedy.[47]

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy.[48] As we have set aside the entire remedy ordered by the Arbitrator, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

V. Decision

We dismiss, in part, and grant, in part, the Agency's exceptions. We set aside the award of backpay and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

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[34] *See* First Exceptions at 8-14.

[35] *See* Supp. Award at 1 ("Those portions of the [first a]ward [addressing the remedy] are stricken and replaced with the following . . . .").

[36] Supp. Exceptions at 10-11.

[37] *E.g.*, *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006) (citing *NTEU*, 50 FLRA 330, 332 (1995)).

[38] *E.g.*, *id.* (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329 (2003)).

[39] *E.g.*, *U.S. Dep't of HHS, Wash., D.C.*, 68 FLRA 239, 243 (2015) (citing *U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014) (*CBP*)).

[40] *E.g.*, *id.* (citing *CBP*, 67 FLRA at 464).

[41] Supp. Award at 2.

[42] 56 FLRA 434, 437 (2000) ("[T]he [a]rbitrator effectively found that 'but for' the [a]gency's unwarranted and unjustified personnel action, the grievants would have been entitled to overtime pay. We disagree with the [a]rbitrator's finding.").

[43] *Id.* at 434-35.

[44] *Id.* at 437 (alteration omitted).

[45] *Id.* at 438.

[46] *Id.* at 437-38.

[47] *See e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (citing *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, 67 FLRA 342, 343 (2014)).

[48] *E.g.*, *U.S. Dep't of HUD*, 65 FLRA 433, 436 (2011) (citing *U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009)).

Member DuBester, dissenting:

I do not agree with the majority that the supplemental award is contrary to law. And in particular, I do not agree with the majority's view that this case is controlled by *U.S. Department of the Air Force, Travis Air Force Base, California* (*Travis AFB*).[1]

In *Travis AFB*, employees worked an eight-hour workday, which included a paid, working lunch period during which employees were expected to "remain[] at their stations and perform[] work."[2] However, the agency unilaterally eliminated employees' paid lunch period because the agency concluded that employees were taking their lunch periods without working. The agency replaced the paid, working lunch period with an unpaid lunch period during which employees were not required to work.[3] However, employees continued to work eight hours each day. The arbitrator found that the agency violated the parties' agreement, and ordered the agency "to compensate employees . . . at the 'appropriate overtime rate for the additional time they were required to work beyond their eight-hour workday.'"[4]

The Authority set aside the arbitrator's backpay remedy.[5] The Authority reasoned that employees suffered no loss of pay as a result of the change. Before the agency eliminated employees' paid lunch period (during which employees were required work), employees were paid for eight hours of work each day. After the agency eliminated the paid lunch period and replaced it with an unpaid lunch period, employees were still paid for eight hours of work each day.[6] Therefore, there was no loss of pay; both before and after the change, employees were paid for all of the compensable time to which they were entitled, and the amount of that compensable time did not change.

This case is different. It concerns the deprivation of paid rest breaks. The Arbitrator found that the Agency was "delayed and inconsistent" in eliminating the practice of combining two fifteen-minute paid rest breaks with a thirty-minute unpaid lunch period.[7] In the confusion that ensued,[8] some employees were "deprived" of the paid rest breaks to which they were entitled,[9] and worked each day without taking one or both of those breaks. The Arbitrator found that the Agency had "deprived [employees] of a paid benefit" that "reduced the employees' pay and, thus, is the loss of a 'monetary . . . employment benefit to which an employee is entitled by statute or regulation.'"[10]

Focusing on these employees, the Arbitrator in his supplementary award directs a remedy *only* "for paid breaks which [employees] were not afforded."[11] In other words, the Arbitrator is ordering a remedy for employees who obeyed the Agency's order to *cease* combining their two paid rest breaks with their unpaid lunch period, but who also "were not afforded"[12] those rest breaks at other times during the workday. That is why the Arbitrator orders the Union to "compile an alphabetical list of all employees who[] . . . were not afforded their paid morning or afternoon breaks,"[13] and to provide "evidence as to the number of paid breaks, if any, which such representative employees were not afforded."[14]

The math is simple. Employees who were not afforded their paid rest breaks worked eight hours each day. For those employees, adding one or two *paid* rest breaks to a workday during which they already worked eight compensable hours would extend their "paid" workday by the number of paid rest breaks they "were not afforded."[15] Because the Arbitrator's award merely compensates those employees for the compensable time of which they were deprived, I would find that the award is not contrary to the BPA.

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[1] 56 FLRA 434 (2000).
[2] *Id.* at 435.
[3] *Id.* at 437.
[4] *Id.* at 435 (quoting the arbitrator's award).
[5] *Id.* at 437-38.
[6] *Id.*
[7] First Award at 13.
[8] *See id.* at 11-12.
[9] Supp. Award at 2; *see id.*
[10] *Id.* (quoting 5 C.F.R. § 550.803's definition of "[p]ay, allowances, and differentials").
[11] *Id.* at 3.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*