68 FLRA No. 26

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 1034
(Union)

0-AR-4942

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DECISION

December 29, 2014

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

I. Statement of the Case

Arbitrator Joann T. Donovan sustained a grievance and awarded the grievant backpay. The Arbitrator found that the Agency's decision to reassign the grievant to a different position and deny him overtime was an unjustified or unwarranted personnel action under the Back Pay Act (BPA).[1]

The main question before us is whether the award is contrary to the BPA because the Arbitrator awarded the grievant backpay without finding that the Agency violated an applicable law, rule, regulation, or provision of a collective-bargaining agreement. Because the Arbitrator did not make such a finding, the Arbitrator lacked a basis for determining that the Agency took an unjustified or unwarranted personnel action, as required by the BPA for an award of backpay. Accordingly, the answer is yes.

II. Background and Arbitrator's Award

The grievant is a correctional officer. An inmate accused the grievant of physical abuse. As a result, the Agency initiated an investigation and temporarily reassigned the grievant to a position with minimal inmate contact. In his reassigned position, the grievant continued to have the opportunity to work overtime. Approximately six months later, the grievant was again reassigned – this time to a position in which the Agency denied the grievant overtime for nearly eighteen months.

The Union filed a grievance, which was unresolved and submitted to arbitration. As relevant here, the Arbitrator framed the following issues:

> 2. Was the [g]rievant unjustly, arbitrarily, and unfairly treated with respect to overtime and/or reassignment . . . [for the relevant time period]?
>
> 3. Did the Agency perform an unjustified or unwarranted person[nel] practice . . . in violation of Article 30 [Section] g. and other sections of the [parties' a]greement by reassigning [the g]rievant to other jobs within the institution . . . ?[2]

In resolving the issues, the Arbitrator considered the BPA's requirements. The Arbitrator recognized that an award of backpay under the BPA requires a showing that: "(1) [t]he aggrieved employee was affected by an unjustified or unwarranted personnel action; [and] (2) [t]he personnel action resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials."[3]

Applying the BPA's requirements, the Arbitrator explained: "where there in fact *was* no offense, personnel actions that cause loss of pay and benefits are, in my opinion, unjustified and/or unwarranted."[4] The Arbitrator then found "that there was no offense by [the grievant] on the occasion in question and that he should be made whole."[5]

As a remedy, the Arbitrator ordered the Agency to pay the grievant for the overtime that he would have otherwise received for the approximately eighteen-month period he served in his second reassigned position.

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

[1] 5 U.S.C. § 5596.

[2] Award at 2.
[3] *Id.* at 4 (quoting 5 U.S.C. § 5596).
[4] *Id.* at 5.
[5] *Id.*

III. Analysis and Conclusions

The Agency argues that the award is contrary to the BPA.[6] Specifically, the Agency argues that the Arbitrator did not find an "unjustified or unwarranted personnel action" – because the Arbitrator did not find that the Agency violated an applicable law, rule, regulation, or provision of the parties' collective-bargaining agreement – as required by the BPA for the remedy of backpay to be proper.[7]

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.[8] 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.[9] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[10] unless a party demonstrates that the findings are nonfacts.[11]

Under the BPA, an arbitrator may award backpay only when he or she 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.[12] A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an "unjustified or unwarranted personnel action."[13]

Here, the Arbitrator awarded backpay, applying the principle that "where there in fact *was* no offense [by an employee], personnel actions that cause loss of pay and benefits are, in my opinion, unjustified and/or unwarranted."[14] However, the Arbitrator did not find that the Agency violated any applicable law, rule, regulation, or provision of the parties' collective-bargaining agreement. In fact, the Arbitrator does not mention or quote any law other than the BPA itself, nor any rule, regulation, or collective-bargaining agreement provision. As such, the award does not include a finding that the Agency committed an unjustified or unwarranted personnel action as required by the BPA.[15] Therefore, the Arbitrator did not have any basis under the BPA to award the grievant backpay.[16] Accordingly, we find the award contrary to law.

The Agency also argues that the award of backpay is deficient because the Arbitrator exceeded her authority.[17] As we set aside the award as contrary to the BPA, it is unnecessary to resolve the Agency's exceeds-authority exception.[18]

IV. Decision

We grant the Agency's contrary-to-law exception and set aside the award of backpay.

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[6] Exceptions at 6-8.
[7] 5 U.S.C. § 5596.
[8] *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)).
[9] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[10] *Id.*
[11] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[12] 5 U.S.C. § 5596(b)(1) (emphasis added); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005).
[13] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993).
[14] Award at 5.
[15] Chairman Pope agrees with the dissent that a finding of an unjustified and unwarranted personnel action may be "implicit[]" from the arbitration award. Dissent at 5. But, given the factors discussed above – specifically, that the Arbitrator did not find a violation of, quote, or even mention any applicable law (other than the BPA), rule, regulation, or contract provision – she does not agree that there is sufficient basis for concluding that the Arbitrator made such an implicit finding in this case. *Cf. U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 611 (2014) (*Red River*) (Member Pizzella dissenting) (concluding that an arbitrator implicitly found a contract violation where a grievance alleged a violation of a specific contract provision, the stipulated issue before the arbitrator included wording of that provision, the arbitrator cited the provision as relevant, and the arbitrator sustained the grievance).
[16] Member Pizzella notes that, for the reasons set forth in his dissenting opinions in *U.S. Department of VA, Medical Center, Perry Point, Maryland*, 68 FLRA 83, 88 n.22 (2014) (Dissenting Opinion of Member Pizzella) and *Red River*, 67 FLRA at 617, the Authority's precedent "does not permit the Authority to correct a deficient arbitral award to find a . . . violation 'implicitly' when no contract violation was found by the arbitrator."
[17] Exceptions at 8-10.
[18] *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, 67 FLRA 342, 343 (2014) (finding it unnecessary to address remaining exceptions after setting aside award of backpay as contrary to the BPA where arbitrator "did not find a violation of law, rule, regulation, or the parties' collective-bargaining agreement").

Member DuBester, dissenting:

I disagree with my colleagues' determination that the award is contrary to the Back Pay Act (BPA)[1] and with their decision to set aside the award. Contrary to the majority's view, the award, read in context,[2] shows – and the record supports – that the Arbitrator implicitly found that the Agency violated Article 18(p)(1) of the parties' agreement.

The Union's grievance alleged, in relevant part, that the Agency violated Article 18(p)(1) of the parties' agreement,[3] which provides that "*qualified* employees in the bargaining unit will receive first consideration for . . . overtime assignments."[4] Further, the record indicates that the parties argued and presented evidence at the hearing as to whether the grievant was a "*qualified* employee[]" for the purposes of assigning overtime under Article 18(p)(1).[5]

The Arbitrator found that "the grievant was denied requested overtime for which he was available and *qualified*."[6] In my view, the most reasonable interpretation of this part of the award, read in context, is that the Arbitrator rejected the Agency's argument – that the Agency was justified in denying overtime to the grievant because he was not a qualified employee for overtime assignments – and implicitly found that the Agency violated Article 18(p)(1) of the parties' agreement.[7]

Because a violation of a provision of a collective-bargaining agreement constitutes an "unjustified or unwarranted personnel action" under the BPA,[8] and because the necessary conditions for an award of backpay under the BPA are therefore present in this case, I would deny the Agency's contrary-to-law exception.

I would also deny the Agency's exceeds-authority exception. The Agency's exceeds-authority exception is premised on the same erroneous claim as its contrary-to-law exception – that the award fails to find a violation of an applicable law, rule, regulation, or provision of the parties' collective bargaining agreement.

[1] 5 U.S.C. § 5596.

[2] *See, e.g., U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 611 (2014) (*Red River*) (Member Pizzella dissenting) (citing, inter alia, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 66 FLRA 1046, 1049 (2012) (holding that "[w]hen evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole. That is, the Authority interprets the language of an award in context."); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 463 (2011) (same).

[3] *See* Exceptions, Attach. B at 7; Opp'n at 5-6.

[4] Opp'n, Ex. 2 at 28 (emphasis added).

[5] Exceptions, Attach. B at 2; Opp'n, Ex. 1 at 6-9.

[6] Award at 3 (emphasis added).

[7] *See id.* at 2-5; *see also Red River*, 67 FLRA at 611 (finding that the arbitrator "implicitly" determined that the agency violated the parties' agreement, based on a consideration of the arbitral record); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739-40 (2012) (finding that the arbitrator "implicitly" found a direct causal connection between a contract violation and employees' loss of pay, based on a consideration of the arbitral record); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 (2011) (finding that the arbitrator "implicitly rejected" an agency defense to a remedy sought in the grievance, based on a consideration of the arbitral record).

[8] *E.g., U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993).