68 FLRA No. 57

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 150
(Union)

0-AR-5013

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DECISION

February 27, 2015

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

I. Statement of the Case

Arbitrator Stanley H. Sergent found that the Agency violated the parties' collective-bargaining agreement when it failed to assign two employees (the grievants) overtime, and that the grievants were entitled to backpay under the Back Pay Act (BPA).[1] The Arbitrator rejected the Agency's claim that the parties had a binding past practice that allowed the Agency to remedy its violation by assigning the grievants another overtime opportunity (make-up overtime), finding that the alleged past practice was "effectively eliminated" and "render[ed] . . . unenforceable"[2] by the parties' agreement. This case presents us with five questions.

The first question is whether the Authority should deny the Agency's exceptions because they fail to challenge one of the "separate and independent ground[s]" for the award.[3] Because the exceptions challenge both of the separate and independent grounds for the award, we find that the answer is no.

The second question is whether the award is deficient because the Arbitrator erred, as a matter of law, in finding that the alleged past practice was eliminated by, and conflicts with, the parties' agreement. Such findings involve an arbitrator's interpretation and application of the parties' agreement, and, accordingly, are analyzed under the deferential essence standard. Because the Agency does not argue that the award fails to draw its essence from the parties' agreement, we find that the answer is no.

The third question is whether the award of backpay is contrary to the BPA, because the parties' agreement allegedly allows only a remedy of make-up overtime. Because the Agency has not shown that the Arbitrator erred in finding that the agreement precludes a remedy of make-up overtime, we find that the answer is no.

The fourth question is whether the award conflicts with the BPA's duty to mitigate damages and waiver of sovereign immunity. Because there is no basis for finding that the BPA's duty to mitigate applies to denials of overtime opportunities or that the BPA's waiver of sovereign immunity does not apply in this case, we find that the answer is no.

The fifth question is whether the Arbitrator exceeded his authority. Because the Agency's exceeded-authority claim is premised on its arguments regarding the BPA, and we reject those arguments, we also reject the Agency's exceeded-authority claim.

II. Background and Arbitrator's Award

Under the parties' agreement, the Agency assigns overtime to the employee who has volunteered to work overtime and who has earned the least amount of overtime pay for the year. The grievants volunteered for overtime opportunities, but the Agency assigned the overtime to other employees who allegedly had a lower priority than the grievants on the overtime roster. The Union filed two grievances alleging that the Agency violated the parties' agreement by failing to compensate the grievants with overtime pay after the Agency failed to assign them overtime opportunities to which they were entitled. After the grievances were filed, the Agency offered the grievants the opportunity to work make-up overtime. The grievants declined the offers, and the Union consolidated the grievances for arbitration.

The Arbitrator found that there was no dispute that the grievants should have been assigned the disputed overtime under Article 35 of the parties' agreement, which addresses the procedures for assigning overtime. He did not expressly frame an issue, but stated that "[t]he only issue concerns the appropriate remedy"[4] for failing

[1] 5 U.S.C. § 5596.
[2] Award at 21.
[3] Opp'n at 8.
[4] Award at 3; *see id.* at 11.

to properly assign the grievants overtime under the parties' agreement.

Turning to the issue of remedy, the Arbitrator determined that backpay under the BPA, rather than make-up overtime, was the appropriate remedy. In determining which law or regulation governs the remedy, the Arbitrator relied on Article 3, Section 1 of the parties' agreement, which provides, in pertinent part, that "[e]xcept as provided by law, in the administration of all matters covered by [the parties' agreement], the parties are governed by . . . existing or future laws."[5] Based on this provision, the Arbitrator agreed with the Union's argument that the BPA is the "existing or future law" that governs the remedy.[6]

The Arbitrator next addressed the requirements of the BPA and found those requirements satisfied. In particular, he found that the Agency's violation of the parties' agreement was an unjustified and unwarranted personnel action that directly resulted in a loss of pay to the grievants. For these reasons, he found that backpay was the appropriate remedy.

In determining that backpay under the BPA was the appropriate remedy, the Arbitrator rejected the Agency's claim that, under an expired Agency policy – the Revised National Inspectional Assignment Policy (RNIAP) – the parties had a past practice of a make-up overtime remedy for missed overtime opportunities. Noting that "this contention has been rejected by several recent arbitral decisions on the subject,"[7] the Arbitrator found that the RNIAP "cannot preempt or usurp the legal authority of the [BPA] by unilaterally substituting a different remedy."[8] Moreover, the Arbitrator found that the evidence "fails to demonstrate the existence of a local past practice of make-up overtime."[9] Specifically, the Arbitrator found that the Agency failed to demonstrate that "the Union has followed or assented to the asserted practice," particularly given that "the years of litigation history on the issue of the RNIAP clearly shows that the Union never agreed to this make-up overtime policy."[10]

In addition, the Arbitrator found that "even though . . . the RNIAP did contain express language authorizing make-up overtime as a remedy for skipped opportunities, . . . the RNIAP ended when the [parties'] current [agreement] went into effect."[11] And the Arbitrator further found that the parties' agreement "makes no reference to RNIAP and there is no language [in the agreement] authorizing make-up opportunities as a remedy for skipped overtime assignments."[12] The Arbitrator concluded on this point that the "deletion [of this remedy] effectively eliminated the [remedy] from the [a]greement[,] rendering it unenforceable as a past practice.[13]

Next, the Arbitrator rejected the Agency's claim that a backpay remedy is not appropriate because it compensates employees for time not actually worked, resulting in "unjust enrichment."[14] The Arbitrator found in this regard that backpay for missed overtime opportunities was a make-whole remedy to which the grievants were entitled under the BPA.

In addition, the Arbitrator rejected the Agency's claim that make-up overtime was a proper make-whole remedy. The Arbitrator found that once the overtime in dispute "is worked by someone other than the entitled employee, the time is lost and can only be remedied by back[p]ay."[15] Moreover, the Arbitrator found, "[a] make-up overtime remedy could lead to a violation of another employee's right to overtime in proper turn in further violation of the [parties'] agreement."[16] And, in the Arbitrator's view, a make-up overtime remedy "does not provide an incentive for management to be more attentive and responsible in following [the agreement] in the future."[17]

For these and other reasons, the Arbitrator found that the appropriate remedy for the Agency's contract violation was an award of backpay, and he awarded each grievant overtime pay, with interest.

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

III. Analysis and Conclusions

A. The Agency has not failed to except to a "separate and independent ground" for the award.

In its opposition, the Union claims that the Arbitrator based his award on "separate and independent ground[s]," and that the Agency has not excepted to both of those grounds.[18] Specifically, the Union claims that the Agency excepts only to the Arbitrator's finding that the alleged past practice violates Article 35 of the parties'

[5] *Id.* at 11.
[6] *Id.* (internal quotation marks omitted); *see also id.* at 11-12.
[7] *Id.* at 19.
[8] *Id.*
[9] *Id.* at 20.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 21.
[14] *Id.* at 21-22.
[15] *Id.* at 23.
[16] *Id.*
[17] *Id.*
[18] Opp'n at 8.

agreement, and not to his finding that the alleged practice violates external law, particularly the BPA.[19] As a result, the Union claims that it is unnecessary for the Authority to resolve the Agency's exceptions.[20]

When an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient for the Authority to find the award deficient.[21] In such circumstances, if the excepting party does not demonstrate that the award is deficient on one or more of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds.[22]

As discussed in greater detail below, the Agency argues that the Arbitrator erred by finding that the parties' agreement eliminated the alleged past practice,[23] which is a finding that underlies both of the allegedly separate and independent bases for his award. Further, the Agency challenges both the Arbitrator's interpretation of Article 35 of the parties' agreement and his findings regarding the BPA.[24] Accordingly, we find that the Agency has excepted to both of the separate and independent grounds for the award, and address the merits of the Agency's exceptions.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law in several respects. When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.[25] 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.[26] In making that assessment, the Authority defers to the Arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts."[27]

1. The Arbitrator's finding that the alleged past practice violates the parties' agreement is not contrary to law.

The Agency contends that the Arbitrator erred, as a matter of law, in finding that the alleged past practice was eliminated by, and conflicts with, the parties' agreement.[28] Specifically, the Agency argues that the agreement and the practice have existed "in harmony" for a long time,[29] and that the Arbitrator erred in finding that Article 35 does not give management discretion to award make-up overtime.[30] The Agency claims that, because the past practice does not conflict with the parties' agreement, the agreement incorporates the practice.[31] Further, the Agency claims that the agreement is silent as to the appropriate remedy[32] and, citing *Cruz-Martinez v. DHS*,[33] claims that the Arbitrator should have applied the parties' past practice.[34] Finally, the Agency argues[35] that the award conflicts with the Authority's decision in *U.S. Department of the Navy, U.S. Marine Corps Logistics Base, Albany, Georgia* (*Navy*).[36]

In reviewing an arbitrator's award concerning whether a past practice has altered a contract term negotiated by the parties, the Authority considers the issue as a challenge to an arbitrator's interpretation and application of the parties' agreement.[37] An allegation that an arbitrator erred in this regard does not provide a basis for finding the award contrary to law.[38] Instead, the Authority applies the deferential essence standard in reviewing the arbitrator's findings.[39]

Here, although the Agency challenges the Arbitrator's interpretation of the parties' agreement, it does not argue that the award fails to draw its essence from the agreement. And to the extent that some of the Agency's arguments challenge the Arbitrator's factual findings, the Agency does not argue that the award is based on nonfacts. As stated previously, in applying de novo review, the Authority defers to an arbitrator's factual findings, absent a demonstration that those findings are nonfacts.[40]

[19] *Id.* at 9; *see also id* at 9-12.
[20] *Id.* at 12.
[21] *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 81 (2012).
[22] *Id.*
[23] Exceptions at 16-20.
[24] *See id.* at 21-24.
[25] *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)).
[26] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[27] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012) (*IRS*).
[28] Exceptions at 18.
[29] *Id.*
[30] *Id.* at 7.
[31] *Id.* at 19.
[32] *Id.* at 18-19.
[33] 410 F.3d 1366 (Fed. Cir. 2005).
[34] Exceptions at 18-19.
[35] *Id.* at 20.
[36] 39 FLRA 576 (1991).
[37] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 691 (2014) (*DHS*); *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000).
[38] *DHS*, 67 FLRA at 691.
[39] *Id.*
[40] *IRS*, 67 FLRA at 104.

Further, the Agency's reliance on *Cruz-Martinez* and *Navy* is misplaced. *Cruz-Martinez* held that "past practices . . . can establish terms of [an] agreement that are as binding as any specific written provision[,] . . . particularly . . . where the past practice does not contradict any written provision in the" parties' agreement.[41] That decision does not support a conclusion that the Arbitrator was required, as a matter of law, to find that the particular alleged past practice in this case was binding on the parties – particularly given his finding that the alleged past practice was eliminated and became unenforceable when the parties negotiated Article 35 of the parties' agreement.[42] As for *Navy*, the Authority denied an essence exception to an arbitrator's award of make-up overtime.[43] *Navy* did not hold, as a matter of law, that an arbitrator is required to grant a make-up remedy when the requirements of the BPA have been met, as in this case. In fact, in *NTEU, Chapter 231*, the Authority held that when the requirements of the BPA are met in connection with a denial of overtime, an arbitrator *must* award backpay.[44] In so holding, the Authority noted that *Navy* did not address whether the BPA allows make-up overtime as a remedy.[45]

For these reasons, we find that the Agency has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the alleged past practice was eliminated by and conflicts with the parties' agreement.

The Agency also challenges the Arbitrator's finding that a past practice did not exist.[46] However, given his finding that (even if it existed) the alleged practice was eliminated and became unenforceable when the parties negotiated Article 35 of the parties' agreement – which the Agency has not shown to be deficient – it is unnecessary to resolve the Agency's claim. Accordingly, we reject the Agency's challenge.

2. The award is not contrary to § 5596(b)(4) of the BPA.

The Agency asserts that, under 5 U.S.C. § 5596(b)(4), any remedy available under the BPA is restricted to limitations placed by the parties' agreement.[47] The Agency further argues that the parties' agreement incorporates the alleged past practice of granting make-up overtime and that, therefore, any remedy is limited to make-up overtime.[48]

Section 5596(b)(4) provides, in pertinent part, that backpay "shall not exceed that authorized by the . . . collective[-]bargaining agreement under which the unjustified or unwarranted personnel action is found."[49] Here, the Arbitrator found that the parties' agreement eliminated the alleged past practice. Further, the Agency has not shown this finding to be deficient. As a result, there is no basis for finding that the alleged practice was incorporated into the agreement. Consequently, there is also no basis for finding that the award of backpay exceeds a limit contained in the parties' agreement, and we find that the award is not contrary to § 5596(b)(4).

Moreover, the Authority has found that § 5596(b)(4)'s purpose is to establish an outermost time limit on backpay awards, while allowing for a shorter limitations period where "authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted personnel action" was found.[50] In other words, § 5596(b)(4) merely places time limits on recovery under the BPA.[51] As time limits on recovery were not an issue in this case, the Agency's reliance on § 5596(b)(4) is misplaced.

3. The award is not contrary to the BPA's duty to mitigate damages or the BPA's waiver of sovereign immunity.

Even assuming that a remedy is available under the BPA, the Agency alternatively argues, the award conflicts with the BPA's duty to mitigate damages.[52] Specifically, the Agency claims that the grievants failed to mitigate their losses by not accepting subsequent offers of make-up overtime.[53] The failure to mitigate damages under the BPA, according to the Agency, exceeds the BPA's waiver of sovereign immunity.[54]

Although the Agency raised the mitigation issue in proceedings before the Arbitrator,[55] the Arbitrator did not address it. However, in *U.S. DHS, U.S. CBP, Brownsville, Texas* (*DHS*), the Authority considered and rejected the same argument that the Agency makes here.[56] For the reasons given in *DHS*, we reject the Agency's duty-to-mitigate claim in this case.

[41] 410 F.3d at 1370-71.
[42] Award at 21.
[43] 39 FLRA at 578-79.
[44] 66 FLRA 1024, 1026-27, *recons. denied*, 67 FLRA 67 (2012), *remanded without decision sub nom. U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir. 2013), *decision on remand*, 67 FRLA 247 (2014).
[45] *Id.* at 1026.
[46] Exceptions at 9.
[47] *Id.* at 21.
[48] *Id.* at 9, 21-22.
[49] 5 U.S.C. § 5596(b)(4).
[50] *E.g., DHS*, 67 FLRA at 692.
[51] *Id.*
[52] Exceptions at 22.
[53] *Id.* at 23.
[54] *Id.*
[55] *Id.*, Attach. B, Agency's Post-Hr'g Br. at 14-18.
[56] 67 FLRA at 692.

In addition, because the Agency has not shown that the duty to mitigate damages bars the award of backpay or that the award is otherwise contrary to the BPA, we reject the Agency's claim that the award is contrary to the waiver of sovereign immunity.

Accordingly, we find that the Agency has not established that the remedy awarded violates the BPA, and we deny this exception.

C. The Arbitrator did not exceed his authority.

The Agency asserts that the Arbitrator exceeded his authority, because he awarded a remedy that "exceeded the limitation of what is authorized by Congress."[57] This exception is premised on the Agency's claim that the award is contrary to the BPA. Because we have rejected the Agency's claims regarding the BPA, we also reject the exceeds-authority claim.

IV. Decision

We deny the Agency's exceptions.

[57] Exceptions at 21.