

68 FLRA No. 77

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS C-33
LOCAL 720
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
(Agency)

0-AR-5063

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DECISION

April 15, 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 Thomas J. Nowel determined that the grievants were not entitled to backpay under the Back Pay Act¹ and denied their grievance. The Union contends that the Arbitrator's failure to award backpay is contrary to law. Because the Arbitrator correctly determined that the grievants are not entitled to backpay under the Back Pay Act, we deny this exception.

II. Background and Arbitrator's Award

The grievants are five utility systems repairer operator foremen (operators) at the Agency's Terre Haute facility. From approximately 2002 until 2012, the grievants were assigned to the wage supervisor (WS)-7 pay grade. After learning that operators at other Agency facilities were paid at the WS-8 pay grade, the grievants inquired about this apparent discrepancy. The Agency responded that the Terre Haute facility had retained the position of chief of utilities, a position to which the operators directly reported, whereas the other facilities had eliminated the chief-of-utilities position. Therefore, operators at those locations were paid at the WS-8 pay grade. The Agency also stated that operators at the Terre Haute facility "would be advanced to the

WS-8 [pay grade] upon the retirement of [the then-chief of utilities]."² The Agency eventually "placed [the operators] on the WS-8 pay grade retroactive to January 1, 2012, one day following the retirement of [the then-chief of utilities]."³

While investigating a different grievance, the Union became aware that two other facilities paid their operators at the WS-8 pay grade even though they continued to employ a chief of utilities. According to the Agency, the operators at those facilities had been paid at the WS-8 pay grade prior to the creation of the WS-7 classification. But, the Union later learned that a number of operators had been hired into the WS-8 pay grade following the creation of the WS-7 classification.

The Union filed a grievance that sought "retroactive promotion for [the] grievants from [the] WS-7 to WS-8 [pay grade]."⁴ The matter was unresolved, and the parties submitted the matter to arbitration.

The Agency contended that the matter was not arbitrable because, among other things, it involved classification. The Arbitrator found that, rather than being an issue of arbitrability, the Agency's classification challenge went to the merits, and he addressed it in that portion of his award.

As part of its classification argument, the Agency contended that the grievants' job duties did not qualify them to be promoted to the WS-8 pay grade. The Arbitrator, however, found that the Agency "[c]learly . . . considered the [g]rievants to be qualified at the WS-8 [pay grade]" because the grievants were "automatically moved . . . to the higher pay level upon the retirement of [the chief of utilities]" even though "[t]heir duties did not change."⁵ Moreover, the Arbitrator found that "the sole reason [that the grievants] were not [paid] at the higher pay grade was based on the supervision provided by the [c]hief of [u]tilities."⁶

Regarding the matter of backpay, the Arbitrator found that "the [g]rievants should have been at the WS-8 pay [grade] during [the time that the chief of utilities was employed at the Terre Haute facility]."⁷ However, the Arbitrator found that the parties' agreement was "silent regarding issues of improper pay grade and . . . the manner in which a dispute of this nature may have been resolved in the past."⁸ Moreover, the Arbitrator noted that "[t]here is no evidence [that the Back Pay Act] has

² Award at 8.

³ *Id.* at 9.

⁴ *Id.* (internal quotation marks omitted).

⁵ *Id.* at 19.

⁶ *Id.* at 18.

⁷ *Id.* at 19.

⁸ *Id.* at 19-20.

¹ 5 U.S.C. § 5596.

supported or resolved claims for back[p]ay in a same or similar dispute.”⁹

Applying the Back Pay Act (the Act) to the facts at issue, the Arbitrator found that, “[w]hile the [g]rievants may not have been paid at the proper level or grade, the [Agency] did not withdraw or reduce their pay.”¹⁰ Furthermore, the Arbitrator determined that the Act “specifically excludes back[p]ay in the case of re[c]lassification” and that “it [wa]s possible to infer exclusion of back[p]ay in the case of improper pay grade or other dispute of this nature.”¹¹ Accordingly, because neither the parties’ agreement nor the Back Pay Act allowed for the remedy proposed by the Union, the Arbitrator denied the grievance on the merits.

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

III. Analysis and Conclusion: The award is not contrary to law.

The Union contends that the award is contrary to the Back Pay Act. In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by the exception and the award de novo.¹² 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 and does not assess his or her underlying reasoning.¹³ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.¹⁴ To the extent that the Union challenges the Arbitrator’s reasoning, that challenge provides no basis for finding the award contrary to law.¹⁵

The Union argues that “the Arbitrator’s finding that the [Back Pay Act] does not apply in this case is flawed.”¹⁶ Specifically, the Union contends that the Agency violated the parties’ agreement when the Agency “fail[ed] to treat the grievants fairly and

equitably in all aspects of personnel management”¹⁷ and that a “violation of [the parties’ agreement] is an unjustified or unwarranted personnel action within the meaning of the [Back Pay Act].”¹⁸ The Union also contends that the “[t]he loss of a pay increase [that] a grievant would have received absent the Agency’s improper action satisfies the [Back Pay Act’s] requirement of a loss of pay, allowances, or differentials”¹⁹ and that the Arbitrator’s determination “that it was appropriate to pay the grievants at the WS-[18] pay grade explicitly identifies a causal connection between the Agency’s unwarranted action and a loss of pay.”²⁰

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or the reduction of an employee’s pay, allowances, or differentials.²¹

With respect to the first requirement, an unjustified or unwarranted personnel action can be satisfied by a violation of applicable law,²² a violation of a governing agency regulation,²³ or a violation of the parties’ agreement.²⁴ Here, the Arbitrator did not find a violation of applicable law, governing agency regulation, or the parties’ agreement. The Union acknowledges that the Arbitrator found that the parties’ agreement is “silent regarding issues of improper pay grade and an appeal for backpay,”²⁵ but the Union did not file an essence exception to this finding. Therefore, absent a finding that the grievants were affected by an unwarranted or unjustified personnel action, the Arbitrator did not have the authority to award backpay under the Back Pay Act.²⁶

Because the Union’s exception fails to demonstrate that the award is contrary to law, we deny this exception.

IV. Decision

We deny the Union’s exception.

⁹ *Id.* at 20.

¹⁰ *Id.*

¹¹ *Id.*

¹² *AFGE, Local 2595, Nat’l Border Patrol Council*, 67 FLRA 190, 191 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹³ See *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010); *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*).

¹⁴ See *DOD*, 55 FLRA at 40.

¹⁵ See *AFGE Local 3652*, 68 FLRA 394, 400-01 (2015); *AFGE, Nat’l Council of Field Labor Locals*, 67 FLRA 264, 265 (2014).

¹⁶ Exceptions at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Nat’l Ass’n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006).

²² *U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 56 FLRA 477, 479 (2000).

²³ *Dep’t of Transp., FAA*, 64 FLRA 922, 923 (2010).

²⁴ *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012).

²⁵ Exceptions at 4.

²⁶ See, e.g., *AFGE Local 1228*, 65 FLRA 330, 332 (2010).