

69 FLRA No. 4

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 3307
(Union)

0-AR-5114

—
DECISION

October 19, 2015

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

I. Statement of the Case

The grievant is a border-patrol agent who was charged, by civil authorities, with a serious felony. The Agency indefinitely suspended the grievant pending the resolution of the charges. After a jury acquitted the grievant, the Agency returned him to duty, but placed him on administrative-duty status – which made the grievant ineligible for premium pay – while it completed its own internal investigation. Arbitrator Don B. Hays found that, although the Agency had the right to place the grievant on administrative duty initially, it took an excessively long time to complete its internal investigation and that the Agency subjected the grievant to disparate treatment by not permitting him to work administratively uncontrollable overtime (AUO).¹ The Arbitrator found that the delay in conducting the internal investigation and the disparate treatment with respect to AUO were an unjustified or unwarranted personnel action that entitled the grievant to backpay.

The main question before us is whether the award is contrary to the Back Pay Act (BPA)² 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 was charged with a felony and indicted by a grand jury. After learning of the charges, the Agency suspended the grievant indefinitely. A jury acquitted the grievant, and the Agency restored him to pay status, but did not return the grievant to his previous position. Rather, the Agency assigned the grievant to administrative duties while it conducted its own investigation into whether the grievant violated Agency rules and policies. The Agency did not permit the grievant to earn AUO or other premium pay while he was assigned to administrative duties.

The Agency's investigation took over eleven months to complete, and the Agency ultimately cleared the grievant of misconduct. While the Agency's investigation was ongoing, the Union filed a grievance requesting that the Agency restore the grievant to his regular duties and award him backpay for lost overtime opportunities. The grievance was unresolved, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Union argued that the internal investigation should have taken, at most, two months to complete. The Union noted that there were five months of inactivity during the course of the investigation and that the Agency investigator took over four months to prepare the report of her investigation. The Union further argued that, because the investigator attended the trial (and thus was familiar with most of the evidence), only minimal additional investigation should have been necessary.

Relying on other recent arbitral awards interpreting Article 32.G of the parties' agreement to require the Agency to conduct employee-misconduct investigations as quickly as practicable,³ the Union requested the Arbitrator to retroactively restore the grievant to full-duty status commencing two months after his acquittal and to award backpay.

¹ See 5 U.S.C. § 5545(c)(1) & (2) (providing for AUO); 5 C.F.R. §§ 550.151-550.154 (same).

² 5 U.S.C. § 5596.

³ Exceptions, Attach., Union Post-Hr'g Br. at 21-25 (citing AFGE, Local 3307, FMCS Case No. 13-00555-3 (Sept. 30, 2014) (Toedt, Arb.); U.S. CBP, Laredo, Tex., FMCS Case No. 100517-03322-3, 2011 WL 5035990 (Aug. 5, 2011) (Barnard, Arb.) exceptions denied sub nom., U.S. DHS, U.S. CBP, Laredo, Tex., 66 FLRA 567, 568 (2012)).

Conversely, the Agency argued, as relevant here, that its rights to determine internal security and to assign work under § 7106(a)(1) and (a)(2)(B) of the Federal Service Labor-Management Relations Statute⁴ permitted it to assign the grievant to administrative duties and that Article 32.G applied only to disciplinary actions, not work assignments.

The Arbitrator found in favor of the Union. The Arbitrator found that while there were no “contractually prescribed time limits” for the completion of internal investigations, the Agency’s right to place the grievant on administrative duty contained “implicit time dimensions.”⁵ The Arbitrator further opined that “such investigation[s] should, in [his] judgment be begun and completed in [a] reasonably expeditious manner,” and that “[s]uch a ‘timely investigation’ is, in [his] judgment, an essential ingredient of *due process*.⁶ The Arbitrator concluded that a two-month period of inactivity by the Agency’s investigator unreasonably prolonged the investigation. The Arbitrator also found that the grievant was “the subject of a unique type of *discrimination (disparate treatment)* by not being allowed to earn AUO pay, while other agents [assigned to similar duties] were receiving . . . AUO . . . pay.”⁷

The Arbitrator concluded that, although the Agency did not violate an applicable law, rule, regulation, or provision of the parties’ collective-bargaining agreement by temporarily placing the grievant on administrative duty after his return to work, the Agency’s unreasonable delay in conducting its internal investigation, combined with its disparate treatment of the grievant, was an unjustified or unwarranted personnel action. As a remedy, the Arbitrator awarded the grievant two months of AUO backpay.

The Agency then filed these exceptions, to which the Union filed an opposition.

III. Analysis and Conclusion: The award is contrary to the BPA.

The Agency argues that the award is contrary to the BPA.⁸ 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 – which is required for an award of backpay under the BPA.⁹

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.¹⁰ 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.¹¹ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings,¹² unless a party demonstrates that the findings are nonfacts.¹³

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.¹⁴ A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an “unjustified or unwarranted personnel action.”¹⁵

Here, the Arbitrator awarded backpay because the Agency’s right to place the grievant on administrative duties pending investigation contained “implicit time dimensions”¹⁶ and “a ‘timely investigation’ is, *in [the Arbitrator’s] judgment*, an essential ingredient of *due process*,”¹⁷ and because he found that the grievant was subjected to disparate treatment.¹⁸ And while the Arbitrator obliquely refers to an unspecified right “(impliedly) create[d]” by “the parties’ [agreement] or the applicable statutes,”¹⁹ the Arbitrator did not find that the Agency violated any applicable law, rule, regulation, or provision of the parties’ collective-bargaining agreement in connection with the Agency’s delay in

⁴ 5 U.S.C. § 5596.

⁵ *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)).

⁶ *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*NFFE*)).

⁷ *Id.* (citing *NFFE*, 53 FLRA at 1710).

⁸ *E.g., 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)).

⁹ 5 U.S.C. § 5596(b)(1); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005) (citing *U.S. Dep’t of HHS*, 54 FLRA 1210, 1218-19 (1998)).

¹⁰ *E.g., U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W, Stockton, Cal.*, 48 FLRA 221, 223 (1993) (citing *U.S. Dep’t of the Army, Pine Bluff Arsenal, Ark.*, 47 FLRA 626, 628-29 (1993)).

¹¹ Award at 24 (emphasis omitted).

¹² *Id.* (first emphasis added).

¹³ *Id.* at 29.

¹⁴ *Id.*

⁴ 5 U.S.C. § 7106(a)(1), (a)(2)(B).

⁵ Award at 24 (emphasis omitted).

⁶ *Id.*

⁷ *Id.* at 29.

⁸ Exceptions at 13-15.

conducting its internal investigation, or with due-process or disparate-treatment issues.

Moreover, although the Arbitrator quotes Article 32 (among other articles) at the beginning of the award,²⁰ he does not discuss that provision in his analysis. Likewise, although the Union argues that while the Arbitrator's finding of a “due[-]process” violation is framed in general terms, it can easily find its foundation in either Article 32 . . . or[] the Fifth Amendment to the U.S. Constitution,”²¹ the Arbitrator expressly rejected the reasoning of another recent arbitrator, who found that Article 32.G requires the Agency to conduct internal investigations as quickly as practicable.²² Further, a finding of a constitutional due-process violation would require a finding that the grievant had a property interest in his eligibility to earn AUO pay.²³ But the Arbitrator made no such finding, and the Union provides no authority for such a proposition. Likewise, the Arbitrator does not reference any relevant statutory or regulatory provisions other than the BPA. Finally, “[i]n order to find disparate[-]treatment . . . discrimination, the Arbitrator was required to find that the grievant[is a] member[] of a protected class,”²⁴ and the Arbitrator made no such finding.

As such, the award does not include a finding that the Agency committed an unjustified or unwarranted personnel action as required by the BPA. Therefore, the Arbitrator did not have any basis under the BPA to award the grievant backpay. Accordingly, we find the award contrary to law.

The Agency also argues that the award is contrary to its management rights under § 7106(a) of the Statute. As we set aside the award as contrary to the BPA, it is unnecessary to resolve the Agency's management-rights exception.

IV. Decision

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

²⁰ *Id.* at 4-5.

²¹ Opp'n at 5.

²² Award at 26 n.17 (citing AFGE, Local 3307, FMCS Case No. 13-00555-3).

²³ See NAGE, Local R4-75, 57 FLRA 568, 569 (2001).

²⁴ U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R., 66 FLRA 81, 89 (2011) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).