

**71 FLRA No. 199**

UNITED STATES  
DEPARTMENT OF THE ARMY  
MARINE CORPS AIR STATION MIRAMAR  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1881  
(Union)

0-AR-5526

DECISION

October 15, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester dissenting in part)

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, the Agency suspended the grievant for three days for misconduct. Although Arbitrator Jan Stiglitz found the misconduct undisputed and the suspension appropriate, he also found that the Agency delayed in taking disciplinary action, and sustained the grievance with regard to the grievant’s financial penalty and awarded backpay. The Agency argues that the award is contrary to the Back Pay Act (BPA). Because we find that the Arbitrator’s award of backpay is contrary to law, we vacate the award.

**II. Background and Arbitrator’s Award**

The grievant is a “lead police officer” with supervisory obligations, holding the rank of Sergeant.<sup>1</sup> On December 3, 2017, the grievant and multiple other junior officers conducted a traffic stop of two underage Marines entering United States Marine Corps Air Station Miramar. As the officers were conducting field sobriety tests, the situation escalated and resulted in the grievant and junior officers yelling and threatening the Marines. At some point thereafter, the incident came to the attention of a Captain who had reviewed a “blotter” entry

that raised questions.”<sup>2</sup> On March 28, 2018, based on the body camera footage of the incident, the Agency proposed that the grievant be suspended for fourteen-days for failing to carry out his duties by correcting the junior officers, unprofessional conduct, and unprofessional behavior.

The reviewing official found merit to the charges and sustained the misconduct. In determining the appropriate penalty, the reviewing official considered that the employee had a letter of reprimand for similar behavior just a few months prior to the incident at issue. The reviewing official determined a three-day suspension was appropriate. The Union grieved the suspension. Both the Step 1 and Step 2 grievance officials sustained the discipline and arbitration ensued.

At arbitration, the stipulated issues included: “[w]as the Agency’s [three]-day suspension of [the grievant] consistent with the requirement[s] of the [parties’ agreement]” and “[i]f not, what shall the remedy be?”<sup>3</sup> The Arbitrator found that given the body camera footage of the incident, there was no real dispute that the grievant committed the misconduct. He stated that he could not fault the Agency for deciding a suspension was appropriate to correct the grievant’s behavior when “counseling, followed shortly by a written warning, failed to work,”<sup>4</sup> and that it was not appropriate for him “to second guess the exact number of days chosen by the Agency when the choice is well within the range of discipline normally imposed for such an offense.”<sup>5</sup>

However, the Arbitrator sustained the grievance “because of the Agency’s unexcused delay and failure to interview the participants [to the incident].”<sup>6</sup> He noted that delaying in taking disciplinary action risks memories fading, losing evidence or testimony, and that here, “the delay arguably undermines the Agency’s arguments as to the severity of the misconduct.”<sup>7</sup> He ordered the Agency to make the grievant whole “to the extent of any financial consequence of the [three]-day suspension” and, if no similar misconduct occurred within a year, to expunge the discipline from the grievant’s record and to not use the suspension as prior discipline for any similar charges.<sup>8</sup>

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 28.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 31. Article 10, Section 1 of the parties’ agreement provides, in part, that “[d]isciplinary and adverse actions will be timely and taken against an employee to promote the efficiency of the service.” *Id.* at 18.

<sup>7</sup> *Id.* at 30.

<sup>8</sup> *Id.* at 31.

<sup>1</sup> Award at 1-2.

The Agency filed exceptions to the award on July 23, 2019. The Union filed an opposition to the Agency's exceptions on August 12, 2019.

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

The Agency argues that the award is contrary to the BPA.<sup>9</sup> Specifically, the Agency contends that the Arbitrator has no legal basis to make the grievant whole because the Arbitrator upheld the suspension and determined that the Agency's action was "warranted and justified."<sup>10</sup>

The Authority has held that a grievant may be entitled to compensation under the BPA when an arbitrator 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.<sup>11</sup> A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an unjustified or unwarranted personnel action under the first prong.<sup>12</sup> The second prong is only met where there is a *causal connection* between – as relevant here – a violation of the parties' agreement and a withdrawal or reduction in pay, allowances, or differentials.<sup>13</sup> In other words, backpay is only authorized if the arbitrator has found that but for the unwarranted action, the loss of pay, allowances, or differentials would not have occurred.<sup>14</sup>

<sup>9</sup> When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award de novo; in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. But the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep't of State, Bureau of Consular Affairs, Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

<sup>10</sup> Exceptions at 7.

<sup>11</sup> *U.S. Dep't of VA, San Diego Healthcare Sys., San Diego, Cal.*, 70 FLRA 641, 642 (2018) (*VA San Diego*) (Member DuBester concurring, in part, dissenting in part) (internal quotation omitted); see also *U.S. DOJ, Fed. BOP, Fed. Corr. Complex-Allenwood White Deer, Pa.*, 68 FLRA 841, 843 (2015) (Chairman Pope concurring); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005).

<sup>12</sup> *U.S. Small Bus. Admin.*, 70 FLRA 745, 747 (2018) (internal quotation and citation omitted).

<sup>13</sup> *NTEU, Chapter 143*, 68 FLRA 871, 873-74 (2015) (*NTEU*) (Member Pizzella concurring) (citing *AFGE, Local 916*, 57 FLRA 715, 717 (2002)).

<sup>14</sup> *U.S. Dep't of VA, Cleveland Reg'l Office, Cleveland, Ohio*, 59 FLRA 248, 251 (2003) (*VA Cleveland*) (citing *U.S. Dep't of HHS*, 54 FLRA 1210, 1218-19 (1998)).

In this case, the Arbitrator cited Article 10, Section 1 of the parties' agreement in his award, which provides, in part, that disciplinary actions will be timely.<sup>15</sup> Because he was "troubled"<sup>16</sup> by the Agency's "unexcused delay"<sup>17</sup> in taking disciplinary action against the grievant, the Arbitrator sustained the grievance "with regard to the financial penalty imposed."<sup>18</sup> Although the Arbitrator did not explicitly find that the Agency violated Article 10, Section 1, the issue in this case was whether the Agency violated the parties' agreement<sup>19</sup> and the Arbitrator sustained the grievance, at least in part, because he found some wrongdoing on the Agency's part with regard to Article 10, Section 1's requirement that disciplinary actions be timely. Read in context, the Arbitrator's findings indicate he found a contractual violation. Thus, the award arguably satisfies the BPA's first requirement of a contractual violation constituting an unjustified or unwarranted personnel action.<sup>20</sup>

However, the award fails to satisfy the BPA's second requirement. Here, the Arbitrator did not find that the Agency's failure to take timely disciplinary action resulted in the grievant's loss of pay, or that but for the Agency's "unexcused delay" in taking disciplinary action, the grievant would not have been suspended. Rather, the Arbitrator's findings demonstrate that the grievant's misconduct led to his suspension and loss of pay. Furthermore, the Arbitrator found that the grievant's misconduct was undisputed,<sup>21</sup> that a suspension was an appropriate penalty, and that the duration of the suspension was "well within the range of discipline normally imposed for such an offense."<sup>22</sup> Because of this, he "sustain[ed] the grievance [only] to the extent that [the grievant] has suffered a financial penalty," and directed the Agency to make the grievant "whole to the extent of any financial consequence of the [three]-day suspension."<sup>23</sup> The Arbitrator, in effect,

<sup>15</sup> Award at 18.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> *Id.* at 31.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 66 FLRA 1046, 1050 (2012) (the Authority held that, read in context, the arbitrator's findings indicated that he found the agency's delay in disciplining the grievant violated an agency directive and that the first prong of the BPA test was satisfied).

<sup>21</sup> Award at 27.

<sup>22</sup> *Id.* at 28 (noting that the grievant had been disciplined for the same type of misconduct "just a few months prior to the incident at issue here"); see also *id.* at 30 ("because [the grievant] had only months before engaged in similar misconduct, I cannot criticize the Agency for its decision to impose a [three]-day suspension as progressive discipline").

<sup>23</sup> *Id.* at 31 (also stating that "[t]he grievance is sustained with regard to the financial penalty imposed").

upheld the suspension itself.<sup>24</sup> Therefore, because it was the suspension that caused the grievant's loss of pay, and not the Agency's failure to take timely disciplinary action, and the Arbitrator never rescinded that suspension, the award does not support finding a causal connection between the contract violation and loss of pay.

Consequently, the award of backpay is deficient as contrary to the BPA.<sup>25</sup> Because we set aside the Arbitrator's award as contrary to law,<sup>26</sup> we do not address the Agency's remaining exception.<sup>27</sup>

#### IV. Decision

We grant the Agency's contrary-to-law exception and vacate the award.

#### Member DuBester, dissenting in part:

The Arbitrator found that the Agency violated Article 10, Section 1 of the parties' collective-bargaining agreement based on its "unexcused delay" in taking disciplinary action against the grievant.<sup>1</sup> And based on this finding, he ordered the Agency to make the grievant whole for the three-day suspension. As additional remedies, he ordered the Agency to expunge the discipline from the grievant's record after one year and to not use the suspension as prior discipline for any similar charges after the expungement.<sup>2</sup>

I agree that, under the circumstances of this case, the backpay remedy is contrary to the Back Pay Act (BPA). But I do not agree that granting the Agency's contrary-to-law exception warrants vacating the entire award, including the additional remedies not pertaining to back pay. While the Agency challenged these remedies as failing to draw their essence from the parties' agreement, it did not argue that they were contrary to the BPA. And the majority has similarly failed to explain why this aspect of the award should be vacated based upon its finding that the backpay remedy was contrary to law.

Accordingly, I would vacate only that portion of the award pertaining to the backpay remedy, and would consider the Agency's argument that the award fails to draw its essence from the parties' agreement. Because the majority improperly vacates both awarded remedies, I dissent.

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<sup>24</sup> The Union concedes that the Arbitrator did not rescind the suspension. See *Opp'n* at 6.

<sup>25</sup> *NTEU*, 68 FLRA at 874 (finding the second prong of the BPA test not satisfied); *VA Cleveland*, 59 FLRA at 251 (holding that the arbitrator did not find and the record did not establish that the agency's failure to follow the CBA procedures resulted in the loss of pay). *But see U.S. DHS, U.S. CBP*, 67 FLRA 8, 11 (2012) (finding a causal connection between the agency's failure to take timely action and the grievant's loss of pay because the arbitrator found that had the agency acted promptly, it would have taken the grievant off of light duty and allowed him to resume normal duty *and pay* sooner).

<sup>26</sup> See *VA San Diego*, 70 FLRA at 642 & n.17 (where award was contrary to the BPA, and in the absence of any other applicable waiver of sovereign immunity, "the award must be set aside").

<sup>27</sup> The Agency also argues that the award fails to draw its essence from the agreement. Exceptions at 8-13.

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<sup>1</sup> Award at 31.

<sup>2</sup> *Id.*