73 FLRA No. 170

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY McCREARY
PINE KNOT, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 614
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5921

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DECISION

May 10, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Agency stopped paying four employees (the grievants) overtime for the time they spent answering work phone calls while in an on-call status. The Union grieved, claiming the Agency's refusal to pay the grievants violated the parties' collective-bargaining agreement and government-wide regulations. Arbitrator Jules I. Crystal issued an award finding the grievance timely, sustaining it on the merits, and awarding the grievants backpay.

The Agency files three exceptions. First, the Agency argues the award fails to draw its essence from the parties' agreement because the Arbitrator allegedly applied a statutory grievance-filing deadline, rather than the agreement's deadline. Second, it argues the Arbitrator exceeded his authority by failing to address a framed issue. Third, the Agency contends the backpay remedy is contrary to law because the Arbitrator failed to make the required findings under the Back Pay Act (BPA).[1]

Because the Arbitrator applied the agreement's grievance-filing deadline to the Union's grievance, we deny the Agency's essence exception. As the award directly responds to the framed issues, we deny the exceeded-authority exception. Finally, because the Arbitrator made the BPA's required findings, we deny the contrary-to-law exception.

II. Background and Arbitrator's Award

The grievants are medical personnel working at the Agency's prison facility, which does not maintain around-the-clock medical staff on site. To manage medical issues arising after work hours, the Agency requires the grievants to remain "on call," on a rotating schedule, from 10:00 p.m. to 6:00 a.m. in order to receive phone calls from the facility.[2] During these on-call phone conversations, the grievants answer medical questions and prescribe medications to inmates at the facility. Previously, the Agency paid the grievants overtime for the time spent on these calls.

In July 2019, the Agency notified the grievants that, based on its interpretation of a regulation regarding the compensability of time spent "on call," the Agency would "no longer be compensat[ing]" them for their time spent on work calls while in an on-call status.[3] After attempting informal resolution, the Union filed a grievance in August 2022. The grievance proceeded to arbitration. The Arbitrator framed the issues, as relevant here, as whether "the grievance [was] timely filed under the provisions of Article 31, Section d of the [parties'] agreement" (Article 31(d)) and whether "the Agency violate[d] Article 3, Section b of the [a]greement [(Article 3(b))] by failing to pay [the grievants] for their time spent answering phone calls from the prison regarding medical issues while in on-call status."[4]

Article 31(d) provides that "[g]rievances must be filed within . . . forty . . . calendar days of the date of the alleged grievable occurrence."[5] It also states, "where [a] statute[] provide[s] for a longer filing period, . . . the statutory filing period would control."[6] In evaluating the timeliness issue, the Arbitrator considered whether any statutory filing periods extended the forty-day filing period for the Union's grievance. Ultimately, the Arbitrator did not find that a statute extended the filing period. Instead, he determined that "the [alleged] violation [of the parties' agreement] is repeated each time [a grievant] works overtime without compensation"[7] and that, multiple times per week while in on-call status, the grievants answer phone calls without compensation. As the Union filed its grievance within forty days of such uncompensated phone calls, the Arbitrator found the grievance timely.

[1] 5 U.S.C. § 5596.
[2] Award at 10.
[3] *Id.* at 13; *see also* Exceptions, Attach. C (Regional Director Memo) at 1 (citing 5 C.F.R. § 551.431).
[4] Award at 2.
[5] *Id.* at 3.
[6] *Id.*
[7] *Id.* at 17.

The Arbitrator then evaluated whether the Agency violated Article 3(b). That provision states the parties "are governed by existing and/or future laws, rules[,] and government-wide regulations."[8] The Arbitrator considered the Agency's contention that 5 C.F.R. § 551.431 does not permit paying overtime "for phone calls received during on-call status."[9] That regulation provides that "time spent in an on-call status shall not be considered hours of work" if an employee is merely available to receive calls.[10] However, the Arbitrator found the grievants did not allege "that on-call time *other than that spent on phone calls*" was compensable.[11] Rather, the Arbitrator found the grievants were seeking compensation for time spent engaged in their "principal work" of providing medical advice on phone calls—not for the time spent merely in on-call status.[12] Noting that federal regulations require overtime for Agency-directed "principal work" that exceeds the basic work schedule,[13] the Arbitrator found the grievants were "entitled to overtime pay for [the] time spent on phone calls taken during their on-call shifts."[14] Thus, he concluded "the Agency violated the [parties' a]greement and the incorporated statutes and regulations by failing to pay [the grievants] overtime."[15]

Regarding remedies, the Arbitrator considered whether awarding the grievants backpay was appropriate under the BPA. He found the BPA's requirements that "employees must be affected by an unwarranted personnel action[,] which resulted in loss of pay[,] . . . ha[d] been met [because] the [grievants] were denied overtime pay for work [they] performed."[16] As "[t]he Agency did not keep track of the number of calls made to on-call staff or the amount of time . . . the calls took,"[17] the Arbitrator found, based on witness testimony, that thirty minutes per on-call shift was a "reasonable" estimate.[18] The Arbitrator directed the Agency to provide the grievants backpay accordingly.

The Agency filed exceptions on October 16, 2023, and the Union filed an opposition on November 20, 2023.

III. Analysis and Conclusions

A. The Agency does not establish the award fails to draw its essence from the parties' agreement.

The Agency alleges the award fails to draw its essence from the parties' agreement because the Arbitrator applied a statutory deadline to "extend" the agreement's forty-day grievance-filing deadline.[19] The Authority will find an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[20] Arguments based on a misunderstanding of an award do not demonstrate that an award fails to draw its essence from an agreement.[21]

According to the Agency, the Arbitrator extended Article 31(d)'s forty-day filing deadline by applying a statutory time frame that did not apply – specifically, the Fair Labor Standards Act's (FLSA's) statute of limitations.[22] Although the Arbitrator discussed the FLSA in addressing the timeliness issue, he acknowledged that the FLSA did not apply.[23] Instead, he found the grievance timely under the agreement's forty-day deadline. Contrary to the Agency's claim, he did not extend that deadline. Rather, he determined that the Agency "repeated" its violation weekly, whenever a grievant "work[ed] overtime without compensation."[24] The Agency did not dispute at arbitration, and does not dispute in its exceptions, that the grievants worked on-call shifts within forty days of the Union's grievance during which they answered phone calls from the facility without compensation. Thus, the Agency's contention that the Arbitrator applied a statutory-filing deadline is premised on a misunderstanding of the award, so we deny this exception.[25]

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[8] *Id.* at 2.
[9] *Id.* at 18.
[10] 5 C.F.R. § 551.431(b).
[11] Award at 18 (emphasis added).
[12] *Id.* at 18-19 (finding calls at issue required grievants to "order medication or assess a patient based on the report of [a] staff member and thereafter determine what treatment is necessary" and that "[t]his is precisely the same [principal] work that the employees perform on a regular basis at the facility").
[13] *Id.* (citing 5 C.F.R. § 550.112).
[14] *Id.* at 20.
[15] *Id.* at 25.
[16] *Id.* at 23.
[17] *Id.* at 11.
[18] *Id.* at 22.
[19] Exceptions Br. at 11.
[20] *SSA*, 73 FLRA 708, 713 (2023).
[21] *Id.*
[22] Exceptions Br. at 11 (claiming Arbitrator relied on the Fair Labor Standards Act to extend the filing deadline beyond forty days).
[23] Award at 16-17.
[24] *Id.* at 17.
[25] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 624, 626 (2023) (denying essence exception based on a misunderstanding of the award); *NTEU*, 72 FLRA 182, 184 (2021) (same); *AFGE, Loc. 2338*, 71 FLRA 1039, 1041 (2020) (same).

B. The Agency does not establish the Arbitrator exceeded his authority.

The Agency argues the Arbitrator exceeded his authority by failing to resolve his framed issue regarding Article 3(b).[26] As relevant here, arbitrators exceed their authority where they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.[27] Where parties fail to stipulate to issues, arbitrators have the authority to frame the issues.[28] In those circumstances, the Authority examines only whether the award is directly responsive to the issues as the arbitrator framed them.[29]

According to the Agency, the award is not directly responsive to the issue of whether the Agency violated Article 3(b), because the "Arbitrator only mention[ed] Article 3(b) twice in his entire twenty-six[-]page decision," but did not otherwise discuss it.[30] The Agency contends the Arbitrator improperly focused on whether it complied with law and overtime regulations, rather than analyzing the wording of the parties' agreement.[31] However, Article 3(b) provides that the parties "are governed by . . . laws . . . and government-wide regulations."[32] In order to determine whether the Agency violated Article 3(b) by not paying the grievants overtime, the Arbitrator assessed whether the Agency complied with laws and regulations governing overtime.[33] The Arbitrator found the Agency violated government-wide regulations "incorporated" into the parties' agreement, so he concluded the Agency violated Article 3(b).[34] Consequently, we find the award directly responsive to the issue the Arbitrator framed, and we deny this exception.[35]

C. The Agency does not demonstrate that the award is contrary to law.

The Agency argues the award is contrary to law because the Arbitrator "never discuss[ed] any of the requirements of the [BPA]."[36] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[37] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[38] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[39]

Under the BPA, an arbitrator may award backpay only after finding: (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.[40] With respect to the first requirement, a violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an "unjustified and unwarranted personnel action."[41] As for the second requirement, the Authority has held that a direct causal connection may be implicit from the record and the award.[42]

The Agency contends the Arbitrator did not make either of the "specific finding[s]" required by the BPA.[43] However, the Arbitrator noted the BPA requires that "employees must be affected by an unwarranted personnel action[,] which result[s] in loss of pay."[44] He then concluded these "requirement[s] ha[d] been met [because] the employees were denied overtime pay for work [they] performed."[45] Thus, the Arbitrator made the required findings under the BPA.

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[26] Exceptions Br. at 13-16.
[27] *U.S. Dep't of VA, Winston-Salem, N.C.*, 73 FLRA 794, 795 (2024) (*Dep't of VA*).
[28] *Id.* at 796.
[29] *Id.*
[30] Exceptions Br. at 15.
[31] *Id.* at 16 (arguing that the Arbitrator spent the entire Article 3 analysis considering whether statute or regulation required the overtime payments).
[32] Award at 2.
[33] *Id.* at 19.
[34] *Id.* at 25 ("[T]he Agency violated the [parties' a]greement and the incorporated statutes and regulations by failing to pay [the grievants] overtime . . . .").
[35] *See Dep't of VA*, 73 FLRA at 796 (denying exceeded-authority exception where award was directly responsive to the issues the arbitrator framed); *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 775 (2022) (same).
[36] Exceptions Br. at 20.
[37] *Dep't of VA*, 73 FLRA at 797.
[38] *Id.*
[39] *Id.*
[40] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 73 FLRA 762, 764 (2023) (*FCI Englewood*); *U.S. DHS, U.S. CBP*, 69 FLRA 19, 20 (2015) (*CBP*).
[41] *CBP*, 69 FLRA at 20.
[42] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex Coleman, Fla.*, 65 FLRA 1040, 1045 (2011) (*Coleman*); *see also AFGE, Loc. 31*, 41 FLRA 514, 518 (1991) (where arbitrator does not make explicit finding of causal connection, "the absence of such language will not be dispositive if the requisite finding of a causal connection is otherwise apparent").
[43] Exceptions Br. at 19-20.
[44] Award at 23.
[45] *Id.*

Further, the Arbitrator's factual determinations support this conclusion. The Arbitrator determined the grievants were "entitled to overtime pay for the time spent on phone calls taken during their on-call shifts," and the Agency's failure to pay such overtime violated Article 3(b).[46] This violation constitutes an "unjustified and unwarranted personnel action" that satisfies the BPA's first requirement.[47] Regarding the BPA's second requirement, the Arbitrator found the Agency "denied" the grievants overtime pay to which they were "entitled" under government-wide regulations and Article 3(b).[48] That finding sufficiently establishes a causal connection between the Agency's violation of Article 3(b) and employees' loss of overtime pay.[49] The Agency does not argue the Arbitrator erred in either of these findings. Consequently, this exception does not demonstrate that the award is deficient, and we deny it. [50]

IV. Decision

We deny the Agency's exceptions.

[46] *Id.* at 20.
[47] *See FCI Englewood*, 73 FLRA at 764 (holding award satisfied first prong of BPA where arbitrator found agency violated the parties' agreement).
[48] Award at 20, 23.
[49] *See Coleman*, 65 FLRA at 1045-46 (denying contrary-to-law exception challenging arbitrator's application of BPA where arbitrator "implicitly" found agency denying grievant overtime opportunities caused a reduction in grievant's pay).
[50] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 624, 626-27 (2023) (denying contrary-to-law exception where excepting party did not demonstrate that the arbitrator misapplied the BPA); *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 106 (2012) (same).