

63 FLRA No. 180

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION

(Union)

0-AR-4150

DECISION

August 14, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Craig E. Overton filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated the parties' collective bargaining agreement when it ceased guaranteeing 2 hours of work to all employees who are held over their scheduled Saturday night shift. To remedy the violation, the Arbitrator awarded affected employees backpay. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

Article 38, Section 9 of the parties' collective bargaining agreement provides: "When an employee is . . . held over past his/her regularly assigned shift, he/she shall be guaranteed two (2) hours of work." Award at 22 (quoting agreement). In accordance with this provision, air traffic controllers at the Agency's Bradley facility working the Saturday night shift who were held over the end of their shift to brief the controllers working the Sunday morning shift "w[ere] given the opportunity to be guaranteed

two (2) hours of work." *Id.* at 4. By memorandum, the facilities' air traffic manager replaced this practice with a practice of "paying overtime in 'one minute increments covering the actual time beyond 8 hours an employee works to accomplish the relief and sign out for the shift[.]'" *Id.* As a result of this change, grievances were filed and submitted to arbitration.

Before the Arbitrator, the Union asserted that the Agency's change violated Article 38, Section 9. As a remedy, the Union requested that the Arbitrator order under the Back Pay Act that the Agency "restore all pay to employees who were denied the guaranteed two hours of work[.]" *Id.* at 18. The Agency argued that the decision in *Aviles v. United States*, 151 Ct. Cl. 1 (1960) (*Aviles*), compelled the Arbitrator to interpret Article 38, Section 9 so that "the entitlement to the guaranteed two (2) hours of work is not triggered" by the Sunday morning briefings. *Id.* at 26. Alternatively, the Agency argued that backpay is not appropriate under the Back Pay Act "[b]ecause the Arbitrator is not able to accurately determine which employees would have taken the opportunity to work the two hours of overtime and determine those employees who would not have taken the opportunity[.]" *Id.* at 32.

The Arbitrator determined that Article 38, Section 9 is clear "that when a Controller is held over past his/her regularly assigned shift, he/she shall be guaranteed

two (2) hours of work." *Id.* at 35. Consequently, the Arbitrator concluded that "the Agency violated the Collective Bargaining Agreement when it determined that it would cease the compensation of a guaranteed two (2) hours of work to all employees who are held over past the end of their scheduled shift on Saturday nights at 12:00 p.m." *Id.* at 37 (citation omitted). As a remedy, the Arbitrator ordered the Agency to "make all of these employees whole by properly compensating said employees for the hours of work they should have been allowed to work" but for the violation of the agreement. *Id.* at 38.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency contends that the award is contrary to law because the Arbitrator failed to follow the decision in *Aviles*. Exceptions at 5. The Agency asserts that, under *Aviles*, the overtime necessary to perform the briefings is part of the employees' regularly assigned shift. *Id.* at 12. The Agency further asserts that, if the briefings are part of the employees' regularly assigned shift, then "there [would] be no violation of the Collective Bargaining Agreement." *Id.* at 13. Consequently,

the Agency claims that, “as a matter of law,” the Arbitrator should have denied the grievance. *Id.*

Alternatively, the Agency contends that the remedy of backpay is deficient. The Agency first argues that the award “is based on equitable principles rather than under the statutory authority of the Back Pay Act[.]” *Id.* The Agency maintains, in this regard, that “the Arbitrator does not make a finding of the statutory basis to order the [a]ward.” *Id.* at 14. The Agency claims that, “[w]ithout a finding of a statutory basis for the [a]ward,

... the [a]ward is contrary to [l]aw[.]” *Id.*

The Agency next argues that, if the backpay is based on the Back Pay Act, then the award of backpay is contrary to the Back Pay Act because the unwarranted action “did not result in a direct loss of pay, allowances, or differentials.” *Id.* at 15. The Agency maintains that the award is not based on a violation of Article 38, Section 9, but rather a violation of the established practice where “employees held over to complete position relief briefings would be given the opportunity to work up [to] two (2) hours of overtime[.]” *Id.* at 16. The Agency claims that, under this practice, “whether the employee remains for the entire two (2) hours is at the [employee’s] discretion.” *Id.* at 17. Consequently, the Agency argues that the result of the unwarranted action on employees “is the loss of the opportunity to work two (2) hours of overtime.” *Id.* Accordingly, the Agency contends that there is no finding or evidence of “the required connection between the opportunity to work an additional two (2) hours and a direct loss of pay, allowances, or differentials.” *Id.* at 19.

B. Union’s Opposition

The Union contends that the decision in *Aviles* provides no basis for finding the award deficient because the decision is “inapplicable[.]” Opposition at 5. The Union further contends that the award of backpay was properly based on the Back Pay Act, and not equitable principles. *Id.* at 6-7. In this regard, the Union also argues that the Arbitrator specifically found a violation of Article 38, Section 9 and that there is a clear connection between the violation of Article 38, Section 9 and the employees’ loss of pay because the employees have no choice but to work overtime. *Id.* at 8-9.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency contends on the basis of *Aviles* that the Arbitrator was compelled, as a matter of law, to find no violation of Article 38, Section 9 and to deny the grievance. We review questions of law raised by exceptions to an arbitrator’s award *de novo*. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1709 (1998). In applying a standard of *de novo* review, we determine whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* at 1710.

In *Aviles*, meat inspectors claimed night differential pay under the Federal Employees Pay Act, as amended, (FEPA) for overtime they were customarily required to work between the hours of 6 p.m. and 6 a.m. *Aviles*, 151 Ct. Cl. at 3. The court noted that FEPA directs differential payment for all regularly scheduled hours, including overtime, between 6 p.m. and 6 a.m. The court held that omitting regular overtime from scheduled tours of duty does not make that overtime occasional or irregular. Accordingly, the court concluded that the overtime worked by the inspectors was part of their regularly scheduled tours of duty and that they were entitled to recover the claimed night differential pay. *Id.* at 9, 20. The Agency fails to establish that this decision compelled, as a matter of law, the Arbitrator to interpret Article 38, Section 9 to find that the shift briefings were regularly scheduled overtime and did not trigger the contractual guarantee of 2 hours of overtime work. Instead, the issue of whether *Aviles* provided support for the Agency’s asserted interpretation of Article 38, Section 9 is a question of contract interpretation and whether the award draws its essence from the agreement, and not a question of law. We note that the Agency does not contend that the award fails to draw its essence from the agreement.

Accordingly, we deny this exception.

B. The award of backpay is not deficient.

The Agency argues that the award of backpay is deficient because it is based on equitable principles rather than the Back Pay Act. Exceptions at 13. According to the Agency, the award of backpay must be based on equitable principles because the Arbitrator does not specify the statutory basis of the award of backpay. *Id.* at 14. This argument provides no basis for finding the award deficient. Before the Arbitrator, the Union requested a remedy of backpay and specifically cited the Back Pay Act. Award at 18-19. In response, the Agency extensively argued that, even if the Arbitrator found a violation of Article 38, Section 9, the Back

Pay Act prohibited an award of backpay. *Id.* at 28-32. In his award, the Arbitrator expressly set forth these arguments in discussing the positions of the parties. *Id.* at 18-19, 28-32. In these circumstances, the Agency fails to establish that the Back Pay Act is not the implicit basis for the Arbitrator's award of backpay.

Alternatively, the Agency contends that the award of backpay is contrary to the Back Pay Act because the unwarranted action "did not result in a direct loss of pay, allowances, or differentials." Exceptions at 15. An award of backpay is authorized under the Back Pay Act only when: (1) the aggrieved employees were affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in a loss of pay, allowances, and differentials by the employees. *E.g., United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Oakdale, La.*, 59 FLRA 277, 279 (2003). In determining whether an award of backpay is deficient, we examine whether there has been an unjustified or unwarranted personnel action and whether there is a causal connection between the unwarranted action and the loss of pay, allowances, or differentials. *Id.*

The Agency does not contest that there was an unjustified or unwarranted personnel action. Exceptions at 15. Instead, the Agency contends that there is no finding or evidence of "the required connection between [the] opportunity to work an additional two (2) hours and a direct loss of pay, allowances, or differentials." *Id.* at 19. The Agency maintains that the Arbitrator did not find a violation of Article 38, Section 9, but rather found a violation of the established practice where "employees held over to complete position relief briefings would be given [the] opportunity to work up [to] two (2) hours of overtime[.]" *Id.* at 16-17. The Agency claims that, under this practice, "whether the employee remains for the entire two (2) hours is at the [employee's] discretion." *Id.* at 17.

With respect to the requirement of a causal connection, we examine whether the arbitrator has found that, but for the unwarranted action, the loss of pay, allowances, or differentials would not have occurred. *United States Dep't of Health and Human Servs.*, 54 FLRA 1210, 1218-19 (1998) (an examination of whether a pay loss would have occurred but for the unwarranted action "amplifies" the causal connection requirement of the Act). Contrary to the claim of the Agency, the Arbitrator specifically and repeatedly found that the Agency violated the collective bargaining agreement and not an established past practice. Award at 36, 37, 38. Moreover, the Agency fails to establish that the violation did not result in the loss of pay, allowances, or differentials. The Agency expressly acknowl-

edged to the Arbitrator that there were employees who would have worked the two hours of overtime. *Id.* at 32. The Agency's complaint to the Arbitrator and in its exception is that there were also employees who would not have worked the overtime. *Id.*; Exceptions at 17-18. However, because employees were denied overtime pay as the result of the violation of Article 38, Section 9, the Agency's complaint about employees who would not have worked overtime concerns a matter of compliance and implementation, and not the requirements of the Back Pay Act. *See United States Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 55 FLRA 322, 326 (1999) (*FAA*) (when an arbitrator has found the specific requirements giving rise to entitlement to backpay, there is no requirement for the arbitrator to identify the specific employees entitled to backpay and calculate the amount of backpay). By specifying backpay only for those who were not "allowed to work[.]" award at 38, the award sufficiently identifies the specific circumstances under which employees are entitled to backpay as those in which the employee otherwise would have worked. *See United States Dep't of the Treasury, United States Customs Serv., El Paso, Tex.*, 57 FLRA 724, 727 (2002) (award satisfies the Back Pay Act when the award sufficiently identifies the circumstances under which employees are entitled to backpay); *FAA*, 55 FLRA at 326.

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.