

65 FLRA No. 58

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3955
(Union)

0-AR-4451

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DECISION

November 24, 2010
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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

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

The Arbitrator concluded that the Agency violated: (1) the parties' collective bargaining agreement (parties' agreement) and federal laws when it failed to store properly explosive materials; and (2) the parties' agreement when it did not properly pay employees who stored, handled, and transported such materials. For the reasons set forth below, we grant the Union's exception regarding the Arbitrator's failure to require the payment of interest on the hazard pay differential award, modify the award to include interest consistent with the requirements of the Back Pay Act, and deny the parties' remaining exceptions.

II. Background and Arbitrator's Award

The grievants work as either Locksmiths or Assistant Locksmiths at the Federal Bureau of Prisons, Federal Correctional Complex located in Tucson, Arizona (Penitentiary). *See* Award at 17; Agency's Exception at 5-6. The positions involve a high level of risk for hazardous and stressful working conditions, and employees are required to know how to use "emergency entry equipment, riot control equipment, chemical munitions, and all Special Operations Response Team . . . equipment in order to maintain a high level of readiness at all times." Agency's Exception, Attach. D at 2 & Attach. E at 3.

During a conversation with management officials, the grievants expressed concern regarding their handling of explosive devices and the Agency's storage of such devices. *See* Award at 18. The grievants then sent a letter to the Agency regarding these concerns and inquiring about their potential entitlement to a hazard pay differential. *Id.* In its response to the grievants, the Agency noted that "a hazard pay differential was not in order because the hazardous work had already been taken into account in the pay rate for the Lock [and] Security Specialist job classification." *Id.* The grievants sent another letter to the Agency addressing, among other things, their entitlement to a hazard pay differential. *Id.* After the grievants failed to reach agreement with the Agency, the Union filed a formal grievance on their behalf. *See id.* at 19.

The matter was unresolved and was submitted to arbitration. The Arbitrator framed two issues regarding the merits of the case, one of which was whether the grievants were "entitled to be paid a hazard pay differential for working with or in close proximity to explosive material in accordance with applicable law? If so, what shall be the remedy?"¹ *Id.* at 2.

The Arbitrator found that the Agency violated the parties' agreement "when it did not properly pay [the grievants] who had the responsibility to store, handle, and transport . . . explosive devices." *Id.* at 31. The Arbitrator determined that, in his estimation, the job classifications did not contain language regarding the performance of the hazardous duties at issue. *Id.* at 30. Based on testimony, the Arbitrator inferred that the stun munitions, or flash

1. The Agency also raised other threshold issues before the Arbitrator. Award at 2. Because no exceptions were filed to the Arbitrator's resolution of those issues, they are not before us.

bangs, and tactical blast strips were explosive devices and that the Union had provided sufficient information regarding the hazardous nature of these explosive devices and the danger surrounding the improper storage of these munitions. *Id.* at 27-28. Also, the Arbitrator cited testimony indicating that the reference to equipment in the position descriptions “does not take in to consideration the stun munitions, because chemical munitions were listed separately, and explosive munitions were not listed, and are considered a serious hazard.” *Id.* at 27. The Arbitrator found that the grievants were entitled to a hazard pay differential of 25 percent. *Id.* at 30. Furthermore, although the Arbitrator noted that a grievant testified that he became aware that he was responsible for handling and storing explosives in late 2006, he awarded the grievants backpay from the date that the grievance was filed, September 21, 2007. *Id.* at 19, 31.

III. Positions of the Parties

A. Agency’s Exception

The Agency contends that the Arbitrator’s conclusion that the grievants are entitled to a hazard pay differential is contrary to law. Agency’s Exception at 4-7. According to the Agency, neither 5 U.S.C. § 5545(d) nor 5 C.F.R. § 550.904(a) authorizes the payment of a hazard pay differential to a grievant whose classification takes into consideration the hazardous duty that he has performed. *Id.* at 4-5. The Agency claims that “it is quite clear that the grievant’s [sic] position descriptions take into account the hazards involved, specifically, working with and maintaining weapons, stun guns and other munitions.” *Id.* at 5. Similarly, the Agency argues that “[b]oth position descriptions . . . clearly discuss the need for employees in these positions to be knowledgeable of weapons, weapons repair and to have technical and operational knowledge [of] riot control equipment and chemical munitions[,]” and that the position description for the GS-9 Assistant Locksmith position specifies that “employees in these positions must ‘[have the] ability to conduct technical inspections, test, and make repairs to maintain all weapons in good operational condition at all times.’” *Id.* at 6 (quoting Agency’s Exception, Attach. D at 2 & Attach. E at 3).

Moreover, the Agency claims that the Arbitrator failed to refer to, evaluate, and make specific factual findings about the content of the position descriptions. *Id.* at 7 n.3. The Agency argues that the Arbitrator simply made a conclusory statement when he determined that, in his estimation, the

classification of the positions did not contain language requiring the grievants to perform the relevant hazardous duties. *Id.* (citing Award at 30).

Finally, the Agency claims that testimony presented at arbitration demonstrates that the grievants’ positions were classified to include the performance of hazardous duties. *Id.* at 6-7. According to the Agency, its own witness testified that “in no way can a position description contain each and every aspect of an employees [sic] duties . . .” and that the actual certifiers of the positions at issue told her that “the classification of these positions did specifically take into account the need to handle and work with hazardous materials.” *Id.*

B. Union’s Opposition

The Union argues that the Arbitrator’s finding that the classifications did not take into account the hazardous duties in question is not contrary to law. Union’s Opp’n at 8-9. The Union contends that the Arbitrator was hired to evaluate the relevant evidence and testimony and that the Agency simply disagrees with the Arbitrator’s finding that the hazardous duties at issue were not taken into consideration in the classification of the positions. *Id.* at 5, 7-9.

Also, the Union argues that, contrary to the Agency’s contention, the Arbitrator made specific findings regarding whether the relevant position descriptions mentioned explosive munitions. *Id.* at 5. Moreover, the Union contends that it put forth sufficient evidence for the Arbitrator to find that the relevant position descriptions did not include the hazardous duties performed by the grievants. *See id.* The Union argues that “[t]he position descriptions at issue do not at any point mention the requirement of the employee to handle, transport, store, or in any way work with explosive materials or devices.” *Id.* The Union contends that, because chemical munitions are listed separately in the position descriptions, the clear absence of explosive munitions from the position descriptions demonstrates that the hazardous duties at issue were not included in the classification of the grievants’ positions. *Id.* at 6.

The Union notes that, although the position descriptions do not mention explosive munitions, they do reference weapons, ammunition, and weapons repair. *Id.* at 5. However, the Union contends that, to the extent that the Agency is arguing that weapons include explosive devices in its exceptions, it is making this argument for the first time on appeal. *Id.* at 5-6.

Furthermore, the Union argues that, even if the position descriptions take into consideration working with explosive materials, “the fact that the Agency is violating federal regulations in the manner in which [it] require[s] the grievants to store these items would be relevant to whether or not these specific duties were considered in the classification of these positions.” *Id.* at 7.

C. Union’s Exceptions

The Union alleges that the Arbitrator’s award of a hazard pay differential from the filing date of the grievance is contrary to law. Union’s Exceptions at 5-10. The Union contends that, by calculating the hazard pay differential from the filing date of the grievance, the Arbitrator’s award violates the Back Pay Act. *Id.* at 6-7, 10. According to the Union, the Back Pay Act authorizes an arbitrator to award backpay retroactively, up to six years before the filing date of the grievance, and requires that backpay must be awarded during “*the period for which the personnel action was in effect[.]*” *Id.* at 6 (citations omitted) (emphasis in original). Also, the Union contends that, where parties do not agree to a different contractual backpay recovery period, the statutory six-year recovery period applies and that “a clear distinction [exists] between contractual backpay recovery periods and contractual time periods for filing grievances.” *Id.* at 9-10 (citation omitted). Furthermore, the Union alleges that, because the Arbitrator found that the grievance was timely filed, there is no reason to limit backpay from the date that the grievance was filed. *Id.* at 9.

The Union admits that, based on the testimony and evidence presented during the arbitration proceedings, the exact period of time that the grievants stored, handled, and transported explosives without being paid a hazard pay differential is unknown. *Id.* at 7. According to the Union, one witness testified that the grievants began performing these hazardous duties in late 2005 or early 2006. *Id.* Moreover, the Union asserts that, although a second witness testified that he discovered that he was storing explosive materials in late 2006, this witness meant to say that he began performing these hazardous duties in late 2005. *Id.* at 8. Ultimately, the Union claims that, because the Penitentiary “opened at some point in February 2006, at the very latest[,] the grievants should be entitled to back pay [sic] for the period beginning March 1, 2006 up to the date upon which the Agency makes the correction to their pay to include the hazard pay differential or

ceases requiring the grievants to perform these hazardous duties.” *Id.*

Also, the Union argues that the award is contrary to law because the Arbitrator failed to award interest in accordance with the Back Pay Act. *Id.* The Union claims that the Back Pay Act requires that interest be paid beginning on the date of the unjustified personnel action and “ending on a date not more than 30 days before the date on which payment is made.” *Id.* (citations omitted). The Union asserts that, because the award does not explicitly award interest in addition to awarding backpay, it is contrary to law. *Id.*

D. Agency’s Opposition

The Agency argues that the Arbitrator’s award of a hazard pay differential from the filing date of the grievance is not contrary to law. Agency’s Opp’n at 4-7. The Agency reiterates its contention that the grievants were not subjected to an unjustified or unwarranted personnel action because the grievants’ positions were classified to include the storage, handling, and transportation of explosives. *Id.* at 4. The Agency argues that, even assuming the grievants were affected by an unjustified or unwarranted personnel action, the Back Pay Act does not specify an appropriate time period for an award of a hazard pay differential. *Id.* at 5. Additionally, the Agency contends that an arbitrator has great latitude in fashioning his remedy and that, because the Union failed to present clear evidence as to when the grievants were entitled to a hazard pay differential, the Arbitrator appropriately used his discretion in determining the time frame to award backpay.² *Id.* at 5-6.

IV. Analysis and Conclusions

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award

2. Although the Agency argues in its opposition that “[h]azard pay is a type of [e]nvironmental [d]ifferential pay[,]” a hazard pay differential and environmental differential pay are distinct. Agency’s Opp’n at 5 n.1. Whereas hazard pay differentials are governed by 5 U.S.C. § 5545(d) and apply to general schedule (GS) employees, the Office of Personnel Management is authorized under 5 U.S.C. § 5343(c)(4) to issue regulations providing for environmental differential pay to wage grade employees. *NAGE*, 43 FLRA 414, 422 & n.5, 424 (1991). Because the grievants, here, are GS employees, the Hazardous Duty Act, 5 U.S.C. § 5545, applies to them. Agency’s Exception, Attach. D & Attach. E.

de novo. See *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)). 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. See *U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

- A. The Arbitrator's conclusion regarding the classification of the grievants' positions is not contrary to law.

The Agency claims that the Arbitrator's legal conclusion that the grievants are entitled to a hazard pay differential is contrary to law. Agency's Exception at 4-7. The Agency argues that, because "it is quite clear that the grievant's [sic] position descriptions take into account the hazards involved, specifically, working with and maintaining weapons, stun guns and other munitions[.]" the grievants are not entitled to a hazard pay differential. *Id.* at 4-5. Moreover, the Agency notes that the Arbitrator failed to refer to, evaluate, and make specific factual findings about the content of the position descriptions in his award. *Id.* at 7 n.3. Finally, the Agency claims that certain testimony demonstrates that the grievants' positions were classified to include a hazard pay differential. *Id.* at 6-7.

The threshold requirements for an employee's entitlement to a hazard pay differential originate from a statutory mandate, as well as government regulation. *U.S. Dep't of the Army, Alaska*, 54 FLRA 1117, 1122 (1998); see also 5 U.S.C. § 5545 & 5 C.F.R. Part 550, subpart I. As relevant here, a grievant must satisfy three requirements before he is entitled to a hazard pay differential: (1) the hazard or physical hardship must not have been considered in the classification of his position pursuant to 5 U.S.C. § 5545(d); (2) the hazard or physical hardship must be listed in Appendix A to 5 C.F.R. Part 500; and (3) he must be performing a hazardous duty within the definition of 5 C.F.R. § 550.902. *U.S. Dep't of the Army, Alaska*, 54 FLRA at 1122.

The Agency only contests the Arbitrator's conclusion with respect to the first requirement – i.e., whether the hazardous duty was considered in the classifications of the positions at issue. Agency's Exception at 5-7; Agency's Opp'n at 4. Therefore, the other requirements are not before us.

Based on the Arbitrator's factual findings, the award of a hazard pay differential is not contrary to law. In his award, the Arbitrator evaluated the credibility of evidence and testimony presented to him at arbitration before concluding that the classification of the grievants' positions did not take into account the performance of certain hazardous duties. Award at 26-28, 30-31. The Arbitrator cited specific testimony demonstrating that "the reference to equipment [in the position descriptions] does not take in to consideration the stun munitions, because chemical munitions were listed separately, and explosive munitions were not listed, and are considered a serious hazard." *Id.* at 27. Additionally, he noted that, based on certain testimony, it became clear to him that "the position description[s] did not include duties that were being performed by the grievants" and that, in his estimation, the job classifications did not contain language regarding the performance of the hazardous duties at issue. *Id.* at 30.

Further, to the extent that the Agency contends that the Arbitrator's award of a hazard pay differential is deficient because testimony demonstrates that the grievants' positions were classified to include a hazard pay differential, its contention is without merit. Agency's Exception at 6-7. The Agency's argument merely challenges the weight that the Arbitrator accorded to certain testimony; accordingly, the Agency has not established that the award is contrary to law. See *U.S. DOL*, 19 FLRA 300, 301-02 (1985) (finding that the arbitrator's award was not contrary to law when the arbitrator did not rely on certain classification standards and expert witness testimony indicating that the grievants' positions were classified to include a hazard pay differential when making his decision on the merits). Moreover, an arbitrator's failure to set forth specific findings, or to specify and discuss all allegations in a grievance, does not provide a basis for finding an award deficient. *U.S. Dep't of Commerce, Patent & Trademark Office*, 41 FLRA 1042, 1049 (1991) (citation omitted). In this regard, an arbitrator is not required to specify or discuss specific items of evidence on which an award is based or which otherwise were considered by the arbitrator. See, e.g., *U.S. Dep't of the Navy, Charleston Naval Shipyard, Charleston, S.C.*, 39 FLRA 987, 993 (1991) (citing *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 37 FLRA 766, 773-74 (1990)).

Consequently, given the Arbitrator's underlying factual findings, his conclusion that the classification of the grievants' positions did not take into account

the performance of certain hazardous duties is not contrary to law. *See U.S. Dep't of the Army, Alaska*, 54 FLRA at 1123 (finding that, given the arbitrator's underlying factual findings, his legal conclusion that the grievants worked with, or in close proximity to, unstable and highly sensitive material, for which they were entitled to a hazard pay differential, was consistent with the applicable regulations).

Accordingly, we deny the Agency's exception.

- B. The award of backpay from the filing date of the Union's grievance is not contrary to law.

The Union alleges that "the [a]ward [of backpay] is contrary to law because it was incorrectly calculated [as] beginning on the date the grievance was filed . . ." Union Exceptions at 6. According to the Union, the grievants are entitled, under the Back Pay Act, to receive a hazardous pay differential during the period that they performed hazardous duties. *Id.*

Under Authority precedent, it is well established that arbitrators have broad authority and discretion to fashion remedies. *See, e.g., Nat'l Ass'n of Indep. Labor, Local 11*, 64 FLRA 709, 711 (2010) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 47 FLRA 98, 101 (1993)). In particular, the Authority has found that the Back Pay Act's six year statute of limitations does not require an arbitrator to award backpay for a period of six years. *See id.* (citing *Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841, 846 (1993) & *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 819, 829 (1993)). Moreover, the Authority has determined that Back Pay Act recovery periods are within the discretion of arbitrators, as long as awards do not exceed the maximum recovery authorized by law. *Id.* (citations omitted).

The Union's contention that the award of backpay from the date that the grievance was filed is contrary to the Back Pay Act is without merit. The Arbitrator has the discretion, under the Back Pay Act, to award the grievants a 25% hazard pay differential beginning on the date the grievance was filed. *See id.* The Arbitrator was not required, under the Back Pay Act, to award the grievants backpay for six years or however long the Union requested within that six year period. *See id.* Moreover, the Union has not cited any other statute or regulation that obligates the Arbitrator to award backpay retroactive to the date that the grievants began performing the hazardous duties. *See U.S. Dep't of the Navy, Naval Surface*

Warfare Ctr., Crane Div., Crane, Ind., 49 FLRA 27, 31-32 (1994) (finding that the union failed to demonstrate that any other statute or regulation obligated the arbitrator to award backpay retroactive to the date the grievants were exempted from the FLSA). Consequently, the Union's exception provides no basis for finding the award deficient.

Accordingly, we deny the Union's exception.

- C. The award is contrary to law for failing to include an award of interest.

The Union claims that the award is contrary to law because the Arbitrator failed to award interest in accordance with the Back Pay Act. Union Exceptions at 8. Under the provisions of the Back Pay Act, interest must be paid on backpay awards, beginning on the date of the unjustified and unwarranted personnel action, and the payment of interest must continue until a date selected by the Agency, which must not be more than 30 days before the date on which payment is made. *See, e.g., Nat'l Air Traffic Controllers Ass'n*, 64 FLRA 906, 907 (2010) (citing *U.S. Dep't of Def., Marine Corps Logistics Base, Barstow, Cal.*, 37 FLRA 796, 797 (1990)); *NTEU, Chap. 72*, 58 FLRA 447, 447 (2003); *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 57 FLRA 724, 728 (2002); 5 C.F.R. § 550.806(a)(2). Because the Arbitrator awarded a hazard pay differential to the grievants, the Union is entitled to an award of interest as a matter of law. *See U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine, Hyattsville, Md.*, 38 FLRA 1291, 1299 (1991) (awarding the union interest after denying the agency's exceptions to the backpay award).

Accordingly, we modify the award to include interest on the hazard pay differential award.

V. Decision

The Union's exception regarding the Arbitrator's failure to require the payment of interest on the hazard pay differential award is granted, the award is modified to include interest consistent with the requirements of the Back Pay Act, and the parties' remaining exceptions are denied.