

64 FLRA No. 141

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
BECKLEY, WEST VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 44
(Union)

0-AR-4337

—
DECISION

May 11, 2010

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 Eric W. Lawson filed by the Agency 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 exceptions.

The Arbitrator found that the procedure followed by the Agency in selecting employees for a temporary duty (TDY) assignment with guaranteed overtime violated the parties' agreement, and he awarded backpay and attorney fees. For the reasons that follow, we set aside the award of backpay and attorney fees, and remand it to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Award

When the Agency selected employees based on seniority for a TDY assignment with guaranteed overtime, rather than their ranking on the established overtime roster, the Union filed a grievance on behalf of all employees listed on the overtime roster. The

grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as follows:

Did the [Agency] violate the . . . Agreement . . . and/or any other applicable law, rule or regulation, in the manner by which it filled assignments . . . ? If so, shall officers signed up for overtime be compensated with the payment of the value of . . . overtime pay and the Agency ordered to follow local and national overtime procedures?

Award at 2.

The Arbitrator found that the seniority-based selection process used by the Agency violated the parties' agreement, and he sustained the grievance. *Id.* at 11-12. Although he found that "there is no certain way to know which employees would have received the [overtime] payments" had the Agency utilized the overtime roster, he directed the Agency to: determine the value of all overtime paid to employees who worked overtime; divide that amount among employees deemed eligible from the overtime roster; and provide backpay accordingly. *Id.* at 11. The Arbitrator also awarded attorney fees. *Id.* at 12.

III. Positions of the Parties**A. Agency's Exceptions¹**

The Agency argues that the award of backpay is contrary to the Back Pay Act and its implementing regulation, 5 C.F.R. § 550.111.² In

1. We note that the Union asserts that the Agency's exceptions were untimely filed. The Arbitrator served the award by mail on December 14, 2007, and the exceptions were due on January 22, 2008. As the Agency filed its exceptions on January 17, 2008, they were timely filed, and we consider them.

2. The Back Pay Act, 5 U.S.C. § 5596, provides, in pertinent part:

(b)(1) An employee of an agency who . . . is found . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction or all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or

this connection, the Agency asserts that the Back Pay Act requires evidence that “employees would have worked overtime had the [A]gency not engaged in improper conduct and, therefore, they suffered the loss of pay because of that conduct.” Exceptions at 5. The Agency further contends that the award violates 5 C.F.R. § 550.111 because there is no evidence that all of the employees who were awarded backpay were ready, willing, and able to work the overtime assignments at issue. *Id.* at 7.

B. Union’s Opposition

The Union asserts that the Agency’s exceptions are meritless and should be dismissed. Opp’n at 1-3.

IV. Analysis and Conclusions

Under the Back Pay Act, an award of backpay is authorized only 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. *See AFGE, Local 48*, 56 FLRA 1082, 1083 (2001). A violation of a collective bargaining agreement provision constitutes an unjustified or unwarranted personnel action under the Back Pay Act. *See U.S. Dep’t of Justice, INS*, 42 FLRA 222, 232 (1991). The Authority has held that

where an arbitrator finds that an agency violated an agreement provision in the method of assigning overtime and awards backpay to several grievants, but does not determine which of the grievants would have received the overtime assignment, or that all of them would have been assigned overtime, had the agency complied with the agreement, an award of backpay to all of the grievants violates the Back Pay Act and is deficient.

AFGE, Local 1286, Council of Prison Locals, 51 FLRA 1618, 1621 (1996) (citing *U.S. Dep’t of the*

Army, Aviation Applied Tech. Directorate, Fort Eustis, Va., 38 FLRA 362, 366 (1990)).

Although the Arbitrator found that the Agency violated the parties’ agreement, he concluded that “there is no certain way to know which employees would have received the [overtime] payments” had the Agency complied with the agreement. Award at 11. As such, his award of backpay to all of the grievants violates the Back Pay Act. *See AFGE, Local 1286*, 51 FLRA at 1621. Accordingly, we set aside the award as deficient under § 7122(a) of the Statute.

We note that the Authority has held that attorney fees can be awarded under the Back Pay Act only in conjunction with an award of backpay. *See AFGE, Local 216, Nat’l Council of EEOC Locals*, 42 FLRA 319, 320-21 (1991). As we have set aside the award of backpay, we also set aside the award of attorney fees.

In cases where the Authority sets aside an entire remedy, but an arbitrator’s finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g., U.S. Dep’t of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). As we have set aside the entire remedy but left undisturbed the Arbitrator’s finding of a contract violation, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

V. Decision

The award of backpay and attorney fees is set aside and remanded to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred[.]

5 C.F.R. § 550.111, provides, in pertinent part: “(a) [O]vertime works means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—(1) [o]fficially ordered or approved; and (2) [p]erformed by an employee.”