

64 FLRA No. 159

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1592
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
HILL AIR FORCE BASE, UTAH
(Agency)

0-AR-4637

DECISION

June 2, 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 an exception to an award of Arbitrator Barbara Bridgewater filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator awarded the grievant three hours of compensatory time off but denied his request for an award of attorney fees under Back Pay Act, 5 U.S.C. § 5596 (BPA). For the reasons that follow, we conclude that the basis for the denial of fees is deficient, and we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a resolution of the attorney-fee request.

II. Background and Arbitrator's Award

The Union filed a grievance protesting the Agency's denial of the grievant's request for compensatory time off for time spent in a travel status.¹ The grievance was not resolved and was

submitted to arbitration. The Arbitrator concluded that the grievant was entitled to compensatory time off and awarded him three hours of compensatory time off. However, she denied the grievant's request for an award of attorney fees under the BPA on the basis that the award of compensatory time off did not constitute "pay, allowance[s], or differential[s]" within the meaning of the BPA. Award at 8.

III. Positions of the Parties**A. Union's Exception**

The Union contends that the basis for the denial of the request for attorney fees is contrary to the BPA. In particular, the Union asserts that the award of compensatory time off constitutes "pay, allowances, or differentials" within the meaning of the BPA similar to awards of administrative leave, annual leave, or sick leave. Exception at 2. In this regard, the Union claims that the Authority has specifically held that awards of paid leave satisfy the requirement of the BPA that the grievant be awarded backpay to be eligible for an award of attorney fees. *Id.* at 3-4 (citing *NAGE, Local R4-6*, 52 FLRA 1522 (1997) (*NAGE*); *Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841 (1993); *U.S. Dep't of the Air Force, Aerospace Guidance & Metrology Ctr., Newark Air Force Base, Ohio*, 41 FLRA 550 (1991)).

B. Agency's Opposition

The Agency contends that the Arbitrator correctly denied the request for fees because an award of compensatory time off is not an award of pay, allowances, or differentials. Additionally, the Agency claims that the denial of the request for fees was warranted because the grievant was not the prevailing party.

IV. The award is contrary to the BPA.

When an exception to an arbitration award challenges an award's consistency with law, we review the question of law raised by the exception and the award *de novo*. *E.g., U.S. Dep't of Agric., Rural Dev., Wash., D.C.*, 60 FLRA 527, 529 (2004) (*Dep't of Agric.*). In applying a standard of *de novo* review, we assess whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

For a grievant to be eligible for an award of attorney fees under the BPA, an arbitrator must award the grievant backpay upon finding under

1. 5 U.S.C. § 5550(b) provides for compensatory time off for time spent in a travel status that is not otherwise compensable.

applicable law, rule, regulation, or collective bargaining agreement that the grievant was affected by an unjustified or unwarranted personnel action which resulted in the grievant's loss of pay, allowances, or differentials. *E.g.*, *NAGE*, 52 FLRA at 1528. It is not disputed that the Arbitrator found under applicable law and regulation that the grievant was affected by an unjustified or unwarranted personnel action. The only question presented is whether compensatory time off constitutes pay, allowances, or differentials within the meaning of the BPA such that the Arbitrator's award of compensatory time constitutes an award of backpay.

"Pay, allowances, and differentials" are defined as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." 5 C.F.R. § 550.803. On the basis of definition, the Authority has held that awards of paid leave, including annual leave or administrative leave, constitute awards of backpay because paid leave constitutes pay, allowances, or differentials. *Dep't of Agric.*, 60 FLRA at 529 (annual leave); *NAGE*, 52 FLRA at 1528-29 (administrative leave). Moreover, in *NAGE*, the Authority concluded that an award of administrative leave constituted an award of backpay and that the arbitrator's refusal to award attorney fees on that basis was contrary to the BPA. *Id.*

The Authority as repeatedly held that compensatory time off is equivalent to annual leave and sick leave. *E.g.*, *U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 54 FLRA 584, 590 (1998); *Int'l Bhd. of Police Officers*, 47 FLRA 397, 401-02 (1993). Consequently, arbitration awards of compensatory time off constitute awards of backpay and, as in *NAGE*, the Arbitrator's refusal to award fees on the basis that she had not awarded backpay is contrary to the BPA.

As the Arbitrator did not address the other statutory requirements for an award of attorney fees under the BPA, we remand the award to the parties for submission to the Arbitrator, absent settlement, for resolution of the request for an award of attorney fees.² *NAGE*, 52 FLRA at 1529.

V. Decision

The award is remanded to the parties for further action consistent with this decision.

2. As the Arbitrator is the appropriate authority for the resolution of the request for fees, the Agency's allegation that the grievant was not the prevailing party is appropriately presented to the Arbitrator. Accordingly, we do not address the allegation. *See AFGE, Local 3105*, 63 FLRA 128, 131 (2009) (citing 5 C.F.R. § 550.807 (a)).