65 FLRA No. 217

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 506
(Union)

0-AR-4560

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DECISION

July 29, 2011

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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 J. J. Pierson 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 Agency violated the parties' agreement by the manner in which it reassigned a correctional officer (the grievant), and denied him the opportunity to work overtime, while his conduct was under investigation. As a remedy, the Arbitrator directed the Agency to pay the grievant for lost overtime. For the reasons that follow, we deny the exceptions, but modify the award to correct a typographical error.

II. Background and Arbitrator's Award

When the grievant entered a correctional institution to begin his shift with prohibited items in his possession, the Agency opened an investigation into the matter (the investigation). Award at 2. During the investigation, the Agency reassigned the grievant to a phone-monitoring post in the central administrative building – outside the correctional institution – and did not permit him to work overtime. *Id.* The Union filed a grievance alleging that the Agency had not taken these actions against similarly situated employees and thereby violated the parties' agreement, particularly Article 6 (Article 6),[1] "by failing to treat [the grievant] fairly and equitabl[y]." *Id.* at 3. The Arbitrator framed the issue as follows: "Did the Agency . . . violate the [parties'] [a]greement by reassigning [the grievant] to work outside the institution during the period he was being investigated for his conduct . . . and by denying him the opportunity to work overtime [during that period]? If so, what shall be the remedy?" *Id.* at 1.

The Arbitrator found that, although the suspicion that prompted the investigation was "neither unreasonable nor unjustified[,]" *id.* at 21, the Agency's treatment of the grievant was "less than fair and equitable," *id.* at 24. In this regard, the Arbitrator found that, unlike in situations involving other employees under investigation, the Agency reassigned the grievant from the correctional institution to a post "where he was in view of other officers and administrators[,]" which caused him "embarrassment and humiliation[.]" *Id.* at 22. In addition, the Arbitrator found it "unwarranted" for the Agency to deny the grievant the opportunity to work overtime, *id.*, because "others were not denied overtime opportunities when reassigned from regular duties or under investigation." *Id.* at 23. Thus, the Arbitrator concluded that the reassignment of the grievant and the denial of overtime violated the parties' agreement, was "unjustified and unwarranted[,]" *id.* at 27, and "caused the [g]rievant to lose substantial overtime opportunities and income[,]" *id.* at 24.

The Arbitrator determined that an appropriate remedy would be "an award for lost overtime opportunities, calculated by past records of performance and in response to the actual monetary loss of income by [the grievant]." *Id.* at 25. The Arbitrator noted the Agency's arguments that "the Union could not prove that [the grievant] would have been offered specific overtime assignments on specific dates[,]" and that "the overtime opportunities had been markedly decreased" at the institution during the period of the investigation. *Id.* at 25 n.35. However, the Arbitrator found that: (1) the grievant was prohibited from working overtime for seventeen

1. The pertinent text of Article 6 is provided below.

weeks, *id.* at 26; (2) "overtime opportunities were a regular and routine assignment in the institution[,]" *id.* at 25; and (3) the grievant "previously worked an extensive amount of regular and voluntary overtime shifts[,]" *id.* The Arbitrator also stated that "[t]here was no contention that the [g]rievant ever refused overtime." *Id.* The Arbitrator "acknowledge[d] that the [g]rievant would not have worked every available overtime hour . . . each week[,]" but concluded that "based on his prior personnel and pay records, it is not unreasonable to conclude that [the grievant] would have worked forty . . . hours of overtime each week[.]" *Id.* at 26. As a result, the Arbitrator directed the Agency to pay the grievant $16,388 as compensation for lost overtime income. *Id.* Later in the award, the Arbitrator directed the Agency to pay the grievant $17,388 "as calculated in the above [o]pinion." *Id.* at 28.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award fails to draw its essence from the parties' agreement. Specifically, the Agency claims that the award is inconsistent with Article 30, Section g (Article 30)[2] of the agreement. Exceptions at 22.

In addition, the Agency argues that the award is contrary to law because the parties' agreement, as interpreted by the Arbitrator, affects management's rights to assign work, assign employees, and determine internal security practices under § 7106(a) of the Statute[3] and does not constitute an appropriate arrangement under § 7106(b)(3).[4] *Id.* at 7-18. In this regard, the Agency argues that the Arbitrator's interpretation of the agreement "would never allow management to temporarily reassign a correctional officer . . . while [he or she is] under investigation for potential security breaches[,]" *id.* at 15-16, and "completely prevents the Agency from choosing where to reassign an employee[,]" *id.* at 17. The Agency also argues that "the agreement as interpreted by the Arbitrator [is] not sufficiently tailored to constitute [an] appropriate arrangement[]." *Id.* at 16. In support of its management rights arguments, the Agency cites: *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Lompoc, California*, 58 FLRA 301 (2003) (*BOP Lompoc*) (Chairman Cabaniss concurring and then-Member Pope dissenting); *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon*, 58 FLRA 279 (2003) (*BOP Sheridan*) (Chairman Cabaniss concurring and then-Member Pope dissenting); *IFPTE, Local 1*, 49 FLRA 225 (1994) (*IFPTE*) (Member Talkin dissenting in part); and *NTEU, Chapter 26*, 22 FLRA 314 (1986) (*Chapter 26*). Exceptions at 16-18. Further, the Agency contends that the award is deficient under prong II of the test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), because the remedy does not reconstruct what management would have done if it had complied with the agreement. Exceptions at 18-20.

Additionally, the Agency argues that the Arbitrator's award of allegedly lost overtime pay is contrary to the Back Pay Act, 5 U.S.C. § 5596 (BPA). Exceptions at 22-31. In this regard, although the Agency concedes that a contract violation can constitute an unjustified or unwarranted personnel action under the BPA, the Agency contends that, for the reasons set forth in its essence and management rights exceptions, it did not commit an unjustified or unwarranted personnel action. *Id.* at 23. In addition, the Agency argues that the Union did not establish "that overtime was available to the grievant on specific days and that the grievant was specifically available on those days to work it." *Id.* at 24-25. In this connection, the Agency asserts that: (1) "[t]he overtime available for staff to work after the investigation commenced markedly decreased[,]" *id.* at 28-29; (2) "the Union provided no evidence as to specific dates that [the grievant] would have been available" to work overtime, *id.* at 28; and (3) "each and every overtime assignment would not have been available" to the grievant because overtime is assigned using a seniority-based rotation, *id.* at 26-27. As a result, the Agency argues that the Arbitrator's calculation of lost overtime opportunities based on the amount of overtime that the grievant worked prior to the investigation was "speculative[.]" *Id.* at 28. For support, the Agency cites: *United States Department of Justice, Federal Bureau*

2. The pertinent text of Article 30 is provided below.

3. Section 7106(a) of the Statute provides, in pertinent part, that "nothing . . . shall affect the authority of any management official of any agency . . . to determine . . . internal security practices[,] . . . assign . . . employees . . . , or . . . to assign work[.]"

4. Section 7106(b)(3) provides, in pertinent part, that "[n]othing in this section shall preclude any agency and any labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

of Prisons, Federal Correctional Complex, Beaumont, Texas, 59 FLRA 466 (2003) (*BOP Beaumont*) (Chairman Cabaniss dissenting in part); *United States Department of the Air Force, Warner Robins Air Force Base, Georgia*, 56 FLRA 541 (2000) (*Warner Robins*); *AFGE, Local 1857*, 35 FLRA 325 (1990) (*Local 1857*); and *Naval Air Rework Facility, Norfolk, Virginia*, 21 FLRA 410 (1986) (*Naval Air*). Exceptions at 24, 28-29, 31.

B. Union's Opposition

As a preliminary matter, the Union argues that, because the Agency "failed to raise any argument based on management's rights under § 7106" to the Arbitrator, § 2429.5 of the Authority's Regulations bars the Agency from making such an argument to the Authority. Opp'n at 8.

In regard to the merits of the Agency's exceptions, the Union argues that the award does not fail to draw its essence from the agreement because the Arbitrator enforced "the mandates of the [parties'] [a]greement requiring the Agency to treat all employees in a fair [and] equitable manner." *Id.* at 14. In addition, the Union argues that the award is not contrary to § 7106 because Article 6 constitutes an appropriate arrangement under § 7106(b)(3). *See id.* at 12. In this connection, the Union claims that the award merely requires that, in exercising its management rights, "the Agency do so in a manner [that] is fair and equitable to all employees, as is required by Article 6[.]" *Id.*

Additionally, the Union argues that the award does not violate the BPA. In this connection, the Union contends that the Arbitrator made the necessary specific factual findings to support the amount of overtime awarded, and that "a finding of causal connection under the [BPA] may be implicit from the award." Opp'n at 16 (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., Portland, Or.*, 54 FLRA 764 (1998) (*Customs*); *U.S. Dep't of the Army, Anniston Army Depot, Anniston, Ala.*, 46 FLRA 974 (1992) (*Army Depot*)). Further, the Union asserts that the Arbitrator "implicitly rejected the Agency's argument as to the amount of overtime [the grievant] would have worked." Opp'n at 17.

IV. Analysis and Conclusions

A. Preliminary Issue: § 2429.5 does not bar the Agency's management rights exceptions.

The Union claims that the Agency's management rights arguments should be dismissed under § 2429.5. The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[5] Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Agric., Forest Serv.*, 64 FLRA 931, 933 (2010). In its post-hearing brief to the Arbitrator, the Agency cited 5 U.S.C. § 7106(a)(1)-(a)(2), and argued that "the parties' . . . [a]greement, *consistent with the . . . Statute*, gives the Warden the right to assign . . . . [and] the right to determine the internal security practices of the institution." Exceptions, Attach. B at 11 (emphasis added). Thus, the record demonstrates that the Agency presented its management rights arguments to the Arbitrator. Accordingly, we reject the Union's claim, and address the Agency's management rights arguments.

B. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*,

5. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

Article 30 provides, in pertinent part, that the Agency has "the right to respond to an alleged offense by an employee" that raises security concerns by "reassign[ing] the employee to another job within the institution or remov[ing] the employee from the institution pending investigation and resolution of the matter[.]" Award at 5. The Agency argues that the award is inconsistent with this wording because it "limit[s] where an employee can be reassigned during an investigation . . . ." Exceptions at 22. However, the Union alleged before the Arbitrator that the Agency violated Article 6, which requires that employees "be treated fairly and equitably in all aspects of personnel management[.]" Exceptions, Attach. C (Collective Bargaining Agreement (CBA)) at 10. *See also* Award at 3; Opp'n, Attach. (Union's Post-Hearing Brief) at 14-15, 18. The Arbitrator found that the grievant was "entitled to be treated fairly and equitably[,]" Award at 21, but "received treatment different from other employees[,]" *id.* at 23, and that the Agency treated the grievant "in a manner less than fair and equitable," *id.* at 24. In so finding, the Union argues, and there is no dispute, that the Arbitrator was enforcing Article 6. *See* Opp'n at 12, 14. Thus, although Article 30 provides management with certain rights, the Arbitrator effectively found that Article 6 limited those rights by requiring the Agency to treat employees fairly and equitably. *See* Award at 21-24, 27. The Agency provides no basis for concluding that this finding is unfounded, irrational, implausible, or manifestly disregards the agreement. Accordingly, we deny the Agency's essence exception.

C. The award is not contrary to law, rule, or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award 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 a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to § 7106 of the Statute.

The Authority recently revised the analysis that it will apply when reviewing exceptions alleging that awards are contrary to law because they are inconsistent with management rights under § 7106 of the Statute. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right under § 7106(a). *EPA*, 65 FLRA at 115.[6] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[7] *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, then whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 118. In concluding that the Authority would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 113. In addition, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-07.

6. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC, S.F. Region*, 65 FLRA at 107; *SSA, Office of Disability Adjudication & Review*, 65 FLRA 477, 481 n.14 (2011); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

7. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

The Agency argues that the Arbitrator's award affects management's rights to assign work, assign employees, and determine internal security practices under § 7106(a) of the Statute. Exceptions at 9. Where the Authority has found that an arbitrator was enforcing an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Authority has assumed, without deciding, that the award affected the management rights as claimed by the excepting party. *See, e.g., U.S. Dep't of the Army Headquarters, I Corps & Ft. Lewis, Ft. Lewis, Wash.*, 65 FLRA 699, 703 (2011). As discussed below, we find that the Arbitrator was enforcing an appropriate arrangement. Accordingly, we assume without deciding that the award affects the Agency's rights to assign work, assign employees, and determine internal security practices.

As discussed above, the Arbitrator's finding that the Agency violated the parties' agreement was based in part on his application of Article 6, which requires the Agency to treat employees "fairly and equitably in all aspects of personnel management[.]" CBA at 10. "The Authority has repeatedly found provisions requiring management to exercise its management rights fairly and equitably to constitute arrangements because they are intended to mitigate the adverse effects of the unfair or inequitable exercise of management's rights." *SSA, Dallas Region*, 65 FLRA 405, 409 (2010) (*SSA*). *See also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Prison Camp, Duluth, Minn.*, 65 FLRA 588, 591 (2011) (*BOP Duluth*); *U.S. Dep't of the Army, Dugway Proving Ground, Dugway, Utah*, 57 FLRA 224, 226 (2001) (*Dugway*) (Chairman Cabaniss dissenting). Further, although the Agency argues that the award is not sufficiently tailored to be an arrangement, "the Authority does not conduct a tailoring analysis in resolving exceptions to arbitration awards." *EPA*, 65 FLRA at 116. Accordingly, we find that Article 6, as interpreted and applied by the Arbitrator, constitutes an arrangement.

In arguing that, as interpreted by the Arbitrator, the agreement is not an "appropriate" arrangement, Exceptions at 15, the Agency cites several decisions in which the Authority determined that arbitrators' enforcement of contracts excessively interfered with management rights, *id.* at 17-18 (citing *BOP Lompoc*, 58 FLRA at 302-03; *BOP Sheridan*, 58 FLRA at 284; *IFPTE*, 49 FLRA at 249). However, as stated above, the Authority no longer applies the excessive-interference standard in determining whether an arbitrator has enforced a contract provision negotiated under § 7106(b)(3); rather it applies the abrogation standard. *EPA*, 65 FLRA at 116-18. Thus, the Agency's reliance on these decisions is misplaced.

With regard to whether the award abrogates management rights, an award abrogates the exercise of a management right if the award precludes the agency from exercising the right. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 174 (2010). However, the Authority previously has found Article 6, as interpreted by another arbitrator, to be an appropriate arrangement under § 7106(b)(3) because the provision did not "preclude [an agency] from reassigning employees, but, rather, only preclude[d] the [a]gency from conducting reassignments in an unfair manner." *BOP Duluth*, 65 FLRA at 591. *Cf. SSA*, 65 FLRA at 409 (provision requiring management to exercise its rights fairly and equitably does not abrogate management's rights); *Dugway*, 57 FLRA at 226 (same). Similarly, the award in this case does not, as the Agency alleges, preclude the Agency from temporarily reassigning an employee under investigation, Exceptions at 15-16, or "completely prevent[] the Agency from choosing where to reassign an employee[,]" *id.* at 17. Instead, the award requires the Agency to manage the reassignment and overtime opportunities of an employee under investigation in a "fair and equitable" manner. Award at 24. Thus, this case is distinguishable from the decisions cited by the Agency because they each involved awards or proposals that effectively precluded an agency's exercise of its management rights. *See BOP Lompoc*, 58 FLRA at 303 (award "effectively remove[d] . . . [a]gency's authority to determine the staffing necessary to maintain the security of its facility"); *BOP Sheridan*, 58 FLRA at 284 (award "totally over[o]de any [a]gency internal security staffing determinations"); *IFPTE*, 49 FLRA at 249 (award imposed "absolute" restriction on agency's ability to assign work); *Chapter 26*, 22 FLRA at 317 (proposal "could totally preclude [an] [a]gency from exercising its right to assign work").[8] Because the award in this case does not impose similar restrictions on the Agency's exercise of its management rights, the Agency does not establish that the Arbitrator's enforcement of Article 6 abrogates management's rights to assign work, assign employees, or determine internal security practices. Accordingly, we find that Article 6, as interpreted by the Arbitrator, is an appropriate arrangement under § 7106(b)(3).

8. Further, as noted above, in *BOP Lompoc*, 58 FLRA at 303, *BOP Sheridan*, 58 FLRA at 284, and *IFPTE*, 49 FLRA at 249, the Authority was applying the excessive-interference standard, rather than the abrogation standard.

The Agency also argues that the award is deficient under *BEP* because the remedy does not reconstruct what management would have done if it had not violated the parties' agreement. Exceptions at 18-20. However, as noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done if it had not violated the parties' agreement. *FDIC, S.F. Region*, 65 FLRA at 106-07. Thus, the Agency's argument does not provide a basis for setting aside the award.[9] *See id.*

For the foregoing reasons, we find that the award is not contrary to § 7106 of the Statute, and deny the Agency's management rights exceptions.

2. The award is not contrary to the BPA.

Under the BPA, 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 has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See, e.g., U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the BPA. *See id.* Thus, the Arbitrator's finding that the Agency violated the parties' agreement supports a conclusion that the award satisfies the first requirement of the BPA. Although the Agency argues that this requirement is not met, its argument is premised on its essence and management rights exceptions. As we have denied these exceptions, we also reject the Agency's argument in this connection.

With respect to the second BPA requirement, the Authority has held that a direct causal connection may be implicit from the record and the award. *See Customs*, 54 FLRA at 770-71; *Army Depot*, 46 FLRA at 976; *AFGE, Local 31*, 41 FLRA 514, 518-19 (1991) (*Local 31*). In this regard, the Authority has found that where an agency disputed before an arbitrator a grievant's availability to work overtime, but the arbitrator nevertheless awarded backpay for overtime, the arbitrator "implicitly rejected" the agency's argument and found that, but for the agency's unjustified or unwarranted personnel action, the grievant would have worked overtime and received the backpay awarded. *Customs*, 54 FLRA at 771; *Army Depot*, 46 FLRA at 976.

In this case, the Arbitrator found that the Agency's denial of overtime opportunities to the grievant violated the parties' agreement, Award at 28, and determined that an appropriate remedy would be "an award for lost overtime opportunities, calculated by past records of performance and in response to the actual monetary loss of income by [the grievant][,]" *id.* at 25. Both parties offered evidence concerning the number of overtime opportunities denied the grievant and the grievant's history of working overtime. *Id.* at 8, 15-16, 18, 25-26. Based on that evidence, the Arbitrator found that: (1) the grievant was prohibited from working overtime for seventeen weeks, *id.* at 26; (2) "overtime opportunities were a regular and routine assignment in the institution[,]" *id.* at 25; and (3) the grievant "previously worked an extensive amount of regular and voluntary overtime shifts[,]" *id.* The Arbitrator concluded that, "based on his prior personnel and pay records, it is not unreasonable to conclude that [the grievant] would have worked forty . . . hours of overtime each week[.]" *Id.* at 26. In this regard, the Arbitrator noted that "[t]here was no contention that the [g]rievant ever refused overtime[,]" Award at 25, and implicitly rejected the Agency's argument that the Union failed to establish the grievant's availability to work overtime on specific dates. *See, e.g., Customs*, 54 FLRA at 771; *Army Depot*, 46 FLRA at 976. Similarly, the Arbitrator acknowledged, but implicitly rejected, the Agency's arguments about the amount of overtime assignments that would have been offered the grievant. *See* Award at 25 n.35. Further, the Arbitrator "acknowledge[d] that the [g]rievant would not have worked every available overtime hour . . . each week[,]" when he determined that the grievant would have worked forty hours of overtime per week, rather than the seventy-two hours per week suggested by the Union. *Id.* at 26. As a result of these findings, the Arbitrator "calculate[d] and determine[d] that [the grievant] lost $964 of overtime opportunity each week . . . during the seventeen[-]week period of reassignment[.]"[10] *Id.*

9. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient because the remedy is reasonably related to Article 6 and the harm being remedied.

10. We note that the rate of pay used by the Arbitrator in his calculation of backpay for the grievant's "lost overtime opportunities" does not appear to be consistent with the Back Pay Act or Fair Labor Standards Act. Award at 25. Backpay for loss of overtime opportunity is paid at an appropriate overtime rate. *See Dep't of the Navy, Phila. Naval Shipyard, Phila., Pa.*, 28 FLRA 574, 575-76 (1987). Here, the Arbitrator bases his calculation of damages on a "straight-time hourly rate" but offers no justification for

By arguing that this calculation is too "speculative" to satisfy the BPA, Exceptions at 29, the Agency effectively challenges the Arbitrator's factual findings discussed above. However, where, as here, a party has not demonstrated that an award is based on a nonfact,[11] the Authority defers to an arbitrator's factual findings. *See Local 1437*, 53 FLRA at 1710. Further, the Arbitrator's factual findings distinguish this case from those cited by the Agency in which the Authority found backpay awards deficient because the arbitrators' factual findings did not support a backpay award. *See BOP Beaumont*, 59 FLRA at 467-68 (arbitrator awarded grievant the "average" overtime amount paid to coworkers during the relevant time period without finding the grievant would have been offered, or available to work, overtime); *Warner Robins*, 56 FLRA at 543 (arbitrator expressly found "potential" as opposed to "actual" monetary loss); *Local 1857*, 35 FLRA at 326-27 (arbitrator awarded sixteen hours of overtime pay "[b]ased on what is, admittedly, pure conjecture"); *Naval Air*, 21 FLRA at 412 (arbitrator awarded backpay despite finding that there was "no evidence that any of the [grievants] were actually available and willing to work" during the missed overtime opportunities).

Although the Agency characterizes the Arbitrator's award of $17,388.00 as a "mysterious amount," Exceptions at 19, that violates the BPA, *id.* at 22, this figure appears to be the result of a typographical error. In this regard, earlier in the award, the Arbitrator found that the grievant lost $964 of overtime per week, for a total of "$16,388.00" in lost overtime pay for the seventeen-week investigation period. Award at 26. Later in the award, the Arbitrator directed the Agency to compensate the grievant for "his loss of overtime income in the amount of $17,388.00, as calculated in the above [o]pinion." *Id.* at 28. Because the former amount is consistent with the Arbitrator's calculations, and the latter amount appears to be merely a typographical error, we modify the award to correct that error.

For the reasons stated above, we find that the award, as modified above, is not contrary to the Back Pay Act.

V. Decision

The award is modified to correct a typographical error in the amount of backpay, and the Agency's exceptions are denied.

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this aberration other than his "view" that the "straight-time" rate is "more reasonable." Award at 26. However, as there are no exceptions to this aspect of the award, we do not discuss it further.

11. The Agency has not asserted that the award is deficient because it is based on a nonfact.