

**67 FLRA No. 101**

UNITED STATES  
DEPARTMENT OF ENERGY  
WESTERN AREA POWER ADMINISTRATION  
LAKEWOOD, COLORADO  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3824  
(Union)

0-AR-5001

DECISION

April 30, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator David M. Blair issued an award finding that the Agency violated the parties' agreement when processing a grievance over overtime pay and that the remedy for that violation was to grant the grievant his requested relief: twelve hours of overtime compensation and 9% interest on the unpaid compensation. We must determine whether the Arbitrator's award of 9% interest is contrary to the Back Pay Act, 5 U.S.C. § 5596 (BPA). Because the Arbitrator awarded the grievant interest at a rate higher than the statutory rate provided in the BPA, we grant the Agency's exception and modify the award to provide for interest at a rate of 3% per annum, pursuant to the BPA.

**II. Background and Arbitrator's Award**

The grievant is an energy management and marketing specialist, or real time merchant, employed by the Agency. The Union filed a grievance alleging that the grievant was wrongfully denied an overtime opportunity. The Agency delivered a copy of its written decision regarding the grievance to the Union representative, but failed to deliver a copy to the grievant. The grievance was unresolved, and the parties proceeded to arbitration.

When the parties were unable to agree on the issues to submit for resolution, they agreed to allow the Arbitrator to fashion them. The Arbitrator framed the issues, in pertinent part, as: (1) "[D]id the Agency sufficiently process the Union[s] grievance pursuant to the terms of the [parties' agreement]?" and (2) "[D]id the Agency violate the terms of the [parties' agreement] when the grievant was not paid overtime wages for a shift he could have worked."<sup>1</sup>

Article 24, Section 7.A.2.a of the parties' agreement (Section 7.A.2.a) requires the Agency's deciding official to "deliver a written decision" on a grievance "to the employee and the Union [r]epresentative within ten (10) calendar days" after conducting a meeting on the grievance.<sup>2</sup> The Arbitrator concluded that the Agency violated this provision by failing to deliver a copy of its decision to the grievant.

Turning to the remedy, the Arbitrator found that Section 7.A.2.a further provides that "[f]ailure to respond at any level[] [within] the time limits identified above [for processing the grievance] will constitute an agreement with the grievant and his/her relief sought will be granted in favor of the employee if not prohibited by law."<sup>3</sup> According to the Arbitrator, the Union's requested remedy was that the grievant "be made whole."<sup>4</sup> The Arbitrator noted that the Agency had not provided any evidence that this remedy "would be prohibited by law" and further noted that he was not aware of any such restriction.<sup>5</sup> Accordingly, the Arbitrator awarded the grievant twelve hours of overtime compensation and interest on the unpaid compensation at a rate of 9% per annum. The Arbitrator then "award[ed] the Union . . . the status of prevailing party" and found that "as such[,] the Agency shall be solely responsible for the . . . costs associated with this decision."<sup>6</sup>

The Agency filed exceptions to the award. The Union did not file an opposition to the Agency's exceptions.

**III. Preliminary Matter: §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar certain Agency exceptions.**

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider

<sup>1</sup> Award at 3.

<sup>2</sup> *Id.* at 10 (emphasis omitted).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 14 (internal quotation marks and emphasis omitted).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 15.

any evidence or arguments that could have been, but were not, presented to the arbitrator.<sup>7</sup>

The Agency contends that the award is contrary to law because the Agency's violation of Section 7.A.2.a did not result in a withdrawal or reduction of pay as required by the BPA.<sup>8</sup> As noted above, Section 7.A.2.a provides that failure to comply with the requirements of that provision "constitute[s] an agreement with the grievant and his/her relief sought will be granted in favor of the employee if not prohibited by law."<sup>9</sup> The Agency knew at the time of the hearing that the relief requested in the grievance was for the grievant to "be made whole" with respect to his overtime claim.<sup>10</sup> Yet, before the Arbitrator, "[t]he Agency provided no evidence that would suggest that the relief requested by the Union would be prohibited by law."<sup>11</sup> As the Agency could have presented its argument that an award of overtime pay to remedy the Agency's violation of Section 7.A.2.a would violate the BPA to the Arbitrator, but did not do so, we find that §§ 2425.4(c) and 2429.5 bar this contrary-to-law exception.<sup>12</sup>

The Agency also argues that the award fails to draw its essence from the parties' agreement because it awards the Union the status of "prevailing party" and finds the Agency solely responsible for the arbitration costs.<sup>13</sup> Relying on Article 24, Section 8.5 of the parties' agreement (Section 8.5), the Agency contends that "[t]he Arbitrator's meager statement of reliance solely on the Union's prevailing in this arbitration" is erroneous because "it fails to address the relative merits of each party's case."<sup>14</sup> Section 8.5 provides, in pertinent part, that "[t]he [A]rbitrator shall be empowered to determine the percentages of [f] his/her fee for which each party will be liable" and that, "[i]n making this determination, the [A]rbitrator shall be bound by the relative merits of each party's case."<sup>15</sup> However, there is no indication in the record that the Agency raised Section 8.5 at arbitration.<sup>16</sup>

<sup>7</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *see also* U.S. DOL, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).

<sup>8</sup> Exceptions at 3-5.

<sup>9</sup> Award at 10.

<sup>10</sup> *Id.* at 14 (internal quotation marks and emphasis omitted).

<sup>11</sup> *Id.*

<sup>12</sup> *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

<sup>13</sup> Exceptions at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> U.S. DHS, CBP, 66 FLRA 495, 497 (2012) (dismissing essence claim based on contract provision that agency could have, but did not, raise at arbitration); U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla., 65 FLRA 1004, 1007 n.8 (2011) (same); *see also* U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div., Fraud/BSA, Detroit, Mich., 63 FLRA 567, 572 n.6 (2009) (dismissing essence exception under § 2429.5 where the agency claimed that under

Because the Agency could have presented its argument to the Arbitrator, but did not do so, we find that §§ 2425.4(c) and 2429.5 bar the Agency's essence exception.

#### IV. Analysis and Conclusions

The Agency contends that the award is contrary to law to the extent it awards interest at a rate higher than the statutory rate provided in the BPA.<sup>17</sup> Awards of backpay under the BPA are paid with interest calculated "at the rate or rates in effect under [§] 6621(a)(1) of the Internal Revenue Code [(Code)] of 1986,"<sup>18</sup> which is known as the "[o]verpayment rate."<sup>19</sup> Section 6621(a)(1) provides that the overpayment rate "shall be the sum of: (A) the [f]ederal short-term rate determined under subsection (b), plus (B) [three] percentage points."<sup>20</sup> Pursuant to § 6621(b), the Secretary of the Treasury determines the federal short-term rate for each calendar quarter in the first month of that quarter.

Internal Revenue Service Revenue Ruling 2013-16 provides that the "rates for interest determined under [§] 6621 of the Code for the calendar quarter beginning October 1, 2013, will be 3 percent."<sup>21</sup> Accordingly, the rate of interest available under the BPA for a backpay award issued on November 6, 2013 was 3%. We therefore find that the Arbitrator's award of interest at a rate of 9% was contrary to the BPA.

When the Authority is able to modify an award to bring it into compliance with applicable law, it will do so.<sup>22</sup> Because the Arbitrator erred in awarding the grievant interest at a rate of 9% per annum, we modify the award to provide for interest at a rate of 3% per annum, pursuant to the BPA.

#### V. Decision

We dismiss the Agency's exceptions in part, grant them in part, and modify the award to provide for interest at a rate of 3% per annum.

the parties' agreement, the union did not "substantially prevail" in the arbitration, such that the arbitration fees and costs should be apportioned equally, but there was "no indication in the record" that the agency raised its apportionment argument before the arbitrator).

<sup>17</sup> Exceptions at 5-6.

<sup>18</sup> 5 U.S.C. § 5596(b)(2)(B)(ii).

<sup>19</sup> 26 U.S.C. § 6621(a)(1).

<sup>20</sup> 26 U.S.C. § 6621(b)(1).

<sup>21</sup> Rev. Rul. 2013-16, 2013-2 C.B. 275.

<sup>22</sup> U.S. DOJ, U.S. Marshals Serv., 66 FLRA 531, 536 (2012).