

**67 FLRA No. 89**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 164  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
BLAINE, WASHINGTON  
(Agency)

0-AR-4899

DECISION

March 28, 2014

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

**I. Statement of the Case**

Arbitrator Gerald Cohen found that the Agency violated the Agency's rules and regulations when it failed to assign the grievant overtime. As a remedy, he awarded the grievant the opportunity to perform an additional overtime assignment (makeup overtime).

The substantive issue in this case is whether the award is contrary to the Back Pay Act (BPA)<sup>1</sup> because the Arbitrator failed to award overtime pay. As the Arbitrator made the necessary findings under the BPA for backpay, he was required to award a backpay remedy. Therefore, we find that the award violates the BPA, and modify it to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of its rules and regulations.

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

The Agency "withdrew [the g]rievant's official firearm" and reassigned him to other duties while it investigated an incident with which he was allegedly involved.<sup>2</sup> The Agency did not give the grievant overtime assignments while he was reassigned to other duties.

As pertinent here, the Union filed a grievance claiming that the Agency violated the parties' agreement by not providing the grievant with overtime opportunities. The grievance was not resolved, and the parties submitted the matter to arbitration. The Arbitrator framed the issue as whether "the Agency violate[d] the [c]ollective-[b]argaining [a]greement[,] any memorandum of understanding[,] or any other rule or regulation in refusing to assign [the] [g]rievant overtime? If so, what is the remedy?"<sup>3</sup>

The Arbitrator found that the Agency improperly denied the grievant overtime opportunities. In making this finding, the Arbitrator considered the Agency's Revised National Inspectional Assignment Policy (RNIAP) and its Use of Force Policy Handbook (Handbook). Section 5(A)(2)(a) of the RNIAP states: "The number of personnel assigned to any inspectional activity, regardless of whether it is performed on [a] regular or overtime basis, on a regular workday or holiday, shall be determined by [A]gency managers to meet the operational needs and budgetary concerns."<sup>4</sup> Section F.(10) of the Handbook provides that:

In the event an authorized officer has temporarily had their authority to carry a firearm rescinded, the officer will be assigned duties that do not require the carriage of a firearm until the officer's situation is resolve[d]. *During this time, the Agency will make a reasonable effort to assign these officers to duties that may provide for overtime compensation.*<sup>5</sup>

The Arbitrator found that the RNIAP provision is a "direction for the general awarding of overtime," while the Handbook provision "applies specifically to officers who have had a temporary rescission of their right to carry firearms."<sup>6</sup> Concluding that the specific rule in the Handbook "controls" over the general rule in the RNIAP, the Arbitrator concluded that the Handbook required the Agency to make a reasonable effort to provide the grievant with overtime and that the Agency violated the grievant's "rights" under the Handbook by failing to do so.<sup>7</sup> Thus, the Arbitrator found that the Agency subjected the grievant to an unjustified and unwarranted personnel action under Section F.(10) of the Handbook, which "resulted in a reduction of the [g]rievant's pay."<sup>8</sup>

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 15 (quoting Section 5(A)(2)(a)).

<sup>5</sup> *Id.* at 14 (quoting Section F.(10)).

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 16.

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Award at 4.

As a remedy, the Arbitrator “propos[ed]” that the grievant “be given some make[-]up overtime.”<sup>9</sup> The Arbitrator retained jurisdiction to determine “that question in the event that the parties [could not] come to any agreement on it.”<sup>10</sup>

The Union filed an exception. The Agency filed a motion to dismiss the exception as interlocutory and an opposition to the exception.

### III. Preliminary Matter: The Union’s exception is not interlocutory.

The Authority issued a show-cause order (order) directing the Union to show why its exception should not be dismissed as interlocutory.<sup>11</sup> In its response to the order, the Union claims that its exception is not interlocutory because the Arbitrator’s award is “a final and full resolution to the issues submitted for his determination.”<sup>12</sup> The Union asserts that the Arbitrator resolved the issue of the remedy when he ordered “some make-up overtime.”<sup>13</sup> According to the Union, the Arbitrator retained jurisdiction only to assist the parties in the implementation of that remedy.<sup>14</sup>

Section 2429.11 of the Authority’s Regulations provides that “the Authority . . . ordinarily will not consider interlocutory appeals.”<sup>15</sup> Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award completely resolves all of the issues submitted to arbitration.<sup>16</sup> Consequently, an arbitration award that postpones the determination of an issue submitted is not a final award subject to review.<sup>17</sup> However, an arbitrator’s retention of jurisdiction solely to assist with the implementation of any awarded remedies does not prevent the award from being final.<sup>18</sup> Such an award is final for purposes of filing exceptions because, while the award may leave room for further disputes about compliance, the award does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages.<sup>19</sup>

In this case, the Arbitrator resolved all of the issues submitted to arbitration because he found that the Agency violated its rules and regulations by failing to assign overtime to the grievant, and he identified a remedy for the violation.<sup>20</sup> Specifically, he “propose[d]” that the grievant “be given some make[-]up overtime,” and retained jurisdiction to “determine that question in the event that the parties [could not] come to any agreement on it.”<sup>21</sup> While the Arbitrator phrased the remedy in terms of a proposal, he did not direct the parties to negotiate an alternative remedy, and the award does not indicate that he or the parties contemplate the introduction of some new measure of damages. Therefore, taking the Arbitrator’s remedial discussion in context, we find that he awarded make-up overtime, directed the parties to attempt to agree to the amount of that overtime, and retained jurisdiction solely to assist the parties if they could not reach such an agreement.

To support its claim that the award is interlocutory, the Agency cites *U.S. Department of HUD (HUD)*<sup>22</sup> and *U.S. Department of the Treasury, IRS, Small Business/Self-Employed Business Division, Compliance Area 6 (IRS)*.<sup>23</sup> In *HUD*, the arbitrator did not make a final disposition on the merits of the grievance. And in *IRS*, the arbitrator declined to issue a remedy and instead directed the parties to negotiate one. In contrast, the Arbitrator here made a final disposition on the merits, expressly identified and awarded make-up overtime as a remedy, and left to the parties only the determination of the amount of make-up overtime that the grievant would receive.<sup>24</sup> Therefore, the Agency’s reliance on *HUD* and *IRS* is misplaced.

For the foregoing reasons, we find that the Union’s exception is not interlocutory, and resolve the merits of the exception.

### IV. Analysis and Conclusions: The award is contrary to the BPA.

The Union asserts that the Arbitrator’s award is contrary to the BPA.<sup>25</sup> Citing *NTEU, Chapter 231*,<sup>26</sup> the Union claims that when an arbitrator makes the requisite factual findings under the BPA, as in this case, the BPA requires a backpay remedy.<sup>27</sup>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Order at 2.

<sup>12</sup> Union’s Resp. (Resp.) at 1.

<sup>13</sup> *Id.* at 4 (internal quotations omitted).

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> 5 C.F.R. § 2429.11.

<sup>16</sup> See, e.g., *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (award not interlocutory where arbitrator retained jurisdiction only to assist with implementation of awarded remedies).

<sup>17</sup> See *id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Cong. Research Emps. Ass’n, IFPTE, Local 75*, 64 FLRA 486, 489-90 (2010); *U.S. Dep’t of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007).

<sup>20</sup> Award at 2, 15-16.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> 62 FLRA 52, 53 (2007).

<sup>23</sup> 61 FLRA 757, 759 (2006).

<sup>24</sup> Award at 16.

<sup>25</sup> Exception at 8-9.

<sup>26</sup> 66 FLRA 1024, *recons. denied*, 67 FLRA 67 (2012), *remanded without decision* No. 13-1024 (D.C. Cir. 2013) (*NTEU I*), *decision on remand*, 67 FLRA 247 (2014) (*NTEU II*).

<sup>27</sup> Exception at 10.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.<sup>28</sup> 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.<sup>29</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those factual findings are deficient as nonfacts.<sup>30</sup>

An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of the employee's pay, allowances, or differentials.<sup>31</sup>

The Authority has found that where an arbitrator's findings support an award of backpay under the BPA, the arbitrator's failure to award backpay is contrary to the BPA.<sup>32</sup> While the Authority has held that nothing in the BPA requires a monetary award for every unjustified or unwarranted personnel action, that holding is applicable only to situations where an arbitrator has found that the requirements of the BPA were not fully met.<sup>33</sup>

Here, the Arbitrator considered the requirements of the BPA and found that those requirements were met.<sup>34</sup> Specifically, he found that the Agency's failure to provide the grievant overtime consistent with Section F.(10) of the Handbook,<sup>35</sup> was "[an] unjustified personnel action" that "resulted in a reduction of the [g]rievant's pay."<sup>36</sup> Thus, the Authority precedent

discussed above supports a conclusion that the Arbitrator erred by not ordering backpay for the grievant.<sup>37</sup>

The Agency contends that, under § 5596(b)(4) of the BPA, "the scope of any monetary remedy available under the [BPA] is limited to the remedy authorized under the [RNIAP]," which the Agency states is the "provision of the next overtime opportunity."<sup>38</sup> However, the Authority has found that § 5596(b)(4)'s purpose is to establish an outermost time limit on backpay awards, while allowing for a shorter limitations period where "authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted personnel action" was found.<sup>39</sup> In other words, § 5596(b)(4) merely places time limits on recovery under the Act. As time limits on recovery were not an issue in this case, the Agency's reliance on § 5596(b)(4) is misplaced.

Based on the foregoing, we find that the award is contrary to the BPA. Accordingly, we modify the award and direct the Agency, consistent with the BPA, to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of its rules and regulations.<sup>40</sup>

## V. Decision

We grant the Union's exception and modify the Arbitrator's award to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of its rules and regulations.

<sup>28</sup> *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)).

<sup>29</sup> *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>30</sup> See, e.g., *AFGE, Local 1164*, 66 FLRA 74, 78 (2011).

<sup>31</sup> E.g., *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).

<sup>32</sup> See *NTEU I*, 66 FLRA at 1026-27 (award modified where Authority found that arbitrator was required to award backpay because his findings supported backpay under the BPA); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 7-8 (2007) (*Bremerton*) (rejecting agency's contention that an award of backpay was not required where arbitrator made all of the requisite findings under the BPA).

<sup>33</sup> See *NTEU I*, 66 FLRA at 1026.

<sup>34</sup> Award at 14-16.

<sup>35</sup> *Id.* at 14.

<sup>36</sup> *Id.* at 15-16.

<sup>37</sup> See *NTEU I*, 66 FLRA at 1026; see also, *Bremerton*, 62 FLRA at 7-8.

<sup>38</sup> *Opp'n* at 9 (citing 5 U.S.C. § 5596(b)(4)).

<sup>39</sup> *NTEU II*, 67 FLRA 247, 250 (2014) (quoting 5 U.S.C. § 5596(b)(4)).

<sup>40</sup> See, e.g., *NTEU I*, 66 FLRA at 1027.