

67 FLRA No. 91

UNITED STATES
DEPARTMENT OF THE AIR FORCE
GRISSOM AIR RESERVE BASE
MIAMI, INDIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3254
(Union)

0-AR-4928

—
DECISION

April 8, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella Concurring)

I. Statement of the Case

Arbitrator George E. Larney found that the Agency improperly delayed the grievant's promotion, and awarded her backpay.

The main question before us is whether the award is contrary to the Back Pay Act (BPA).¹ Because the Arbitrator did not find an unjustified or unwarranted personnel action within the meaning of the BPA, and the BPA requires such a finding to support an award of backpay, the answer is yes.

II. Background and Arbitrator's Award

The Agency hired the grievant into a General Schedule (GS)-7 contract-specialist position that had promotion potential to the GS-9 level. Although the Agency's GS-7 contract specialists are eligible for promotion to the GS-9 level after one year, and the Agency timely promoted two other newly hired contract specialists, the Agency delayed the grievant's promotion for approximately nine months beyond her eligibility date.

The Union filed a grievance claiming that the Agency discriminated against the grievant by delaying her promotion and that the Agency engaged in preferential treatment, unfair and inequitable distribution of work, and retaliation for past grievances. The parties did not resolve the grievance and submitted it to arbitration. The Arbitrator framed the issues, in relevant part, as whether the Agency "wrongfully delay[ed]" the grievant's promotion "for reasons other than her work performance" and, "[i]f so, what should be the appropriate remedy?"²

The Arbitrator stated that the Agency's actions "do not fall within the 'legal' definition of the term, 'discrimination.'" ³ Nevertheless – without citing any law, rule, regulation, or provision of the parties' collective-bargaining agreement – he found that the Agency treated the grievant in a "disparate manner" by not promoting her to the GS-9 level when she was first eligible.⁴ Accordingly, he sustained the grievance and awarded the grievant backpay.

The Agency filed exceptions to the Arbitrator's award.

III. Analysis and Conclusion: The award of backpay is contrary to the BPA.

The Agency argues that the award of backpay is contrary to law, specifically, the BPA.⁵ According to the Agency, the Arbitrator awarded backpay based on a "subjective sense of 'fairness,'" not on a finding of a violation of a law, rule, regulation, or the parties' collective-bargaining agreement.⁶ As a result, the Agency contends, the Arbitrator did not find an "unjustified or unwarranted personnel action," as the BPA requires.⁷

Under the BPA, an arbitrator may award backpay only when he or she 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.⁸ A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement is an "unjustified or unwarranted personnel action."⁹ Where an arbitrator

² Award at 11.

³ *Id.* at 46.

⁴ *Id.* at 50.

⁵ Exceptions Br. at 9.

⁶ *Id.*

⁷ *Id.* at 11.

⁸ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005) (*BOP*).

⁹ *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993) (*DOD*).

¹ 5 U.S.C. § 5596.

awards backpay without finding an unjustified or unwarranted personnel action, the Authority sets aside the backpay award.¹⁰

Here, the Arbitrator awarded backpay on the basis that the Agency treated the grievant in a “disparate manner.”¹¹ However, the Arbitrator did not find a violation of law, rule, regulation, or the parties’ collective-bargaining agreement – and, in fact, he expressly determined that the Agency’s actions did not “fall within the ‘legal’ definition of the term, ‘discrimination.’”¹² Therefore, he did not find that the Agency committed an unjustified or unwarranted personnel action, as the BPA requires to support an award of backpay.¹³ Accordingly, consistent with Authority precedent, we set aside the award of backpay.¹⁴

The Agency argues that the award of backpay is also deficient on several other grounds.¹⁵ As we set aside the backpay award as contrary to the BPA, we find it unnecessary to resolve the Agency’s remaining arguments.¹⁶

IV. Decision

We set aside the award of backpay.

Member Pizzella, concurring:

I agree with my colleagues that the Arbitrator’s award of backpay is clearly unwarranted because he did not find that the Agency violated any law, rule, regulation, or any provision of the parties’ collective-bargaining agreement.

In the instant grievance, the grievant asserted that the Agency discriminated against her when her promotion was delayed by nine months. The Arbitrator found, however, that the delay was not the result of discrimination¹ and that the Agency articulated valid performance issues which supported its decision to delay the grievant’s promotion.² *Case closed!*

Despite these findings (which answered the dispute the Arbitrator was hired to resolve), the Arbitrator nonetheless went on to find that the Agency treated the grievant in a “disparate manner,”³ based apparently on nothing more than his vague perception that the supervisor’s “demeanor and style . . . contributed” to unspecified “problems and complaints” in the workplace.⁴ But the Arbitrator did not cite to any provision of the parties’ agreement or any law, rule, or regulation that was violated.⁵

As I noted in *U.S. DHS, CBP*,⁶ arbitrators undermine “the effective conduct of [government] business”⁷ when they render “circular[.]”⁸ and “incoherent”⁹ arbitral awards. I write separately here, therefore, to emphasize that arbitrators are not free to award any remedy that they see fit.¹⁰ When an arbitrator awards a remedy that goes beyond the parameters of the issues submitted by the parties or is based on their own sense of fairness, rather than a specific violation of the parties’ agreement, law, rule, or regulation, they do not

¹⁰ See, e.g., *BOP*, 60 FLRA at 730.

¹¹ Award at 50.

¹² *Id.* at 46.

¹³ *DOD*, 48 FLRA at 224.

¹⁴ *BOP*, 60 FLRA at 730.

¹⁵ See Exceptions Br. at 9-13.

¹⁶ See, e.g., *U.S. Dep’t of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 808 n.6 (2012) (Authority found it unnecessary to address additional exceptions that challenged portion of award that was set aside).

¹ Award at 46.

² *Id.* at 47.

³ *Id.* at 50.

⁴ *Id.* at 49.

⁵ *Id.* at 46-49.

⁶ 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella).

⁷ *Id.* at 113 (quoting 5 U.S.C. § 7101(a)(1)(B)).

⁸ *Id.* (quoting *U.S. DOJ, Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011) (*BOP*)).

⁹ *Id.* (quoting *BOP*, 654 F.3d at 97).

¹⁰ *SSA, Louisville, Ky.*, 65 FLRA 787, 791 (2011) (Dissenting Opinion of Member Beck) (citing *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010) (arbitral remedy must be applied in a way that is “reasonably related” to violation of provision at issue); *U.S. Dep’t of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002) (arbitrators must confine their awards and remedies to those issues presented for resolution); *VA*, 24 FLRA 447, 450 (1986)).

“facilitate[] . . . the amicable settlement[] of disputes”¹¹
or promote “work practices [that] facilitate and improve
. . . the efficient accomplishment of the operations of the
Government.”¹²

Thank you.

¹¹ 5 U.S.C. § 7101(a)(1)(C).

¹² *AFGE, Council 215*, 67 FLRA 164, 166-67 (2014)
(Concurring Opinion of Member Pizzella).