

68 FLRA No. 134

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL
COMPLEX - ALLENWOOD
WHITE DEER, PENNSYLVANIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4047
(Union)

0-AR-5096

—
DECISION

August 25, 2015

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

I. Statement of the Case

Arbitrator Lucretia Dewey Tanner found that the Agency did not violate the parties' agreement when it suspended the employee-awards program in fiscal year (FY) 2013 due to sequestration. However, she ordered: (1) that those who received outstanding performance appraisals who would have received some monetary award be "recognized" by having "such documentation" placed in their personnel records;¹ and (2) backpay, in the form of quality-step increases, for those who were given outstanding performance appraisals for FY 2013.

The main question is whether the award is contrary to the Back Pay Act (BPA),² and Section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985 (the Balanced Budget Act).³ Because the Arbitrator specifically did not find a statutory or contractual violation, the BPA does not provide a basis for her award of backpay. Further, the Arbitrator did not find, and the Union does not argue, that another statute waives sovereign immunity in this case. Therefore, the

award is contrary to the BPA, and we do not reach the question as to the other cited statutory provisions argued by the Agency.

II. Background and Arbitrator's Award

The Budget Control Act of 2011⁴ required Congress to pass a budget-reduction plan by November 2011; however, Congress was unable to pass a budget-reduction plan, triggering a process known as "sequestration," which required across-the-board cuts to the federal discretionary budget.⁵ In response to sequestration, the Agency implemented spending restrictions for FY 2013. With regard to its employee awards for FY 2013, the Agency proposed a process whereby employees would receive recognition for exceptional performance and contributions, but the Agency would hold in abeyance any monetary amount attached to those awards, pending the release of funding by Congress. Of the three unions who represent employees that would be affected by the Agency's decision to implement spending restrictions, two unions reached agreement with the Agency. The third union submitted this grievance, alleging that the Agency was violating the parties' agreement, Agency policy, regulation, and law when it suspended the employee-awards program for FY 2013.

The matter was unresolved, and the parties submitted the matter to arbitration. The issue before the Arbitrator was "[whether] the Agency violated the [parties' agreement], agency policy, regulation[,] or law when it ended [or] suspended the [employee-]awards program for [FY] 2013." The Union argued that the Agency's suspension of the employee-awards program harmed its employees, and that the employees should be made whole under the BPA. The Agency, however, contended that the sequestration order governed the FY 2013 employee-awards program, which reduced operating budgets across the government, including the Agency.

The Arbitrator found that the Agency did not violate the parties' agreement when it suspended the employee-awards program due to the sequestration order. The Arbitrator also found: "sequestration was not a normal set of circumstances and could not be ignored by the [Agency]."⁶ Despite such, the Arbitrator ordered: (1) that those who received outstanding performance appraisals who would have received some monetary award be "recognized" by having "such documentation" placed in their personnel records;⁷ and (2) backpay, in the

¹ Award at 8.

² 5 U.S.C. § 5596.

³ Pub. L. 105-33 (Aug. 5, 1997).

⁴ Pub. L. 112-25 (Aug. 2, 2011).

⁵ Award at 1-2.

⁶ *Id.* at 7.

⁷ *Id.* at 8.

form of quality-step increases, for those who were given outstanding performance appraisals for FY 2013.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's contrary-to-law exception.

As a preliminary matter, the Union contends that the Authority should dismiss the Agency's argument that the award is contrary to the BPA, because this argument was not raised before the Arbitrator.⁸

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.⁹

The Agency contends that the award is contrary to the BPA, and so, violates the doctrine of sovereign immunity.¹⁰ Though the Agency did not raise to the Arbitrator the principle of sovereign immunity, a sovereign immunity objection may be raised to the Authority without regard to whether it was raised to the Arbitrator.¹¹ Accordingly, we resolve the sovereign immunity claim on the merits.

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

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by the exception and the award de novo.¹² 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 and does not assess his or her underlying reasoning.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.¹⁴ To the extent that the Agency challenges the Arbitrator's reasoning, that challenge provides no basis for finding the award contrary to law.¹⁵

The Agency argues that the Arbitrator failed to find that the Agency violated a statutory provision or a provision of the parties' agreement.¹⁶ Without such a finding, the Agency contends that it is contrary to law and in violation of the doctrine of sovereign immunity for the Arbitrator to award backpay.¹⁷ The Agency argues, to the contrary, that the Arbitrator explicitly found that the Agency did not violate the parties' agreement, and remained silent on whether there was a statutory violation.¹⁸

The Union, however, contends that the Arbitrator found that the Agency committed an unjustified or unwarranted personnel action that resulted in the reduction of the employees' pay, allowances, or differentials.¹⁹ Specifically, the Union cites to the portion of the award that states: "[I]t is the [A]rbitrator's decision that employees in the [b]argaining unit who were given outstanding performance appraisal[s] during FY 2013[,] and were eligible for [q]uality[-]step [i]ncreases and had not received for that period, be awarded them."²⁰ Thus, the Union argues that the Arbitrator's award of backpay was consistent with the BPA.²¹

⁸ Opp'n at 1-2.

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5; *see also, e.g., AFGE, Council 215*, 66 FLRA 771, 773 (2012) (declining to consider an argument that the award failed to draw its essence from the parties' agreement because the argument was not made during the arbitration hearing); *U.S. Dep't of the Treasury, IRS, Atlanta Compliance Serv., Jacksonville, Fla.*, 66 FLRA 295, 296-97 (2011) (Chairman Pope dissenting in part) (declining to consider arguments against requested remedy not argued below); *U.S. Dep't of HUD*, 64 FLRA 247, 249 (2009) (refusing to consider documents existing at the time of the arbitration hearing but not presented to the arbitrator).

¹⁰ Exceptions at 8-12.

¹¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189 (2009); *U.S. Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind., Dep't of the Army, Fin. & Accounting Office, Fort Sam Houston, Tex. v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995) (rejecting claim that sovereign immunity can be waived if not raised below); *see also U.S. Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, 648 F.3d 841, 845 (D.C. Cir. 2011); *Dep't of the Treasury, IRS v. FLRA*, 521 F.3d 1148, 1152 (9th Cir. 2008).

¹² *AFGE, Local 2595, Nat'l Border Patrol Council*, 67 FLRA 190, 191 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹³ *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010); *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*).

¹⁴ *See DOD*, 55 FLRA at 40.

¹⁵ *See AFGE, Local 3652*, 68 FLRA 394, 400-01 (2015); *AFGE, Nat'l Council of Field Labor Locals*, 67 FLRA, 264, 264-65 (2014).

¹⁶ Exceptions at 9.

¹⁷ *Id.*

¹⁸ *Id.* at 9-10.

¹⁹ Opp'n at 4.

²⁰ *Id.* (quoting Award at 8).

²¹ *Id.*

An award of backpay is authorized under the BPA only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials.²² With respect to the first requirement, the necessary element of an unjustified or unwarranted personnel action can be satisfied by a violation of applicable law,²³ a governing agency regulation,²⁴ or the parties' agreement.²⁵

Here, the Arbitrator quoted from Office of Management and Budget (OMB) Memorandum 13-11, and invoked OMB Memorandum 13-05, in the award's summary of the memoranda's references to quality-step increases. However, the Arbitrator did not reach a conclusion or make any finding that the quality-step increases at issue before her were themselves mandatory.²⁶ The Arbitrator then found that: "the sequestration was not a normal set of circumstances and could not be ignored by the [Agency]."²⁷ Next, the Arbitrator awarded backpay for "any quality[-]step increases not [already] granted," despite the Arbitrator's decision that "the Agency did not violate the [parties'] [a]greement when it suspended the [employee-]awards program because of the sequestration order."²⁸

Because the Arbitrator specifically found that the Agency did not violate the parties' agreement and did not find that the Agency violated a law or a governing Agency regulation, the award does not include a finding that the Agency committed an unjustified or unwarranted personnel action as required by the BPA.²⁹ Therefore, the Arbitrator did not have any basis under the BPA to award backpay.³⁰ Further, the Arbitrator did not find, and the Union does not argue, that any law other than the BPA waives sovereign immunity in this case. Accordingly, we find the award contrary to law and grant the Agency's exception.

The Agency also argues that the award is contrary to the Balanced Budget Act, is contrary to 5 C.F.R. § 550.111, and is based on nonfact.³¹ As we set

aside the award as contrary to the BPA, it is unnecessary to resolve the Agency's remaining exceptions.³²

V. Decision

We grant the Agency's contrary-to-law exception and set aside the award of backpay.

²² *Nat'l Ass'n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006).

²³ *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 56 FLRA 477, 479 (2000).

²⁴ *U.S. Dep't of Transp., FAA*, 64 FLRA 922, 923 (2010).

²⁵ *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012).

²⁶ See Award at 7.

²⁷ *Id.*

²⁸ *Id.* at 8.

²⁹ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014).

³⁰ See, e.g., *AFGE, Local 1228*, 65 FLRA 330, 332 (2010).

³¹ Exceptions at 12-13.

³² *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, 67 FLRA 342, 343 (2014) (finding it unnecessary to address remaining exceptions after setting aside award of backpay as contrary to the BPA).

Chairman Pope, concurring:

I agree with the majority that the Arbitrator's award is contrary to the Back Pay Act (the Act).¹ However, I rely on different reasoning to reach that conclusion.

With respect to whether the question of the award's consistency with the Act is properly before us, §§ 2425.4(c) and 2429.5 of the Authority's Regulations² do not bar an excepting party from making arguments where it is unclear that the party reasonably should have known to make those arguments at arbitration.³ In this case, the Agency's pertinent exception claims that the Arbitrator's award is contrary to the Act because she awarded backpay without finding an unjustified or unwarranted personnel action.⁴ In my view, it is not clear that the Agency reasonably could have expected, at arbitration, that the Arbitrator would *both* find no violation of law or contract *and* then go on to award backpay. As I have stated previously in similar circumstances, "requiring the Agency to have such predictive powers is unsupported by § 2429.5, as interpreted by the Authority."⁵ For those reasons, I would find that §§ 2425.4(c) and 2429.5 do not bar the Agency's argument that the award is contrary to the Act. And, in so finding, I express no opinion on the soundness of the majority's rationale for reaching the merits of that argument.

With respect to the merits of the Agency's argument, the Arbitrator did not find that the Agency committed any legal or contractual violation. As such, she did not find that the Agency committed an unjustified or unwarranted personnel action – a required finding for an award of backpay under the Act.⁶ Accordingly, I agree with the majority that the award of backpay is contrary to the Act, and that it must be set aside.

¹ 5 U.S.C. § 5596.

² 5 C.F.R. §§ 2425.4(c), 2429.5.

³ *See, e.g., SSA, Louisville, Ky.*, 65 FLRA 787, 789 (2011) (SSA).

⁴ Exceptions at 9-10.

⁵ *U.S. Dep't of the Treasury, IRS, Atlanta Compliance Servs., Jacksonville, Fla.*, 66 FLRA 295, 298 (2011) (Dissenting Opinion of Chairman Pope) (citing SSA, 65 FLRA at 789).

⁶ *E.g., AFGE, Council of Prison Locals C-33, Local 720*, 68 FLRA 452, 453 (2015).