70 FLRA No. 34

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

0-AR-5223

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DECISION

February 28, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award issued by Arbitrator Robert M. Hirsch. At arbitration, the Agency and the Union stipulated that the Agency violated the parties' collective bargaining agreement (Agreement) when it did not adhere to the notification protocols prior to placing the grievant on light duty for approximately five months. Both parties also stipulated that the grievant suffered a loss in overtime pay while on light duty. Therefore, the Arbitrator sustained the grievance and granted a monetary remedy measured in the average overtime compensation that the grievant would have been eligible to earn had he never been placed on light duty. The Agency filed exceptions to the award, and the Union filed an opposition.

The first question is whether the award is contrary to law. First, the Agency argues that the award would entitle the grievant to overtime earnings that exceed the statutory cap provided in the Department of Homeland Security Appropriations Act of 2015 (Appropriations Act).[1] Second, the Agency argues that the award obligates the Agency to provide the grievant a sum of money not authorized in an appropriation, which violates the Anti-Deficiency Act (ADA).[2] Because Authority precedent and the Agency's own historical interpretation of the applicable regulation do not demonstrate that the statutory cap provided in the Customs Officer Pay Reform Act (COPRA)[3] applies to backpay, we find that the answer is no. Similarly, because the Agency's claim that the award violates the ADA is premised on finding that the award violates COPRA and the Appropriations Act, we also reject this exception.

The second question is whether the Arbitrator exceeded his authority by issuing an award that is contrary to law. Because the Agency provides no basis for finding that the Arbitrator was precluded from awarding monetary damages measured in lost overtime pay, the answer is no.

II. Background and Arbitrator's Award

The grievant is an Agency customs and border patrol officer. Following an investigation of the grievant for engaging in for-profit subleases of satellite receivers that violated his cable provider's contract, the Agency issued a notice letter, and placed him on light duty pending a determination on whether to remove him from service.

The Union filed a grievance about the notice letter, arguing that it was inadequate and untimely. The Union argued that the Agency failed to articulate an adequate nexus between the alleged misconduct and public safety that would warrant placing the grievant on light duty. And, since the grievant was ineligible for overtime as a result of being on light duty, the Union sought a remedy that would provide the grievant with the average overtime pay for the period he was on light duty.

The Agency agreed that it had violated Article 43 of the Agreement, the Agency Handbook, and a memorandum of understanding between the parties when it placed the grievant on light duty without providing him the adequate notice and nexus statement. However, the parties were unable to determine an appropriate remedy, and the matter was submitted to arbitration.

Before the Arbitrator, the parties stipulated that the Agency's notice letter violated Article 43 of the Agreement. The Agency also expressly waived any argument seeking the remedy of re-serving a correct notice letter because, in a similar grievance brought to arbitration before the same arbitrator years earlier, upon determining such a due-process notification letter was

[1] Pub. L. No. 114-5, 129 Stat. 39, 41.

[2] 31 U.S.C. § 1341(a).

[3] 19 U.S.C. § 267(c)(1).

faulty, he had vacated the underlying action and awarded backpay. Therefore, the Arbitrator found that the sole issue before him was to determine the appropriate remedy for the faulty notice letter.

The Arbitrator turned immediately to the issue of backpay. He noted that Article 28 of the Agreement required that "[w]hen the Union has requested . . . a remedy [such as] back[pay] . . . [it] will be provided in accordance with standards established by [the Federal Labor Relations Authority, Merit Systems Protection Board], or other applicable jurisdiction."[4] Citing the Back Pay Act (BPA),[5] the Arbitrator found that the grievant was entitled to a compensation amount "equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred."[6]

Additionally, the Arbitrator noted that the COPRA provided a statutory cap on overtime earnings (statutory cap) at $35,000 in any fiscal year.[7] In fiscal year 2015, the grievant had earned $33,218.01 in overtime pay. However, the Arbitrator determined that the COPRA statutory cap was not applicable here because Authority precedent recognizes that "awards made in accordance with back[pay] settlements, shall not be applied to any applicable pay cap calculation."[8]

The Agency also argued that had the grievant "actually earned $8,450.34 during the period of time he was on light duty assignment, he would have been unable to work the overtime 'towards the end of the year' because he would have [exceeded] the statutory cap."[9] In that respect, the Arbitrator rejected the Agency's argument and found that "the Arbitrator need not consider the [g]rievant's earnings after he returned to full duty . . . in 2015. [Instead, o]nly the period of time when [the grievant] was assigned [to] light duty is relevant" in determining the backpay settlement.[10]

The Arbitrator concluded that the "best measure[ment of the backpay] amount due is based upon an average of the five preceding years of overtime earned by the [g]rievant during the same time period."[11] The Arbitrator ordered that the Agency make the grievant whole by awarding him the average of overtime earnings for the five preceding years during the period he was on light duty. The Arbitrator also clarified that he was not awarding overtime pay, but rather that the award was "measured by the most reasonable calculation of lost overtime pay, which [the grievant] would have earned had he not been wrongly assigned [to] light duty in 2015."[12]

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

III. Analysis and Conclusion

A. The award is not contrary to law.

The Agency argues that the award is contrary to the Appropriations Act and the ADA.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[14] 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.[15] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[16] unless a party demonstrates that the findings are deficient as nonfacts.[17]

Regarding the Agency's first contrary-to-law argument, the Agency contends that the award is contrary to the Appropriations Act because the award amount, when combined with the grievant's actual overtime earnings for fiscal year 2015, would have exceeded the statutory cap.[18] Additionally, the Agency argues that the Appropriations Act provides only limited circumstances – subject to the Secretary of Homeland Security's approval – where overtime pay may exceed the statutory cap.[19] With respect to the statutory cap exception provided under 19 C.F.R. § 24.16(h), the Agency argues that it is

[4] Award at 3.
[5] 5 U.S.C. § 5596(b)(1)(A)(i).
[6] Award at 4.
[7] Appropriations Act, Pub. L. No. 114-5, 129 Stat. 39, 41 (increasing the overtime limitations for fiscal year 2015 prescribed in 19 U.S.C. § 267(c)(1) to $35,000 for any employee of the United States Customs and Border Protection).
[8] Award at 9 (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (*Treasury*) (quoting 19 C.F.R. § 24.16(h)) (internal quotations omitted).
[9] *Id.* at 8.
[10] *Id.* at 9-10.
[11] *Id.* at 10.
[12] *Id.* (emphasis omitted).
[13] Exceptions Br. at 4.
[14] *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)).
[15] *AFGE, Local 3506*, 65 FLRA 121, 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[16] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[17] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[18] Exceptions Br. at 4.
[19] *Id.* at 5.

not applicable in this matter.[20] Instead, the Agency contends that it is bound by the plain language of the Appropriations Act and that the grievant should have been awarded no more than $1,781.99 in non-performed overtime backpay in order to remain compliant with the Appropriations Act.[21]

We find the Agency's first argument without merit because Authority precedent and the Agency's own historical interpretation – to which we give deference – of § 24.16(h) provide that the Arbitrator's monetary award does not violate the Appropriations Act. In *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons (DOJ)*,[22] the Authority adopted the federal court practice of granting deference to an agency's interpretation of its own regulations, by giving its publicly articulated and pre-litigious interpretation "controlling [weight] unless it is 'plainly erroneous or inconsistent' with the language of the regulation."[23]

Under the plain wording of § 24.16(h), total payments for overtime shall not exceed any applicable fiscal-year pay cap established by Congress.[24] However, compensation awarded to a customs and border patrol officer for work not performed, which includes "awards made in accordance with back[pay] settlements, shall not be applied to any applicable pay cap calculations."[25]

Regulatory history entitled "Pay Reform for Customs Inspectional Services" provides that the Agency's own interpretation of § 24.16(h) exempts backpay awards from any applicable statutory pay caps.[26] Specifically, following the publication in 1994 of notice of § 24.16(h) and the request for comments, the Agency was asked whether backpay "awards and settlements [would be excluded] from the listing of categories not subject to any applicable pay cap calculations."[27] The Agency responded that:

> Regarding the exclusion of back[pay] awards and settlements, the current regulatory language provides that "awards made in accordance with back[pay] settlements" shall not be applied to any applicable pay[-]cap calculations. This correctly conveys the fact that such awards are exempt. Accordingly, no change to § 24.16(h) is made concerning this point.[28]

Based on the foregoing, the Authority in *DOJ* concluded that awards made in accordance with backpay settlements, such as the case here, are not subject to the statutory cap based on the plain language of § 24.16(h) as well as the Agency's own interpretation.[29]

Additionally, the Agency fails to persuade us to abandon well-established precedent. In *U.S. Department of the Treasury, U.S. Customs Service, El Paso, Tex.* (*Treasury*),[30] the Authority analyzed the same argument stemming from an award of backpay for work not actually performed and concluded that COPRA's statutory cap does not apply to awards under the BPA. Thus, we remain consistent with *Treasury*, as the Agency has not demonstrated that the Appropriations Act prohibits the Arbitrator from finding that the grievant was entitled to a remedy of reasonably calculated overtime pay.[31] And so, we reject this argument.

Regarding the Agency's second argument, the Agency argues that the award violates the ADA because the award "obligates the [Agency] to fund [the grievant] for a sum of money not authorized in an appropriation."[32] While the Authority has held that any disbursements of appropriated funds must be authorized by statute,[33] the Authority also recognizes that the BPA is a waiver of sovereign immunity.[34] Notably, when a sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the award is consistent with the BPA, the Authority denies the sovereign-immunity claim.[35] As the award satisfies the requirements of the BPA, it is therefore not in violation of the ADA. Moreover, because the Agency's claim that the award violates the ADA is premised on finding that the award violates the Appropriations Act – which we deny – we also reject this argument. Accordingly, we deny the Agency's contrary-to-law exception.

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[20] *Id.* at 6.
[21] *Id.* at 5-6.
[22] 51 FLRA 1126, 1136 (1996).
[23] *Id.* (quoting *FLRA v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1455 (D.C. Cir. 1989)).
[24] 19 C.F.R. § 24.16(h).
[25] *Id.*
[26] 59 Fed. Reg. 46752-02, 46754 (Sept. 12, 1994).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] 55 FLRA 553 (1999).
[31] *U.S. DHS, U.S. CBP*, 68 FLRA 524, 526, *recons. denied*, 69 FLRA 22 (2015).
[32] Exceptions Br. at 8.
[33] *Ass'n of Civilian Technicians, P.R. Army Chapter*, 58 FLRA 318, 321 (2003) (Member Pope concurring).
[34] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009) (*BOP*).
[35] *U.S. DHS, U.S. CBP*, 68 FLRA 253, 258 (2015) ("When a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim."); *see also U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014); *BOP*, 63 FLRA at 189-90.

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority because his award is contrary to law.[36] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[37]

The Agency argues that the sole question before the Arbitrator was limited to determining the overtime-pay award for the notice-letter violation. The Agency's exceeds-authority exception is premised on distinguishing the Arbitrator's award as a 2016 monetary damage rather than a 2015 overtime-pay award.[38]

Here, as explained above, the Arbitrator found that the Agency violated Article 43 of the Agreement, and we have determined that the award satisfies the requirements of the BPA. As we deny the Agency's contrary-to-law exceptions, the Agency's argument that the Arbitrator exceeded his authority by granting a monetary remedy provides no basis for finding the award deficient. Therefore, we also deny the Agency's exceeds-authority exception.[39]

IV. Decision

We deny the Agency's exceptions.

[36] Exceptions Form at 10; Exceptions Br. at 8-9.
[37] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[38] Exceptions Br. at 9.
[39] *See, e.g.*, *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 692 (2014).