70 FLRA No. 114

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
DETROIT SECTOR
DETROIT, MICHIGAN
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2499
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5317

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DECISION

May 9, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

On August 29, 2017, Arbitrator John A. Obee issued an award finding that the Agency violated an Agency policy and the parties' collective-bargaining agreement by failing to initiate disciplinary action against an employee (the grievant) at the earliest practicable date. As a remedy, the Arbitrator directed the Agency to provide the grievant backpay for twelve months of overtime opportunities that he lost as a result of the Agency's violations of the policy and the parties' agreement.

The main question before us is whether the award violates management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Analyzing this question using the framework in *U.S. DOJ, Federal BOP* (*DOJ*),[2] because the remedy of backpay for twelve months of lost overtime opportunities does not reasonably and proportionally relate to the Agency's failure to provide the grievant with disciplinary notice at the earliest practicable date, we set aside the award as contrary to § 7106(a)(2)(B).

II. Background

On March 6, 2015, the national Chief of the Border Patrol established specialized procedures for disciplinary cases that involved the two most common reasons for arresting Border Patrol Agents: alcohol and domestic violence. The Chief explained that, because the ordinary investigative and disciplinary process was lengthy, the Border Patrol needed expedited procedures for these two types of offenses. The Chief named the expedited procedures the "Standardized Post-Employee Arrest Requirements," or "SPEAR."[3] However, SPEAR included a caveat that the "Agency reserves the right to not utilize these . . . procedures when preliminary findings indicate that they are not appropriate under the circumstances."[4]

On October 2, 2015, the grievant was driving and off duty when a police officer pulled him over. The grievant reported that he was carrying his Agency-issued firearm, and the officer secured the grievant's weapon. After testing the grievant's sobriety, the officer arrested the grievant for driving under the influence of alcohol. The grievant reported his arrest to the Agency, which revoked his authorization to carry a firearm and reassigned him from regular border-patrol duties to administrative duties only.

The Agency processed the grievant's infraction using the ordinary disciplinary procedure, rather than SPEAR. Whereas the average case under SPEAR took two months to resolve, the grievant's case took fourteen months. During that period, the grievant remained on administrative duties, which made him ineligible for overtime. After fourteen months, the grievant was served a notice of a proposed suspension, the Agency restored his authorization to carry a firearm, and the grievant returned to regular duties with overtime eligibility.

The Union filed a grievance alleging, as relevant here, that the Agency's "untimeliness in handling" the grievant's discipline violated the parties' collective-bargaining agreement.[5] The Union argued that if the Agency had applied SPEAR to the grievant's case, then he would have returned to regular duties and regained overtime eligibility much more quickly than he did. The parties proceeded to arbitration before the Arbitrator.

Turning to the merits of the Union's complaint that the Agency should have applied SPEAR to the grievant's case, the Arbitrator found that both Article 32, Section G of the parties' agreement (Article 32G) and

[1] 5 U.S.C. § 7106(a)(2)(B).
[2] 70 FLRA 398 (2018) (Member DuBester dissenting).
[3] Award at 5.
[4] *Id.* (quoting SPEAR § 4.1.4).
[5] Opp'n, Attach. 1, Grievance Submissions & Resps. at 1.

SPEAR required the Agency to initiate disciplinary actions as early as practicable. The Agency argued that the grievant was not eligible for SPEAR because he was arrested for an alcohol-related offense while in possession of his firearm, and because he had a prior disciplinary reprimand. But the Arbitrator found that the Agency had applied SPEAR in several cases that were similar to the grievant's case, and that the Agency's witnesses could not explain why the Agency had treated the grievant differently. The Arbitrator acknowledged that the Agency had discretion not to apply SPEAR based on "preliminary findings" about its appropriateness.[6] However, the Arbitrator found that there was no evidence that the Agency made any preliminary findings that SPEAR was not appropriate. Consequently, the Arbitrator held that the Agency's failure to apply SPEAR to the grievant's case was arbitrary and capricious and violated SPEAR. Further, the Arbitrator found that, by violating SPEAR, the Agency "concomitantly"[7] violated Article 32G's requirement to initiate discipline at the "earliest practicable date."[8]

The Arbitrator found that, if the Agency had complied with Article 32G and SPEAR, then the grievant would have regained eligibility for overtime after two months of performing only administrative duties, rather than fourteen months of performing those duties. Thus, as a remedy, the Arbitrator awarded the grievant backpay for the overtime that the grievant would have worked if the Agency's violations of Article 32G and SPEAR had not extended his administrative-duties assignment by twelve months.

On September 28, 2017, the Agency filed exceptions, and on November 29, 2017, the Union filed an opposition.

III. Analysis and Conclusion: The remedy of backpay for twelve months of lost overtime opportunities is not reasonably and proportionally related to the violation of Article 32G.

The Agency argues that the Arbitrator's decision that the Agency could not restrict the grievant to administrative duties for fourteen months violates the Agency's right to assign work under § 7106(a)(2)(B) of the Statute.[9] The right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, duties will be assigned.[10]

Evaluating the Agency's argument using the framework set forth in *DOJ*,[11] the first question is whether the Arbitrator found a violation of a contract provision.[12] The Arbitrator found that the Agency violated Article 32G by not applying SPEAR to expedite the initiation of the grievant's disciplinary action. Thus, the answer to the first question is yes.

The second question under *DOJ* is whether the Arbitrator's remedy reasonably and proportionally relates to the violation of Article 32G.[13] The Arbitrator recognized, under the plain wording of SPEAR, that the Agency expressly "reserve[d]" its right *not to apply* SPEAR if the Agency did not find it appropriate.[14] However, the Arbitrator's determination that the Agency violated Article 32G rested almost entirely on his finding that the Agency failed to follow its own policy when it did not make "preliminary findings" as to the appropriateness of using SPEAR for the grievant's case; therefore, the Arbitrator concluded the Agency could have, and should have, applied SPEAR to the grievant.[15] Although the Arbitrator found that the Agency did not provide the grievant with disciplinary notice at the "earliest practicable date" under Article 32G,[16] awarding a remedy of *twelve months* of backpay for lost overtime, spanning a window of time that ran heedless of actual events, is disproportionate to the Agency's violation of Article 32G's notice provision. Because the Arbitrator's remedy does not reasonably and proportionally relate to the Agency's violation of Article 32G, the answer to the second *DOJ* question is no.

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[6] Award at 11.
[7] *Id.* at 16; *see also id.* at 14 ("[T]he violation of SPEAR in this case also constituted a violation of Article 32G.").
[8] *Id.* at 9 (quoting Art. 32G); *see also id.* at 16 (finding violation of Art. 32G), 18 (same).
[9] Exceptions Br. at 15.
[10] *E.g., U.S. Dep't of Transp., FAA*, 61 FLRA 54, 56 (2005); *cf. AFGE, AFL-CIO, Nat'l Border Patrol Council*, 23 FLRA 146, 152 (1986) (where proposal limited agency's discretion to assign duties that did not qualify for administratively-uncontrollable-overtime pay, Authority found proposal affected management's right to assign work).
[11] 70 FLRA at 405-06.
[12] *Id.* at 405.
[13] *Id.*
[14] Award at 5 (quoting SPEAR § 4.1.4).
[15] *E.g., id.* at 16 (stating that the "Agency violated . . . SPEAR . . . and concomitantly Article 32G").
[16] *Id.* at 10.

Accordingly, we set aside the award as contrary to § 7106(a)(2)(B),[17] and we do not reach the third question under *DOJ*.[18]

IV. Decision

We set aside the award as contrary to law.

[17] *DOJ*, 70 FLRA at 405 (if the answer to the second *DOJ* question is no, "then the award must be vacated").

[18] Because we are setting aside the award as contrary to § 7106(a)(2)(B), we need not address the Agency's remaining arguments. *E.g.*, Exceptions Br. at 10-14 (arguing award is contrary to management's right to discipline employees under § 7106(a)(2)(A)), 9-10 & n.3 (making other contrary-to-law arguments), 18-21 (alleging award is based on a nonfact); Exceptions Form at 4-6 (making additional contrary-to-law arguments). Nor need we address the Union's claim that some of those arguments are not properly before us. *See* Opp'n Br. at 5 (arguing that Authority's Regulations bar Agency's argument that award violates management's right to discipline employees).

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's detailed, carefully-reasoned award. The majority grants the Agency's management-rights exception based on the flawed analysis the majority adopted in *U.S. DOJ, Federal BOP* (*DOJ*).[1] I explained in *DOJ* why the majority's analysis is contrary to well-established statutory principles and policies.[2] The majority's decision in the current case confirms the validity of those objections, and casts further light on the arbitrary nature of the *DOJ* analysis.

The Arbitrator's award is simple and straightforward. The Arbitrator finds that because of the Agency's failure to comply with the Agency's Standardized Post-Employee Arrest Requirements (SPEAR) disciplinary directive, and a provision of the parties' agreement, Article 32G, both requiring "swift, consistent imposition of disciplinary action," the grievant lost significant overtime-pay opportunities.[3] The Arbitrator finds that, had the Agency followed its SPEAR directive and Article 32G, the grievant would have regained eligibility to earn various types of overtime pay within two months of being assigned only administrative duties, rather than having to wait fourteen months for the Agency's ordinary disciplinary procedure to run its course.[4]

In support, the Arbitrator finds "no evidence" that the Agency made any "preliminary findings" that SPEAR was not appropriate, as SPEAR required.[5] Moreover, the Arbitrator finds that although "SPEAR was designed to . . . 'standardize management [disciplinary] actions and ensure *consistency*,"[6] the Agency showed "no consistency whatsoever" in SPEAR's application.[7] Rejecting the Agency's claims, the Arbitrator finds that the Agency did not exclude cases like the grievant's from SPEAR.[8] Instead, the Arbitrator finds the Agency applied SPEAR to other cases similar to the grievant's.[9] None of these findings are disputed in the majority's decision.

So why, one might ask, does the majority set aside the award's remedy of backpay for twelve months of lost overtime?[10] The majority's decision offers a concise, but nonetheless incomprehensible, answer. The majority sets aside the award's overtime-pay remedy because the remedy "span[s] a window of time that ran heedless of actual events."[11] Such a remedy, the majority concludes, is "disproportionate" to the Agency's undisputed contract violation.[12]

The majority's decision raises a host of questions. For example, the majority's decision does not address the Arbitrator's finding that the Agency violated its SPEAR directive.[13] This is a separate and independent ground for the award. As such, this finding supports the Arbitrator's remedy as completely as the Arbitrator's separate finding of a contract violation.[14]

Further, the majority's decision does not explain why the Arbitrator's remedy is "disproportionate."[15] Specifically, based on the Arbitrator's finding that the Agency should have applied SPEAR and Article 32(g) to the grievant's case, the Arbitrator finds that the grievant's administrative-duty assignment should have lasted only two months, which was the average length of disciplinary proceedings under SPEAR.[16] But the grievant's assignment lasted for fourteen months as his case moved through the ordinary disciplinary process. Therefore, the Arbitrator finds, the Agency's violations resulted in the grievant losing twelve months of overtime eligibility. In these circumstances, why would the Arbitrator's mathematically accurate remedy of backpay for twelve months of lost overtime not "reasonably and proportionally relate" to the Arbitrator's finding that the Agency violated SPEAR and Article 32G?[17]

Moreover, and more generally, the majority's decision departs, without explanation, from "the traditional, widely-recognized deference to arbitrators' remedial determinations."[18] The majority's decision is also in conflict with the Back Pay Act. In this case, the Arbitrator awarded a monetary remedy under the Back Pay Act for what is concededly an unjustified and

[1] 70 FLRA 398 (2018) (Member DuBester dissenting).
[2] *Id.* at 409-12 (Dissenting Opinion of Member DuBester).
[3] Award at 11-14.
[4] *Id.* at 14.
[5] *Id.* at 11.
[6] *Id.*
[7] *Id.* at 13.
[8] *Id.*
[9] *Id.* at 13-14.
[10] *See id.* at 18.
[11] Majority at 4.
[12] *Id.*
[13] *E.g.*, Award at 14.
[14] *E.g.*, *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 124 (2007) (contract violation is "a separate and independent ground for the remedies granted by the Arbitrator"); *see also OPM*, 61 FLRA 358, 364 (2005) ("The Authority has uniformly held that when an award is based on separate and independent grounds, all grounds for the award must be deficient for the award to be vacated.").
[15] Majority at 4.
[16] Award at 14.
[17] *DOJ*, 70 FLRA at 405-06.
[18] *Id.* at 412 (Dissenting Opinion of Member DuBester); *see also U.S. DOD Def. Contract Audit Agency, Cent. Region*, 51 FLRA 1161, 1164-65 (1996) ("It is well established that . . . [a]n arbitrator is granted [substantial] broad discretion to fashion appropriate remedies for contract violations.").

unwarranted personnel action that resulted in a loss of pay: the Agency's violations of an Agency directive and a collective-bargaining-agreement provision.[19] This unexplained failure to follow established precedent in multiple areas is classic arbitrary and capricious decisional behavior.[20]

Finally, and most generally, the majority's disposition of the case, and the analysis the majority employs, rests on what appear to be little more than the majority's "vague" impressions of what parties and arbitrators may and may not do in creating and administering collective-bargaining relationships. Lacking discernible principles, vague decisional frameworks like the majority's "invite the exercise of arbitrary power."[21] The majority's decision in this case is an example.

For all these reasons, I dissent from the majority's disposition of the case, and would reach the Agency's remaining exceptions.

[19] 5 U.S.C. § 5596; *see also SSA, Region VI*, 67 FLRA 493, 496 (2014) (back pay authorized under the Back Pay Act when grievant subjected to unjustified and unwarranted personnel action).

[20] *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973); *Willamette Indus., Inc. v. NLRB*, 144 F.3d 877, 880 (D.C. Cir. 1998); *Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017, 1022 (D.C. Cir. 1995); *NLRB v. Auciello Iron Works, Inc.*, 980 F.2d 804, 812 (1st Cir. 1992); *Doyle v. Brock*, 821 F.2d 778, 786 (D.C. Cir. 1987); *Local 32, AFGE v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974).

[21] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch).