**71 FLRA No. 62**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5460

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DECISION

September 26, 2019

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

Decision by Member Abbott for the Authority

## I. Statement of the Case

In this case, we find that Arbitrator William W. Lowe prematurely denied the Union's request for attorney fees pursuant to an award of compensatory time. The remainder of the Union's exceptions are denied.

The award ordered the Agency to give specific bargaining-unit employees compensatory time and pay travel expenses for transportation from their official duty stations (ODS) to Richmond, Virginia for mandatory training. Because the Union fails to show that interest on reimbursements is appropriate under the Back Pay Act (BPA),[1] the award's denial of interest is not contrary to law. Second, the Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator found that the employees were owed compensatory time instead of overtime. Because the Union fails to challenge the Arbitrator's pertinent factual findings, we also deny this exception.

Lastly, we find that the Arbitrator's award is contrary to the BPA because the Arbitrator did not permit the Union to submit a petition for attorney fees despite the award of compensatory time. Accordingly, we set aside the portion of the award that denies attorney fees and remand the attorney fee issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

## II. Background and Arbitrator's Award

Certain employees of the Agency were required to travel to the medical center in Richmond, Virginia from their ODS for mandatory training. Article 37, Section 3 of the parties' agreement in effect at the time states that "[t]he Department will pay all expenses, including tuition and travel, in connection with training required by the Department."[2] From early 2015 to 2017, the employees alleged that they never received overtime or travel expenses[3] incurred while traveling for the mandatory training.

The Arbitrator found that the Agency violated the parties' agreement. He found that Article 37, Section 3 makes it "apparent that the Department's intention is to compensate employees for their travel to and from remote locations where the training is given for mandatory training" and so the affected employees should be reimbursed for their travel expenses.[4] However, the Arbitrator determined that the employees were not working during the overtime period, nor were they traveling during "hours of work."[5] He found that

[1] 5 U.S.C. § 5596.

[2] Award at 7.

[3] While the grievants claim that "tolls, mileage, and hotel costs" are reimbursable travel expenses under the parties' agreements, *id.* at 13, the Arbitrator's award does not clearly explain what travel expenses each grievant is awarded. *Id.* at 21-23. However, based on a June 3, 2015 memorandum of understanding between the parties, it seems that the grievants were awarded, at most, reimbursements for mileage and per diem. *Id.* at 8-9.

[4] *Id.* at 19.

[5] *Id.* at 17. Article 25, Section 1.B provides that an employee cannot claim overtime for their travel expenses if they are not working during the overtime period. *Id.* at 6. Furthermore, Article 25, Section 1.B.2 states that "travel away from an employee's ODS is *hours of work* if the travel" is pre-approved, during non-duty hours, and meets one of the following four conditions:

> a. Involves the performance of work while traveling (such as driving a loaded truck);
> b. Is incident to travel that involves the performance of work while traveling (such as driving an empty truck back to the point of origin);
> c. Is carried out under arduous and unusual conditions (e.g., travel on rough terrain or under extremely severe weather conditions); or,
> d. Results from an event that could not be scheduled or controlled administratively by any individual or agency in the executive

Article 25, Section 1.C requires employees to accrue compensatory time for travel that is outside normal working hours and is not "hours of work."[6] Therefore, the employees who attended mandatory eight-hour training were owed compensatory time for travel outside the employees' normal working hours. The Arbitrator also denied the Union's request for interest on reimbursable travel expenses and attorney fees. Accordingly, the Arbitrator sustained the grievance in an award dated December 5, 2018.

The Union filed exceptions to the award on January 4, 2019 and the Agency filed an opposition on March 5, 2019.[7]

## III. Analysis and Conclusions

### A. The Union has failed to demonstrate that it is owed interest for reimbursable travel expenses pursuant to the BPA.

The Union argues that the Arbitrator's award is contrary to law because money owed under the BPA "shall be payable with interest."[8] The Union argues, without differentiating between the Arbitrator's awards of compensatory time and travel expenses, that it is owed interest on all monies paid.[9]

However, the Arbitrator concluded that "[n]o interest will be paid on any *reimbursement* due the Grievants."[10] Under the BPA, an award of backpay is necessary before interest can be paid,[11] and the BPA defines backpay as "pay, allowances, or differentials."[12] The Authority has held that travel expenses, including per diem and mileage, are not "pay, allowances, or differentials" and, therefore, an award requiring reimbursement of those expenses does not constitute an award of backpay.[13] Moreover, the Union does not present a persuasive argument in its exceptions to effectively challenge this Authority precedent. Therefore, the Arbitrator's award of travel expense reimbursements does not constitute backpay and the Union cannot recover any interest under the BPA. Accordingly, we deny this exception.

### B. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because under Article 25, Section 1, an employee will be paid overtime if required to travel for mandatory training outside of normal working hours.[14] Without referring to any specific language in the parties' agreement, the Union claims that the Arbitrator's award is "contrary to the plain language" of the parties' agreement.[15]

However, Article 25, Section 1 of the parties' agreement provides specific parameters for when an employee may be paid overtime for mandatory travel during non-duty hours.[16] Specifically, it states the four conditions under which such time may be considered "hours of work" and eligible for overtime payments.[17] In

> branch of government (such as training scheduled solely by a private firm or a job-related court appearance required by a court subpoena).

*Id.* at 6 (emphasis added). Article 25, Section 1.C also states that "[w]hen an employee performs official travel outside their normal working hours, but the travel does not constitute *hours of work* under 5 U[.]S[.]C[.] or the Fair Labor Standards Act, then the employee will be allowed to accrue compensatory time off for travel." *Id.* (emphasis added).

[6] *Id.* at 17.

[7] The Agency was given an automatic extension of time by the Authority due to a lapse in appropriations from December 22, 2018 to January 25, 2019. Therefore, its opposition was timely filed.

[8] Exceptions Br. at 4; 5 U.S.C. § 5596(b)(2)(A).

[9] Exceptions Br. at 4.

[10] Award at 24 (emphasis added).

[11] *U.S. DOD, Dependents Schs.*, 54 FLRA 514, 518 (1998).

[12] 5 U.S.C. § 5596(b)(1).

[13] *See AFGE, Local 342*, 69 FLRA 278, 279 (2016) (Member DuBester concurring) (finding that mileage and per diem reimbursements for travel to a temporary duty station are not encompassed by the BPA); *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 742 (2015) (holding that an award of relocation expenses and travel costs was not recoverable under the BPA); *see also SSA, Balt., Md. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) (finding that the phrase "pay, allowances, or differentials" includes only payments and benefits of the sort that an employee normally earns or receives as part of the regular compensation for performing their job); *U.S. DOD Educ. Activity, U.S. DOD Dependents Schs.*, 70 FLRA 718, 720 (2018) (Member DuBester dissenting) ("Agency attempts to recoup moneys that it actually overpaid grievants, however, do not constitute unwarranted or unjustified personnel actions that result in the withdrawal or withholding of pay under the BPA.").

[14] Exceptions Br. at 5. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligations of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[15] Exceptions Br. at 5.

[16] Award at 19.

[17] *Id.*

accordance with the parties' agreement, the Arbitrator found that the employees did not meet any of the required conditions in Article 25, Section 1 to be eligible for "hours of work" travel.[18] He also found that they were not working during the overtime period.[19] Because the Union does not successfully challenge any of these findings as nonfacts,[20] the Union has not demonstrated that the award is irrational, unreasonable, implausible, or manifests a disregard for the parties' agreement.[21] Consequently, we deny the Union's exception.

C. The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the award is contrary to law because the Union is owed attorney fees pursuant to the BPA and "the Arbitrator denied [attorney] fees without affording the Union a chance to file a full motion with case law."[22] The Authority has held that a grievant must be affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction in the grievant's pay, allowances, or differentials to be entitled to attorney fees under the BPA.[23] Under the BPA, before an arbitrator may grant or deny attorney fees, a grievant or the grievant's representative must present a request for attorney fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request.[24]

As discussed above, the Arbitrator's awards of travel expenses are not "pay, allowances, or differentials" and do not constitute backpay.[25] But, the Authority has held that an award of compensatory time is an award of backpay.[26] Most importantly, while the Arbitrator's award recognized that the Union was claiming attorney fees,[27] he never permitted the Union to submit a petition for attorney fees and he did not provide any explanation for denying the Union's request for attorney fees.[28] The Authority has remanded awards when an arbitrator has summarily denied attorney fees before a party had the opportunity to file a petition.[29] Because the grievants were awarded backpay and the Arbitrator prematurely denied the Union's request for attorney fees, the award is modified to strike the denial of attorney fees, without prejudice, so that the Union may file a petition for attorney fees with the Arbitrator.[30]

On remand, as the Arbitrator considers the Union's petition for attorney fees, he should follow the guidelines we established in our recent decision in *AFGE, Local 1633* (*AFGE*).[31] In *AFGE*, we reaffirmed our reliance on the factors identified in *Allen v. U.S. Postal Service*[32] to determine whether attorney fees are warranted in the "interest of justice" under 5 U.S.C. § 7701(g)(1).[33] We clarified that, in arbitration cases where the grieved action is not disciplinary in nature, the "interest of justice" analysis should focus on whether (a) the agency "knew or should have known," at the time that it denied the grievance, that it would not prevail at arbitration; or (b) prior to the close of the record at arbitration, compelling evidence that the agency's position was "clearly without merit" made the agency's prolonging of proceedings blameworthy.[34]

## IV. Decision

We deny the Union's exceptions in part. We grant the Union's exception to the Arbitrator's denial of attorney fees and remand the attorney fee issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

[18] *Id.* at 17.
[19] *Id.*
[20] Exceptions Br. at 5.
[21] *NTEU, Chapter 32*, 67 FLRA 174, 175-76 (2014) ("[F]actual matters that were disputed at arbitration cannot be challenged as nonfacts.").
[22] Exceptions Br. at 5. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *Fraternal Order of Police, Lodge No. 1*, 71 FLRA 6, 6 (2019) (*Fraternal*). In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*
[23] *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 61 FLRA 68, 69 (2005).
[24] *Fraternal*, 71 FLRA at 6.
[25] *Supra* Section III.A.
[26] *AFGE, Local 1592*, 64 FLRA 861, 862 (2010) (holding that paid leave constitutes pay, allowance or differentials under the BPA and that compensatory time is equivalent to paid leave).
[27] Award at 14.
[28] *Id.* at 24.
[29] *E.g.*, *Fraternal*, 71 FLRA at 7 (finding that arbitrators violate the BPA when they deny attorney fees before parties have the chance to submit a petition for fees after the issuance of the award).
[30] *Id.*
[31] 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester dissenting).
[32] 2 M.S.P.R. 420 (1980).
[33] *AFGE*, 71 FLRA at 211.
[34] *Id.*

**Member DuBester, concurring:**

I agree with the majority's decision to deny the Union's essence exception and the Union's exception arguing that the award is contrary to the Back Pay Act.[1] I also agree with the majority's decision to remand the attorney fee issue to allow the Union to file a petition for attorney fees with the Arbitrator. However, as I stated in *AFGE, Local 1633*,[2] I strongly disagree with the majority's modification of the standards used to determine entitlement to attorney fees in arbitration awards in which the grieved action is not disciplinary in nature.[3]

[1] I have previously expressed concerns about current Authority precedent holding that travel-expense reimbursements are not covered by the Back Pay Act (BPA). *AFGE, Local 342*, 69 FLRA 278, 280 (2016) (Concurring Opinion of Member DuBester). However, because the Union did not discuss or ask the Authority to overrule that precedent in its exceptions, I agree with the majority's decision that the Union failed to demonstrate it is owed interest for reimbursable travel expenses under the BPA.

[2] 71 FLRA 211 (2019).

[3] *Id.* at 219-20 (Separate Opinion of Member DuBester).