

71 FLRA No. 70

UNITED STATES  
DEPARTMENT OF DEFENSE  
EDUCATION ACTIVITY  
(Agency)

and

FEDERAL EDUCATION ASSOCIATION  
STATESIDE REGION  
(Union)

0-AR-5406

DECISION

October 23, 2019

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

**I. Statement of the Case**

In this case, we find that the Agency is obligated to credit employees for certain academic accomplishments when calculating their salaries, as provided in the parties’ collective-bargaining agreement.

Under the parties’ agreement, employees may attain a certain salary rate only if they acquire a master’s “degree *plus* hours” of academic coursework that were not required to earn that master’s degree (plus hours).<sup>1</sup> Arbitrator Charles J. Murphy issued an award finding that the Agency violated the agreement by denying some employees credit for certain plus hours. As a remedy, the Arbitrator directed the Agency to correct employees’ salaries, provide some employees backpay, and pay the Union’s attorney fees. The Agency filed exceptions to the award.

The central issue here concerns the Arbitrator’s interpretation of “plus hours.”<sup>2</sup> The Arbitrator found that the Agency must consider all relevant plus hours in setting salaries, regardless of when employees earned those hours. According to the Agency, employees should receive credit only for plus hours that they completed

after acquiring a master’s degree. The Agency argues that the Arbitrator’s contrary finding exceeded his authority, failed to draw its essence from the agreement, and was based on a nonfact. We reject those arguments for the reasons explained further below.

The Agency also argues that the Arbitrator’s award of attorney fees is contrary to the Back Pay Act (BPA)<sup>3</sup> because the Arbitrator did not make sufficient findings to support awarding fees. We agree, so we set aside the award of fees and remand that issue to the parties. However, we reject the remaining arguments in the Agency’s exceptions.

**II. Background and Arbitrator’s Award**

The Agency operates a school system, and the Union represents teachers and other professionals in that system. Unlike most federal employees, the Union’s bargaining-unit members are entitled to negotiate their salaries.

Because employees have varying levels of education and experience, the parties agreed to consider those factors in establishing different pay rates, which the parties refer to as “pay lane[s].”<sup>4</sup> Article 20, Section 3 of the parties’ agreement states that employees will occupy “the pay lane commensurate with [their] degree, or degree plus . . . hours,”<sup>5</sup> and “[p]ay lane adjustments will be made upon receipt by the Agency of an official copy of a transcript indicating course work completion or award of an advanced degree.”<sup>6</sup>

The Union filed a grievance asserting that, when setting employees’ pay lanes, the Agency refused to credit plus hours that employees earned *before* acquiring a degree. The Agency denied the grievance, noting its longstanding practice of refusing to credit plus hours that were earned before a degree.

The grievance went to arbitration, where the Arbitrator framed the issues to include (1) whether the “Agency’s claim of a ‘past practice’ regarding ‘plus [hours]’” should be sustained, (2) whether the Agency violated the agreement “by failing to compensate bargaining[-]unit employees appropriately for [plus] hours earned,” and (3) “[w]hat are the appropriate remedies, if any?”<sup>7</sup>

The Arbitrator rejected the Agency’s argument that it created a binding “past practice” by refusing, for years, to credit plus hours that were earned before a

<sup>1</sup> Award at 5 (emphasis added) (quoting Collective-Bargaining Agreement (CBA) Art. 20, § 3).

<sup>2</sup> *Id.* at 14.

<sup>3</sup> 5 U.S.C. § 5596.

<sup>4</sup> Award at 5 (quoting CBA Art. 20, § 3(b)).

<sup>5</sup> *Id.* (quoting CBA Art. 20, § 3(b)).

<sup>6</sup> *Id.* (quoting CBA Art. 20, § 3(c)(1)).

<sup>7</sup> *Id.* at 4.

degree.<sup>8</sup> The Arbitrator found that, in order to create a binding past practice, parties must mutually “accept[] . . . a course of behavior.”<sup>9</sup> In this case, he noted that the Union repeatedly objected to the Agency disregarding plus hours that were earned before a degree.

Turning to the central issue, the Arbitrator found that the meaning of a “degree plus hours”<sup>10</sup> “is clear and unequivocal.”<sup>11</sup> Specifically, he found that “plus” means more. It does not mean earned after or later . . . .<sup>12</sup> He criticized the Agency’s alternative interpretation because it created “an unreasonable or absurd result” by placing equally qualified and educated employees in different pay lanes.<sup>13</sup> Thus, he found that the Agency violated the agreement by refusing to credit plus hours unless they were earned after a degree.

The Arbitrator directed the Agency to correct employees’ salaries and provide employees backpay for any salary increases that they lost due to the Agency’s failure to fully credit their plus hours. And the Arbitrator awarded the Union attorney fees, finding that the “payment of the [U]nion’s reasonable attorney fees as provided by law is appropriate and necessary here [and] in the interests of justice.”<sup>14</sup>

The Agency filed exceptions on August 20, 2018, and the Union filed an opposition on September 18, 2018.

### III. Analysis and Conclusions

- A. The Arbitrator’s use of the phrase “plus hours” does not show that he exceeded his authority, or that the award fails to draw its essence from the parties’ agreement or is based on a nonfact.

According to the Agency, because the term “degree plus hours” appears in Article 20, Section 3, but the Arbitrator referred to the term “plus hours” in his award, the award fails to draw its essence from the parties’ agreement<sup>15</sup> and is based on a nonfact.<sup>16</sup>

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5 (quoting CBA Art. 20, § 3(c)(2)).

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> *Id.* at 18; *see also id.* at 19 (“The [U]nion is the prevailing party . . . and is entitled to reimbursement of its reasonable legal fees, should any be requested.”).

<sup>15</sup> Exceptions Br. at 8 (“Because the term ‘degree plus hours’ appears in the parties’ collective[]-bargain[ing] agreement – and the term ‘plus hours’ does not – the Arbitrator’s adoption of this newly created term fails to draw its essence from the [a]greement.”). An award fails to draw its essence from a

Additionally, the Agency argues that the Arbitrator “disregard[ed] [a] specific limitation[] on his authority”<sup>17</sup> by “creating the term ‘plus hours.’”<sup>18</sup>

The Arbitrator recognized that the agreement refers to a “degree plus hours,”<sup>19</sup> and his analysis repeatedly refers to employees’ degrees in the context of interpreting the words “plus hours.”<sup>20</sup> Moreover, we note that the phrase “plus hours” undeniably appears in the parties’ agreement.<sup>21</sup> Therefore, even assuming that the Arbitrator’s use of this phrase may be properly challenged on these grounds,<sup>22</sup> we find that it does not show that he exceeded his authority, or that the award fails to draw its essence from the agreement<sup>23</sup> or is based on a nonfact.

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collective-bargaining agreement when the excepting 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 obligation 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 Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (Member DuBester dissenting).

<sup>16</sup> Exceptions Br. at 10-11 (arguing award based on the “clearly erroneous” proposition that the parties’ agreement includes the term “plus hours”). To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring).

<sup>17</sup> Exceptions Br. at 10.

<sup>18</sup> As relevant here, arbitrators exceed their authority when they disregard specific limitations on that authority. *U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 183 (2017).

<sup>19</sup> Award at 5 (quoting CBA Art. 20, § 3(c)(2)).

<sup>20</sup> *Id.* at 7 (“It is understood that the ‘plus hours’ in question are not those required for the receipt of the initial [m]aster’s degree.”), 13 (“The nut of the present dispute . . . [is] whether ‘plus hours’ . . . must be earned after a [m]aster’s [d]egree has been earned . . . .”), 14 (“[T]he Union would have it that ‘plus hours’ means more hours earned and not more hours earned *only after the initial [m]aster’s degree is earned.*”).

<sup>21</sup> *Id.* at 5 (quoting CBA Art. 20, § 3(c)).

<sup>22</sup> *See AFGE, Local 1802*, 50 FLRA 396, 398 (1995) (nonfact exceptions may not successfully challenge an arbitrator’s interpretation of the parties’ collective-bargaining agreement).

<sup>23</sup> The Agency also argues that the award fails to draw its essence from the agreement because the Arbitrator relied on another arbitration award involving a different contract to interpret the parties’ agreement. Exceptions Br. at 9. But the Arbitrator specifically found that the other arbitration award was not binding. Award at 13, so the Agency’s argument is based on a misunderstanding of the award. We reject the argument on that basis. *See AFGE, Local 1897*, 67 FLRA 239, 241 (2014) (Member Pizzella concurring).

- B. The Arbitrator's past-practice finding is not deficient, but his award of attorney fees is contrary to the BPA.

The Agency also argues that the award is contrary to law.<sup>24</sup> When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award *de novo*;<sup>25</sup> in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>26</sup> But the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.<sup>27</sup>

Here, the Agency argues that the award is contrary to law because: (1) the Arbitrator improperly refused to find that the parties had a binding past practice entitling employees to receive credit only for plus hours earned *after* attaining a degree;<sup>28</sup> and (2) the Arbitrator awarded attorney fees without providing the required justifications under the BPA.<sup>29</sup>

Regarding the Agency's past-practice argument, the Authority has held that "arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms."<sup>30</sup> Here, the Arbitrator found that the meaning of a "'degree plus hours'"<sup>31</sup> was "clear and unequivocal."<sup>32</sup> But even assuming that the term was sufficiently ambiguous for the Arbitrator to consider the parties' practices, the Arbitrator found that the Union repeatedly objected to the Agency disregarding plus hours,<sup>33</sup> and the Agency acknowledges that "the Union has filed a series of grievances" on that issue.<sup>34</sup> Because the existence of a binding past practice is predicated on the practice being "followed by both parties, or followed by one party and not challenged by the other,"<sup>35</sup> the Union's repeated challenges to the

Agency's position show that there could not be a binding past practice here. Therefore, we reject the Agency's argument that the Arbitrator erred by refusing to enforce the alleged practice.

As for the attorney-fee issue, the Arbitrator's full analysis in support of his fee award was that "payment of the [U]nion's reasonable attorney fees as provided by law is appropriate and necessary here [and] in the interests of justice."<sup>36</sup> The Authority has recognized that, under the BPA, an arbitrator awarding fees must "fully articulate[] a reasoned decision setting forth specific findings . . . [to show] that the award . . . was warranted in the interest of justice."<sup>37</sup> The award here fails to satisfy that standard and, consequently, is contrary to the BPA. Thus, we set it aside.

Where an arbitrator's attorney-fee determination is deficient, the Authority "take[s] the action necessary to assure that the award is consistent with applicable statutory standards."<sup>38</sup> If an award does not contain the findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and those findings cannot be derived from the record, then the attorney-fee issue will be remanded to the parties for resubmission to the arbitrator, absent settlement.<sup>39</sup> Here, there is no attorney-fee request in the record, and the Arbitrator did not make findings that would allow the Authority to conduct the appropriate legal analysis. Therefore, we remand the attorney-fee issue to the parties for resubmission to the arbitrator, absent settlement.

On remand, the parties – and, if necessary, the Arbitrator – must follow the Authority's guidance in *AFGE, Local 1633*,<sup>40</sup> which recently clarified the factors that are relevant to an interest-of-justice analysis under the BPA's attorney-fee provision.

<sup>24</sup> Exceptions Br. at 11-14.

<sup>25</sup> *U.S. Dep't of State, Bureau of Consular Affairs, Passport Serv. Directorate*, 70 FLRA 918, 919 (2018).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Exceptions Br. at 12-13.

<sup>29</sup> *Id.* at 13-14.

<sup>30</sup> *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (quoting *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring in part and dissenting in part)).

<sup>31</sup> Award at 5 (quoting CBA Art. 20, § 3(c)(2)).

<sup>32</sup> *Id.* at 16.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> Exceptions Br. at 12.

<sup>35</sup> See *U.S. DOJ, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 456 (1999) (Member Wasserman concurring).

<sup>36</sup> Award at 18; see also *id.* at 19 ("The [U]nion is the prevailing party . . . and is entitled to reimbursement of its reasonable legal fees, should any be requested.").

<sup>37</sup> *U.S. DOD, Def. Distribution Region E., New Cumberland, Pa.*, 51 FLRA 155, 162 (1995); see also *AFGE, Local 1633*, 71 FLRA 211, 214-17 (2019) (Member Abbott concurring) (Member DuBester concurring in part and dissenting in part) (clarifying how the legal standards for attorney-fee awards under the BPA and 5 U.S.C. § 7701(g)(1) apply to arbitration awards in which the grieved action is not disciplinary).

<sup>38</sup> *AFGE, Local 3020*, 64 FLRA 596, 597-98 (2010) (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1695 (1998)).

<sup>39</sup> E.g., *NTEU*, 66 FLRA 577, 582 (2012).

<sup>40</sup> 71 FLRA at 214-17.

**IV. Decision**

We deny the Agency's exceptions, except for its attorney-fee argument, and we remand the attorney-fee issue to the parties.

**Member DuBester, concurring in part and dissenting in part:**

I concur in Part A of the Decision. With respect to Part B, I agree that the award's past-practice finding is not contrary to law, based on the Arbitrator's finding that "[t]here was no mutuality, or consent, in regard to" the Agency's disregard of plus hours.<sup>1</sup> And while I agree with the decision to remand the attorney-fee issue to the parties for resubmission to the Arbitrator, for the reasons set forth in my dissent in *AFGE, Local 1633*,<sup>2</sup> I disagree that the standard set forth in that decision is properly applied on remand.

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<sup>1</sup> Award at 12.

<sup>2</sup> *AFGE, Local 1633*, 71 FLRA 211, 219-20 (2019) (Separate Opinion of Member DuBester).