65 FLRA No. 71

UNITED STATES
DEPARTMENT OF THE NAVY
NAVY EXCHANGE
SAN DIEGO, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3723
(Union)

0-AR-4668

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DECISION

December 16, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jonathan S. Monat filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated the parties' Labor Management Agreement (Agreement) when it changed the hours of barber shop employees. As a remedy, he found that the grievant was entitled to backpay pursuant to the Back Pay Act and ordered the Agency to discuss the impact of the change with the Union. For the reasons set forth below, we dismiss the Agency's essence exception, grant the Agency's contrary to law exception, and set aside the award of backpay.

II. Background and Arbitrator's Award

The grievant works as a barber for the Navy Exchange (NEX) in San Diego, California, which is a nonappropriated fund instrumentality. The Agency, in response to customer complaints, changed the shift for barbers in the NEX barber shop to 12:00 p.m. to 8:30 p.m. Award at 3. The shift hours were previously 11:30 a.m. to 8:00 p.m. *Id.* After the shift change, the barber shop continued to close at 8:00 p.m. Exceptions at 2.

The Union presented a grievance alleging that the new schedule would have an adverse effect on the grievant's income because he works almost exclusively on commission. Award at 3. The Union also alleged that the Agency had violated the Agreement because it had failed to negotiate the schedule change with the Union. Exceptions at 2. The matter was not resolved, and was submitted to arbitration. *Id.* at 2-3. The parties stipulated to the following issue: "Did the Navy Exchange violate the . . . Agreement when it changed the starting and closing times of employees at the barber shop at Naval Base San Diego? If so, what is the appropriate remedy?" Award at 2.

The Arbitrator concluded that the grievant was adversely affected by the change in work schedule because he: (1) was no longer able to earn commissions between 11:30 a.m. and 12:00 p.m. and (2) was required to be at the shop without earning commissions 30 minutes after the shop closed. *Id.* at 6-7. Noting that Article 18, Section 6 of the Agreement provides that the Agency need not notify the Union of changes in hours of work unless the shift changes impact differential pay, the Arbitrator interpreted the phrase "differential pay" broadly to include commissions.[1] *Id.* at 8. According to the Arbitrator, because the grievant "los[t] the opportunity for commission" and, thus, "his pay [wa]s [a]ffected by the shift change, . . . the Union [wa]s entitled to be notified of the shift change." *Id.*

The Arbitrator then addressed the Union's argument that the Agency was required to negotiate the changes in work schedule pursuant to Article 6 of the Agreement. *Id.* The Arbitrator rejected the argument that the dispute was covered by Article 6 because that provision is silent on the specific subjects of hours and scheduling. *Id.* The Arbitrator instead concluded that the dispute was covered by Article 18, which specifically covers the subject of hours and scheduling. *Id.* at 8-9. The Arbitrator then found that Article 3, Section 2 of the Agreement states that nothing precludes the parties "from negotiating . . . arrangements for those who are adversely affected by the exercise of management's

1. The relevant statutory and contract provisions are set forth in the attached appendix.

rights" and that the grievant was adversely affected by the shift change. *Id.* at 9.

In conclusion, the Arbitrator found that the Agency "violated the . . . Agreement." *Id.* As a remedy, the Arbitrator awarded backpay consistent with the requirements of the Back Pay Act and directed the Agency to discuss the adverse impact of the schedule change with the Union. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator's conclusion that the term "differential pay" in Article 18, Section 6 includes commissions fails to draw its essence from the Agreement. Exceptions at 4-5. According to the Agency, the Arbitrator's interpretation disregards the plain language of Article 20, Section 1(a) of the Agreement, which defines differential pay. *Id.* at 5.

Additionally, the Agency argues that the award of backpay under the Back Pay Act is contrary to law. *Id.* at 6. The Agency claims that the grievant is not subject to the Back Pay Act because he is a nonappropriated fund instrumentality employee who is excluded from the definition of employee under 5 U.S.C. § 2105(c)(1), (2). *Id.* Alternatively, the Agency argues that, even if the grievant is subject to the Back Pay Act, he cannot show that he suffered any non-speculative damages as a result of the shift change. *Id.* Accordingly, because the grievant cannot prove that his pay was adversely affected by the change in his schedule, the Agency contends the award of backpay is deficient. *Id.* at 8.

B. Union's Opposition

The Union argues that the Arbitrator's award draws its essence from the plain language of the Agreement. Opp'n at 2. According to the Union, the Agency incorrectly excepted to the Arbitrator's interpretation of Article 18, Section 6 of the Agreement because the Arbitrator ultimately based his award on Article 3, Section 2. *Id.* at 2-3. The Union contends that, because Article 3, Section 2 of the Agreement states that the Agency and the Union may negotiate changes that adversely affect employees, the Arbitrator correctly concluded that the Agency violated the Agreement by failing to negotiate the shift change with the Union. *Id.* at 3.

Relying on *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 34 (1987), the Union also contends that, even if the grievant is not subject to the Back Pay Act, the award of backpay is not contrary to law. *Id.* at 3-4. In this regard, the Union claims that the Arbitrator correctly determined that the grievant had suffered harm by not being allowed to earn commissions during the time when the barber shop was closed. *Id.* at 4.

IV. Analysis and Conclusions

A. The Agency's essence exception is barred by 5 C.F.R. § 2429.5.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[2] *See U.S. Dep't of Health & Humans Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 (2010). The Agency argues that the award fails to draw its essence from the Agreement because the Arbitrator disregarded the clear language of Article 20, Section 1(a). The Agency argued to the Arbitrator that the phrase "differential pay" in Article 18, Section 6 of the Agreement should be interpreted to mean "shift differential," but there is no evidence that the Agency cited to Article 20, Section 1(a) of the Agreement or presented that language to the Arbitrator. Exceptions, Attach., Tr. at 9. Because the Agency could have, and should have, argued to the Arbitrator that Article 20, Section 1(a) defines differential pay, § 2429.5 precludes the Agency from raising the issue for the first time in its exceptions. *See AFGE, Local 2382*, 64 FLRA 1163, 1165 (2010) (finding that an argument that the award manifestly disregards a provision of the agreement barred by § 2429.5 because that argument was not made before the arbitrator). Accordingly, we dismiss this exception. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 172 (2010).

B. The award is contrary to the Back Pay Act.

The Agency argues that the Arbitrator's award of backpay is contrary to law, specifically the Back Pay

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

Act. 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. *See 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)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority has long held that, under the Back Pay Act, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See, e.g., U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998).

The Arbitrator awarded backpay to the grievant pursuant to the Back Pay Act. Award at 9. The Agency argues that the award of backpay is contrary to law because the grievant is not an employee within the definition of 5 U.S.C. § 2105(c)(1) and is, therefore, not eligible for backpay. Employees of nonappropriated fund instrumentalities, such as NEX, are expressly excluded from the provisions of the Back Pay Act. *See Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 740 (1982) (concluding employee of a nonappropriated fund instrumentality is ineligible for backpay under the Back Pay Act); *U.S. Dep't of Agric., Farm Serv. Agency, N.Y. State Office, Malone, N.Y.*, 58 FLRA 508, 509 (2003) (finding employee excluded from the definition of employee to be excluded from coverage under the Back Pay Act).

Citing *Misco*, 484 U.S. at 41, the Union argues that, even if the grievant is not subject to the Back Pay Act, the award of backpay is still proper. Opp'n at 3. The Union's reliance on *Misco* is misplaced, however, as that case arises in the private sector and does not involve the Back Pay Act. The Union has not identified any statute other than the Back Pay Act that would entitle the grievant to backpay. Therefore, because the grievant may not recover backpay under the Back Pay Act, we find that the award of backpay is contrary to law and set it aside. *See Hamlet v. United States*, 63 F.3d 1097, 1106 (Fed. Cir. 1995) (finding that employees who are excluded from the Back Pay Act cannot recover backpay).

V. Decision

The Agency's essence exception is dismissed, the Agency's contrary to law exception is granted, and the award of backpay is set aside.

APPENDIX

Article 3, Section 2 provides:

> Nothing in this section shall preclude the Employer and the Union from negotiating:
>
> > a. procedures which management officials of the agency will observe in exercising any authority under this section;
> >
> > or;
> >
> > b. appropriate arrangements for associates adversely affected by the exercise of any authority under this section by such management officials.

Exceptions, Attach. E, Agreement at 3-4.

Article 18, Section 6 provides:

> There is no requirement on the Employer to notify the Union of changes in hours of work as long as the associate works the same total number of hours in a pay period and/or is on a rotational shift. The Union will be notified when shift changes are effected which impacts differential pay for associates on fixed schedules.

Id. at 24.

Article 20, Section 1(a) provides:

> A seven and one-half percent (7 ½%) shift differential will be paid for the entire shift when the majority of work performed is after 1500 hours. A ten percent (10%) shift differential will be paid when the majority of work performed is after 2300 hours.

Id. at 28-29.

5 U.S.C. § 2105(c)(1) provides:

> An employee paid from nonappropriated funds of the . . . Navy exchanges . . . and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—
>
> (1) laws administered by the Office of Personnel Management[.]