65 FLRA No. 76

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

0-AR-4609

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DECISION

December 21, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Elvis C. Stephens 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 sustained a grievance alleging that the Agency had improperly suspended the grievant for five days and reassigned the grievant to another duty station (port). Accordingly, he directed the Agency to rescind the grievant's suspension; make him whole for any lost pay and benefits, including overtime; provide him with a "priority transfer to the Port of Bellingham when the next opening comes[;]" and reinstate his alternative work schedule (AWS) schedule at the new port. Award at 12.

For the reasons that follow, we deny the Agency's exceptions.

1. Member Beck's opinion, dissenting in part, is set forth at the end of this decision.

II. Background and Arbitrator's Award

The grievant, a U.S. Customs and Border Protection Officer who worked at the Port of Point Roberts, was charged with: (1) inattention to duty, for being asleep at his post; and (2) unprofessional conduct, for alleging that a supervisor was having an affair with a subordinate. *Id.* at 2-3. The Agency suspended the grievant for five days and reassigned him to the Blaine Port of Entry. *Id.* at 3. A grievance was filed and submitted to arbitration. *Id.*

The Arbitrator framed the issues before him as: "Whether a [five]-day suspension and [i]nvoluntary reassignment from the Point of Port Roberts for [i]nattention to [d]uty . . . and [u]nprofessional conduct . . . by [the grievant] would promote the efficiency of the [s]ervice? If not, what should be the appropriate penalty?" *Id.* at 1.

With regard to the inattention to duty charge, the Arbitrator found that the Agency had not penalized similar infractions in a similar manner, and concluded that "fact of disparate treatment is sufficient to resolve this charge in favor of [the grievant]." *Id.* at 10. With regard to the unprofessional conduct charge, the Arbitrator determined that the grievant's comments did "not rise to the level of flagrant misconduct[,]" and dismissed that charge. *Id.* at 11-12.

Based on the foregoing, the Arbitrator found that the grievant's five-day suspension was unjustified, and he directed the Agency to rescind it. *Id.* at 12. The Arbitrator also found that the disciplinary action "resulted in a loss of [the grievant's] pay" and that, "[b]ut for such action, [the grievant] would not have suffered such loss of pay." *Id.* Accordingly, the Arbitrator directed that the grievant "be made whole for any loss of pay and benefits, including any overtime assignments he would have worked." *Id.* In addition, the Arbitrator determined: "Given the situation[,] returning [the grievant] to Port Roberts would not be in the best interest of the service. Therefore, he shall be given a priority transfer to the Port of Bellingham when the next opening comes[.]" *Id.* Finally, the Arbitrator directed that the grievant's "AWS schedule shall be reinstated at the new port." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law because, in directing a rescission of the grievant's suspension because of disparate treatment, the

Arbitrator failed to find that a "similarly situated" employee received a different penalty for the same or similar offenses. Exceptions at 8-9. The Agency alleges that such a finding is required under the factors set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305 (1981) (*Douglas*).[2] Exceptions at 8.

Additionally, the Agency claims that the award is contrary to the Back Pay Act because, in ordering the Agency to "ma[k]e [the grievant] whole for any loss of pay and benefits, including any overtime [the grievant] *would have* worked[,]" the Arbitrator failed to find a "causal connection between the suspension and the loss of *overtime pay*." Exceptions at 9-10 (citing 5 U.S.C. § 5596(b); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Beaumont, Tex.*, 59 FLRA 466, 468 (2003) (Chairman Cabaniss dissenting in part) (*Beaumont*); *U.S. Dep't of the Air Force, Okla. Air Logistics Ctr., Tinker Air Force Base, Okla.*, 58 FLRA 760, 762 (2003)(*Tinker AFB*)). Specifically, the Agency alleges that the Arbitrator did not make the requisite findings regarding "when, where, and the amount of overtime the grievant lost." *Id.* at 10 (citing *AFGE, Local 1857*, 35 FLRA 325, 328 (1990); *Navy Pub. Works Ctr., Norfolk, Va.*, 33 FLRA 592, 599 (1988) (*Navy*)).

Moreover, the Agency alleges that the Arbitrator exceeded his authority by awarding the grievant a "priority transfer" to the Port of Bellingham and reinstating the grievant's AWS schedule at that port. *Id.* at 13. In this connection, the Agency states that the issue before the Arbitrator was "[w]hether a [five]-day suspension and involuntary reassignment . . . would promote the efficiency of the Service? If not, what should be the appropriate *penalty*?" *Id.* (quoting Award at 1). According to the Agency, the Arbitrator answered both questions when he: (1) implicitly found that the five-day suspension and involuntary reassignment did not promote the efficiency of the service; and (2) determined that the five-day suspension should be rescinded. *Id.* By granting the grievant a priority transfer to a port other than his original duty station with "an otherwise unavailable" AWS, the Agency claims that the Arbitrator went "beyond the issue of an appropriate penalty[,]" providing "benefits" that were "completely unrelated to the matter being arbitrated." *Id.* at 14. The Agency also argues that, because the Union first sought this remedy in its closing brief, the "Arbitrator's willingness to award such a remedy" prejudiced the Agency because it was unable to timely raise any objection or offer additional evidence on this issue. *Id.* at 14-15.

In addition, the Agency asserts that the award fails to draw its essence from the parties' agreement because it conflicts with a memorandum of understanding (the Article) regarding AWS.[3] *Id.* at 11. Specifically, the Agency argues that the Article provides that employees covered by the Article may participate in AWS "only to the extent expressly provided under [a] locally negotiated agreement[]." *Id.* (quoting Exceptions, Attach. 7 at 1). The Agency interprets this clause to indicate that "[i]f AWS is not available at a particular port . . . then no employees at that port . . . will work an AWS." *Id.* According to the Agency, the Port of Bellingham "currently does not . . . have AWS available[,]" and, thus contends that the award conflicts with the Article. *See id.* at 12.

Finally, the Agency argues that the award is ambiguous. Specifically, the Agency contends that the Arbitrator's direction to provide a "priority transfer to the Port of Bellingham when the next opening comes" is unclear because such a personnel action does not exist at the Agency. *Id.* at 7, 15. The Agency asserts that, although existing personnel actions called "priority consideration" and "voluntary transfer" do "sound similar" to "priority transfer[,]" neither of those actions appears to be appropriate or intended here. *Id.* at 15-16.

B. Union's Opposition

The Union argues that the award is not contrary to law. Opp'n at 7-8. According to the Union, the Arbitrator was not required to apply the *Douglas* factors because this case involves a suspension for less than fourteen days. *Id.* at 8. In addition, the Union contends that the Arbitrator made the necessary findings to satisfy the requirements of the Back Pay Act. *Id.* at 9-10.

The Union also argues that the Arbitrator did not exceed his authority by ordering the Agency to give the grievant a "priority transfer" and to restore his AWS. *Id.* at 12-13 (citing *NATCA*, 62 FLRA 490 (2008)). The Union contends that, because the

2. The *Douglas* factors are rules developed by the Merit Systems Protection Board for evaluating whether a particular disciplinary action should be mitigated. *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 820 n.3 (2010).

3. The Article states, in pertinent part: "[E]mployees covered by [the Article] may participate in a flexible or compressed work schedule only to the extent expressly provided under a locally negotiated agreement." Exceptions, Attach. 7 at 1.

Agency's imposed penalty included an involuntary reassignment that directly resulted in the loss of the grievant's AWS, the Arbitrator did not exceed his authority by providing a remedy for the Agency's unjustified action. *Id.* at 13-14. Moreover, according to the Union, if the grievant had returned to his original work station, then he would have been under the same management that took the unjustified personnel actions against him. *Id.*

In addition, the Union contends that the Arbitrator's award of an AWS does not fail to draw its essence from the Article because it is not excluded by the Article. Further, the Union asserts that an award of AWS is an appropriate "make whole" remedy for the grievant, who had an AWS prior to being disciplined in a manner that the Arbitrator found unjustified. *Id.* at 11-12.

Finally, the Union contends that the award is not ambiguous because the intent of the award can be reasonably determined. *Id.* at 15 (citing *U.S. EPA*, 63 FLRA 30, 33 (2008)). The Union argues that the award clearly intends for the grievant to receive a transfer to another port because of the Agency's unjustified involuntary reassignment. *Id.* at 15. The Union further argues that the Arbitrator used the term "priority" to indicate that the transfer was to be effective only "when and if an opening occurred at the specified port." *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

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.*

1. The *Douglas* Factors

The Agency argues that the award is deficient because the Arbitrator failed to apply the *Douglas* factors when considering the penalty the Agency imposed. Exceptions at 8. As stated previously, the *Douglas* factors are factors applied by the Merit Systems Protection Board (MSPB) in evaluating whether a particular disciplinary action should be mitigated. Arbitrators are bound by the same substantive standards as the MSPB only when resolving grievances concerning actions covered by 5 U.S.C. §§ 4303 and 7512. *AFGE, Local 2128*, 47 FLRA 962, 967-68 (1993). As suspensions of fourteen days or less are not covered by §§ 4303 and 7512, an arbitrator's failure to apply the *Douglas* factors when considering such suspensions is not a ground for finding an award deficient. *See id.*

As the suspension at issue here is a five-day suspension, the Arbitrator was not required to apply the *Douglas* factors, and the Agency's exception does not provide a basis for finding the award deficient. *See id.* Accordingly, the award is not contrary to law in this regard, and we deny the exception.

2. The Back Pay Act

An award of backpay is authorized under the Back Pay Act when: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in a loss of pay, allowances, or differentials by the employee. *See, e.g., U.S. Dep't of Transp., FAA*, 63 FLRA 646, 648 (2009). As stated above, the Agency claims that the award is contrary to the Back Pay Act because the Arbitrator failed to find a "causal connection between the suspension and the loss of *overtime pay*." Exceptions at 10.

Contrary to the Agency's claim, the award ensures that any overtime backpay the grievant receives is causally connected to the unwarranted personnel action by limiting backpay to "any overtime assignments [the grievant] would have worked" had he not suffered the unwarranted personnel action. Award at 12. Because the Arbitrator conditioned an award of backpay on the existence of a causal connection as required by the Back Pay Act, the award is unlike awards in *Tinker AFB*, 58 FLRA at 762, *Beaumont*, 59 FLRA at 468, *AFGE, Local 1857*, 35 FLRA at 328, and *Navy*, 33 FLRA at 599, where the arbitrators awarded backpay without finding the causal connection required under the Back Pay Act.

Accordingly, the award is not contrary to the Back Pay Act, and we deny the exception.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when, among other things, they resolve an issue not submitted to arbitration. *U.S. Dep't of the Treasury, IRS, Wash.*,

D.C., 64 FLRA 426, 434 (2010) (Member Beck dissenting in part as to other matters) (*IRS*). In cases in which the parties do not stipulate the issues for resolution, the Authority accords the arbitrator's formulation of the issue to be decided the same substantial deference that the Authority accords an arbitrator's interpretation and application of a collective bargaining agreement. *Id.* In this connection, when an arbitrator has formulated issues for resolution, the Authority will not find that the arbitrator exceeded his or her authority when the award is confined to the issues as the arbitrator framed them. *Id.*

Here, the Arbitrator framed the issues as follows: "Whether a [five]-day suspension and [i]nvoluntary reassignment from the Point of Port Roberts for [i]nattention to [d]uty . . . and [u]nprofessional conduct . . . by [the grievant] would promote the efficiency of the [s]ervice? If not, what should be the appropriate penalty?" Award at 1.

The Arbitrator resolved the issues by finding that the penalty imposed by the Agency -- the five-day suspension and the involuntary reassignment away from the Point of Port Roberts -- would not promote the efficiency of the service. Therefore, the Arbitrator rescinded the penalty of the suspension and effectively rescinded the penalty of the grievant's reassignment to the Blaine Port of Entry. *See* Award at 12. Having rescinded the penalty imposed by the Agency, the Arbitrator then determined what should be the appropriate "penalty[.]" *Id.* at 1. *See also id.* at 12. In this connection, the Arbitrator did not define "penalty" or give any indication that it was necessarily intended to mean "penalty against the grievant" as opposed to "penalty against the Agency," i.e., what remedial relief would be appropriate. Responding to the issue as he framed it, the Arbitrator determined that it would promote the efficiency of the service to provide the grievant a priority transfer to the Port of Bellingham, stating: "Given the situation[,] returning [the grievant] to Port Roberts would not be in the best interest of the service. Therefore, he shall be given a priority transfer to the Port of Bellingham when the next opening comes[.]" *Id.* As the Arbitrator's conclusion is responsive to the issues as the Arbitrator framed them, the Agency has not demonstrated that the Arbitrator exceeded his authority in this regard. *IRS*, 64 FLRA at 435 (2010).

With regard to the Agency's claim that it was prejudiced because the Union first sought priority consideration for transfer to the Port of Bellingham in its closing brief, the Agency, which improperly transferred the grievant, was aware that the issue of the grievant's work location was implicated by the grievance. *See* Award at 3 (grievance filed in response to Agency's decision to suspend and transfer grievant to a different work location). Thus, there is no basis for finding that the Agency was prejudiced by the Arbitrator's remedy. *Cf. U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.*, 56 FLRA 467, 472 (2000) (rejecting exceeded-authority claim, noting that arbitrator's remedy was linked to harm alleged in grievance). We note, in this regard, that it is well established that arbitrators have broad discretion to fashion remedies, such as the remedy here. *See, e.g., U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 47 FLRA 98, 101 (1993) (*Air Logistics*).

Accordingly, we deny this exception.

C. The award does not fail to draw its essence from the parties' agreement.

The Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to the arbitrator in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

As stated above, the Agency asserts that the Article provides that employees may participate in AWS "only to the extent expressly provided under [a] locally negotiated agreement[]." Exceptions at 11. The Agency interprets this wording to require that "[i]f AWS is not available at a particular port . . . then no employees at that port . . . will work an AWS." *Id.* However, the Agency does not assert, and the Article does not indicate, that an arbitrator may not direct the continuation of an AWS as part of a remedy for the Agency's improper transfer of an employee. *See id.*; *id.* Attach. 7. In addition, it is well settled that arbitrators have broad discretion to fashion remedies. *See Air Logistics*, 47 FLRA at 101. Accordingly, we deny this exception.

D. The award is not incomplete, ambiguous, or contradictory.

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin. Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

Although the Agency argues that the award is ambiguous because it directs the Agency to provide a "priority transfer" to the Port of Bellingham, Exceptions at 15, a personnel action that the Agency claims does not exist at the Agency, the Agency does not argue, and there is no basis for finding, that the award is impossible to implement. Consequently, we find that the award is not deficient in this regard, and we deny the exception. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 916, 919 (2010).

V. Decision

The Agency's exceptions are denied.

Member Beck, Dissenting in Part:

I disagree with my colleagues' conclusion that the Arbitrator did not exceed his authority by ordering that the grievant be given "priority transfer to the Port of Bellingham" and that "his AWS schedule shall be reinstated." Award at 12.

As I acknowledged in my dissent in *United States, Department of Homeland Security, U.S. Customs and Border Protection*, 65 FLRA 160, 165-66 (2010), arbitrators are granted broad discretion in the fashioning of appropriate remedies. *See, e.g., Veterans Admin.*, 24 FLRA 447, 450 (1986) (*VA*). Even so, the Authority has adhered to the fundamental principle that arbitrators must confine their awards and remedies to those issues submitted for resolution. *See id.*, and the cases cited therein. An arbitrator's authority to fashion a remedy does not extend to issues that are not submitted to arbitration. *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002). Although arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them. *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 780 (2005) (then-Member Pope dissenting as to application).

Here, the Arbitrator framed the issue before him as:

> Whether a [five]-day suspension and [i]nvoluntary reassignment from the Point of Port Roberts for [i]nattention to [d]uty . . . and [u]nprofessional conduct . . . by [the grievant] would promote the efficiency of the [s]ervice? If not, what should be the appropriate penalty?

Award at 1. In other words, the Arbitrator was tasked with assessing whether the penalties that had been imposed on the grievant by the Agency were appropriate, and if not, whether some other penalty against the grievant would be more appropriate.[1]

The Arbitrator answered the first question when he implicitly found that the grievant's five-day suspension and involuntary reassignment did not promote the efficiency of the service. Award at 12. Having so found, the Arbitrator possessed the authority only to determine "the appropriate penalty." He was free to find -- and apparently did find -- that the appropriate penalty was no penalty at all. Thus, he could properly (1) rescind the suspension and award to the grievant the pay and benefits that he lost as a result of the suspension, and (2) return the grievant to his original work location. The Arbitrator, however, went beyond this authority and awarded to the grievant affirmative relief not contemplated by the specific issues that he framed – i.e., he ordered that the grievant be given a priority transfer to the Port of Bellingham and ordered the reinstatement of the grievant's AWS schedule at that port.

This additional relief concerns issues that were not before the Arbitrator. First, whether the grievant should be given a priority transfer to a specific port, and second, whether his AWS schedule should be reinstated there. The Arbitrator was neither asked to, nor authorized to, resolve these other issues, nor to direct remedies concerning them. By doing so, the Arbitrator exceeded his authority. *See Veterans Admin.*, 24 FLRA at 451 (finding arbitrator "exceed[ed] his authority by deciding, and awarding a remedy concerning an issue not submitted to arbitration"); *see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 916, 919-20 (2010); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 62 FLRA 59, 62 (2007).

Accordingly, I would modify the award to vacate the portions of the award concerning these remedies.[2]

1. My colleagues' suggestion that the reference to a "penalty" refers to a "penalty against the Agency" is not plausible. The first sentence of the issue framed by the Arbitrator indisputably relates to the disciplinary penalty that was imposed on the grievant. If the Arbitrator's reference to a "penalty" in the second sentence were intended to indicate something entirely different -- a "penalty" that he might impose on the Agency -- he should have said so much more explicitly. Moreover, labor arbitrators are generally not asked to "penalize" employers who erroneously discipline employees.

2. Because I would find that these additional remedies should be set aside, I would find it unnecessary to address the Agency's remaining exceptions that the award fails to draw its essence from the parties' agreement or that the award is ambiguous. Exceptions at 11-12, 15-16.