

67 FLRA No. 108

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 405
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BUTNER, NORTH CAROLINA
(Agency)

0-AR-4866

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DECISION

May 19, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Barbara J. Wood found that the Agency violated the parties' collective-bargaining agreement when it made Union-represented employees ineligible for overtime assignments that overlapped with their regular shifts. The Arbitrator found that by stopping the practice for employees represented by the Union, but not for employees represented by the Agency's other two local unions (who are covered by the same agreement), the Agency violated the agreement's provision requiring the fair and equitable distribution of overtime.

As a remedy, the Arbitrator awarded backpay to employees who lost overtime opportunities; however, she did not award interest and ordered that "[n]o attorney fees shall be awarded."¹ Both the Agency and the Union filed exceptions to the award and oppositions to each other's exceptions.

The Agency asks us to decide three questions. The first is whether the award fails to draw its essence from the parties' agreement because the Arbitrator's interpretation of the overtime provision is implausible. The second question is whether the award is contrary to

5 C.F.R. § 550.112(g), 5 C.F.R. § 551.422(a), or the Federal Service Labor-Management Relations Statute (the Statute)² because it requires the Agency to compensate employees for time spent traveling to and from voluntary overtime assignments. And the third question is whether the Arbitrator's award of backpay is contrary to 5 C.F.R. §§ 550.804(e)(1) and 550.805(c)(2), which implement the Back Pay Act (BPA).³

Before we reach these questions, however, we must decide whether they are properly before the Authority. Because the Agency failed to present its interpretation of the agreement to the Arbitrator, we find that the Agency's essence exception is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.⁴ We also find that the Agency's contrary-to-law exceptions are barred, in part, because the Agency failed to present its arguments concerning 5 C.F.R. §§ 550.112(g), 550.804(e)(1), and 550.805(c)(2) to the Arbitrator. With respect to the Agency's remaining contrary-to-law claims, we find that the Agency has not established that the practice of compensating employees for their travel time violates 5 C.F.R. § 551.422(a). Accordingly, we deny the Agency's remaining contrary-to-law exceptions.

Additionally, the Union asks us to find that the Arbitrator's failure to award interest is contrary to the BPA and that her denial of attorney fees violates 5 C.F.R. Part 550 and 5 U.S.C. § 7701(g)(1). Because the law is clear both that an agency must pay interest on backpay awards and that an arbitrator may not deny attorney fees in the absence of a fee request by the prevailing party, we grant the Union's exception.

II. Background and Arbitrator's Award

Three locals represent employees at the Agency – AFGE, Council of Prison Locals (Council), Locals 408 and 3696, as well as the Union (i.e., Local 405) – and all three locals administer the same collective-bargaining agreement on behalf of the Council. The Agency had been permitting employees to volunteer for overtime shifts guarding inmates at local hospitals when those shifts overlapped with their regular duty shifts (overlapping overtime). For example, an employee whose regular shift was from 7:30 a.m. to 4:00 p.m. might work a midnight-to-8:00 a.m. overtime shift. The employee would remain at the hospital until 8:00 a.m. (but would begin receiving her normal rate of pay at 7:30 a.m.) and then travel to the Agency for the remainder of her regular shift. As a result, the employee might not arrive at her regular work site until 9:00 a.m.;

² 5 U.S.C. §§ 7101-7135.

³ 5 U.S.C. § 5596.

⁴ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹ Award at 20.

however, the Agency would still pay her for a full, eight-hour shift.

The Agency stopped this practice for Union-represented employees but permitted employees in Locals 408 and 3696 to continue to work overlapping overtime. The Agency alleged that it stopped the overlapping overtime when it discovered that employees were missing one to two hours of their regularly scheduled shifts in order to work these overtime assignments. The Union filed a grievance and invoked arbitration when the grievance was not resolved.

The Arbitrator framed the issue as “[d]id the Agency apply disparate treatment against bargaining[-]unit members in [the Union] by not permitting employees to work overtime shifts in accordance with the [parties’ agreement]?”⁵ Before the Arbitrator, the Union argued that the Agency violated Article 18 of the parties’ agreement by denying overtime opportunities only to the employees that it represented. As a remedy, the Union requested backpay with interest and asked the Arbitrator to retain jurisdiction to implement the backpay remedy and determine attorney fees. The Agency argued before the Arbitrator that it had the right to discontinue overlapping overtime because the practice was illegal and that an award of backpay would violate the BPA.

The Arbitrator found that, under the circumstances, the Agency violated Article 18, Section p.1. of the parties’ agreement, which requires overtime assignments to be “distributed and rotated equitably among bargaining[-]unit employees.”⁶ The Arbitrator concluded, therefore, that the Agency violated the parties’ agreement when it discontinued overlapping overtime only for employees represented by the Union.

As a remedy, the Arbitrator directed the Agency to pay backpay to any employees who lost overtime opportunities because of the change in the practice; however, she did not award interest, and she denied attorney fees.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s essence exception and, in part, its contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations,⁷ the Authority will not consider evidence or arguments that could have been, but were

not, presented to the arbitrator.⁸ Similarly, the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party’s arguments to the arbitrator.⁹ Based on §§ 2425.4(c) and 2429.5, the Authority has declined to consider an argument that an award failed to draw its essence from the parties’ agreement where the excepting party did not advance its interpretation of the agreement at arbitration, despite having the opportunity to do so.¹⁰ Likewise, the Authority has applied §§ 2425.4(c) and 2429.5 to bar a claim that an award is contrary to law when the excepting party relies on a source of authority that it could have, but did not, identify in its arguments to the arbitrator.¹¹

A. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s essence exception.

In its exceptions, the Agency argues that the Arbitrator’s interpretation of Article 18, Section p. of the parties’ agreement was implausible. Section p. provides the following:

Specific procedures regarding overtime assignments may be negotiated locally.

1. [W]hen Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining[-]unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be *distributed and rotated equitably among bargaining unit employees . . .*.¹²

The Agency argues that Section p. allows individual locals to negotiate “different procedures”¹³ for the distribution of overtime assignments, and that the Arbitrator disregarded this provision by considering overtime offered to “members of other locals . . . to

⁵ Award at 2.

⁶ *Id.* at 19 (quoting Art. 18, § p.1. of the Master Labor Agreement) (internal quotation marks omitted).

⁷ 5 C.F.R. §§ 2425.4(c), 2429.5.

⁸ *E.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (*Local 3571*) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012)).

⁹ *U.S. Dep’t of the Treasury, IRS*, 57 FLRA 444, 448 (2001).

¹⁰ *E.g.*, *Local 3571*, 67 FLRA at 219 (citing *AFGE, Council 215*, 66 FLRA 771, 773 (2012)).

¹¹ *U.S. DOD, Domestic Dependent Elementary & Secondary Sch.*, 67 FLRA 138, 139 (2013).

¹² Agency’s Exceptions, Ex. 12, Master Labor Agreement at 47 (emphases added).

¹³ *Id.* at 9.

determine whether the overtime assignments were distributed ‘equitably.’”¹⁴

However, the Agency never argued to the Arbitrator that the equitable-distribution provision requires equitable distribution of overtime across only a given local’s jurisdiction, even though it elicited testimony during the hearing that appears to have been intended to support this very argument.¹⁵ Even if the Agency was not aware that the Union was claiming a violation of Article 18, Section p.1. until it received a copy of the Union’s brief to the Arbitrator, over a month passed between the filing of the Union’s post-hearing brief and the Arbitrator’s award. And the Agency does not argue that either the Arbitrator or the parties’ agreement prohibited it from responding to the Union’s post-hearing brief. Thus, there was a sufficient opportunity for the Agency to request permission to reply to the Union’s argument concerning Article 18, Section p.¹⁶ As such, the Agency could have presented its interpretation of Section p. to the Arbitrator. Because it failed to do so, we dismiss the Agency’s essence exception.

- B. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s contrary-to-law exceptions, in part.

Here, the Agency argues that the award is contrary to 5 C.F.R. §§ 550.804(e)(1)¹⁷ and 550.805(c)(2),¹⁸ which implement the BPA. Although the Agency argued below that an award of backpay

¹⁴ *Id.* at 10.

¹⁵ *Id.*, Ex. 3, Tr. at 73-74.

¹⁶ See *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011).

¹⁷ Section 550.804(e)(1) provides:

The pay, allowances, and differentials paid as back pay under this subpart (including payments made under any grievance or arbitration decision or any settlement agreement) may not exceed that authorized by any applicable law, rule, regulation, or collective bargaining agreement, including any applicable statute of limitations.

¹⁸ The relevant portion of § 550.805(c)(2) provides:

[I]n computing the amount of back pay under [the BPA], and this subpart, an agency may not include . . . Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

would violate the BPA, it did not discuss §§ 550.804(e)(1) and 550.805(c)(2). Moreover, the BPA argument that the Agency made to the Arbitrator is different from the one it makes now.

Before the Arbitrator, the Agency argued that there was no way to “know which employees would have been willing, ready, and able to work on a particular day in question. Therefore, any monetary relief would be based purely on speculation and would be contrary to the [BPA].”¹⁹ Conversely, the Agency argues here that allowing the employees to travel to and from their voluntary overtime assignments while on the clock is illegal, making the employees unavailable to work overtime. Accordingly, the Agency claims that the award requires it to pay backpay to employees who were unavailable to work overtime, in violation of § 550.805(c)(2), and that in doing so it would be paying more backpay than is authorized by law, which violates § 550.804(e)(1).

Thus, not only did the Agency fail to rely on §§ 550.804(e)(1) and 550.805(c)(2) below, but also, the BPA argument that it makes to us is different from the one it made to the Arbitrator. Accordingly, the Agency’s argument that the award is contrary to §§ 550.804(e)(1) and 550.805(c)(2) is barred by the Authority’s Regulations, and we therefore dismiss this exception.

The Agency also argues that the award is contrary to 5 C.F.R. § 550.112(g). The Agency claims that § 550.112(g) makes it illegal to compensate an employee for time spent traveling to and from a voluntary overtime assignment.²⁰ Although the Agency argued before the Arbitrator that the practice was illegal, it only argued that the practice violated 5 C.F.R. Part 551. Accordingly, to the extent the Agency bases its contrary-to-law argument on 5 C.F.R. § 550.112(g), we dismiss it; however, as discussed below, we consider, on the merits, the Agency’s alternative argument that 5 C.F.R. § 551.422(a) makes it illegal to compensate an employee for time spent traveling to and from a voluntary overtime assignment.²¹

¹⁹ Agency’s Exceptions, Ex. 2, Agency’s Post-Hr’g Br. at 6 (citing *Naval Air Rework Facility, Norfolk, Va.*, 21 FLRA 410 (1986); *Norfolk Naval Shipyard, Portsmouth, Va.*, 21 FLRA 307 (1986); *AFGE, Local 1857*, 35 FLRA 325 (1990)).

²⁰ Agency’s Exceptions at 5-7.

²¹ *Id.* at 7 n.7.

IV. Analysis and Conclusions

- A. The Arbitrator's merits determination 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.²² 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.²³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.²⁴

Title 5, § 551.422(a)(1) of the Code of Federal Regulations provides that "[t]ime spent traveling shall be considered hours of work if . . . [a]n employee is required to travel during regular working hours." Subsection (b) of § 551.422 clarifies that "normal 'home to work' travel . . . is not hours of work."

The Agency asserts that the award is contrary to law because it "effectuates an illegal practice."²⁵ Specifically, it contends that the practice of paying employees for time spent traveling to and from a voluntary overtime assignment is contrary to 5 C.F.R. § 551.422(a) because time spent in travel to and from a voluntary overtime assignment is not part of the employees' administrative workweek and, therefore, does not constitute hours of work.²⁶

However, as the Agency acknowledges, the travel at issue here took place during the employees' regularly scheduled shifts²⁷ and entailed driving from one work site to another. And compensating employees for travel under the circumstances presented here is expressly permitted by § 551.422(a)(1). As such, the award is not contrary to § 551.422(a)(1).

Finally, the Agency asserts that the award is contrary to the Statute because it "requires the Agency to continue impact[-]and[-]implementation . . . bargaining over the change to [an] illegal practice."²⁸ As discussed above, the Agency has not established that the practice is illegal, and in any event, the award does not require the parties to bargain. The award simply requires the Agency to "compensate[]" those employees who "would have received overtime assignments."²⁹ Consequently, there is no basis to conclude that the award is contrary to the Statute.³⁰

Accordingly, we deny the Agency's contrary-to-law exceptions, in part.

- B. The Arbitrator's denial of interest and attorney fees is contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator failed to award interest in accordance with the BPA.³¹ Under the BPA, "interest must be paid" on backpay awards.³² In this case, the Arbitrator awarded the grievants backpay for the Agency's violation of the parties' agreement. Under these circumstances,³³ the payment of interest is required.³⁴ Moreover, the Agency agrees that, assuming we reject its exceptions (as we have), the grievants are entitled to interest as a matter of law.³⁵ Accordingly, we grant the Union's exception and modify the award to include the payment of interest on the backpay award.

The Union also argues that the Arbitrator's denial of attorney fees is contrary to 5 C.F.R. § 550.807³⁶ because the Union did not file a request for attorney fees

²² *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)).

²³ *U.S. DOD, Dep't of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

²⁴ *Id.*

²⁵ Agency's Exceptions at 5.

²⁶ *Id.* at 5-6, 7 n.5.

²⁷ *Id.* at 6 n.4.

²⁸ *Id.* at 8 (citing *U.S. DOL, Wash., D.C.*, 60 FLRA 68, 70 (2004)).

²⁹ Award at 20.

³⁰ *See, e.g., U.S. Dep't of the Army, Armor Ctr., Fort Knox, Ky.*, 34 FLRA 161, 164-65 (1990) (finding award did not require agency to take any action under the Statute).

³¹ Union's Exceptions at 5-8 (citing *U.S. DOD, Marine Corps Logistics Base, Barstow, Cal.*, 37 FLRA 796, 797-98 (1990) (*Marine Corps*)).

³² *NATCA*, 64 FLRA 906, 907 (2010) (quoting *Marine Corps*, 37 FLRA at 797); *see also* 5 U.S.C. § 5596(b)(2)(A).

³³ *See U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012); *USDA, Rural Develop., Wash., D.C.*, 60 FLRA 527, 530 (2004).

³⁴ *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 65 FLRA 267, 271 (2010) (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine, Hyattsville, Md.*, 38 FLRA 1291, 1299 (1991) (awarding interest after denying exceptions to backpay award)).

³⁵ Agency's Opp'n at 6.

³⁶ The Union inadvertently cited "5 U.S.C. § 550.807," but quoted the wording of 5 C.F.R. § 550.807. Union's Exceptions at 11. Because the Union relies on 5 C.F.R. § 550.807, we consider its assertion based on this provision.

with the Arbitrator³⁷ and to 5 U.S.C. § 7701(g)(1) because the Arbitrator did not set forth specific findings to support her denial of attorney fees.³⁸ As with her denial of interest, we find it clear that the Arbitrator erred when she denied attorney fees.

The Authority has consistently held that an arbitrator may not deny attorney fees in the absence of a fee request.³⁹ And the Office of Personnel Management's regulations make clear how the issue of attorney fees must be presented to the appropriate authority – here, the Arbitrator. Section 550.807⁴⁰ provides that, to be awarded attorney fees, the grieving party must present a request for fees to the arbitrator, and the employing agency must have an opportunity to respond. Here, the Union did not request an award of fees as part of the merits award, and the Agency was not granted an opportunity to respond to any request for fees. Instead, as in *U.S. Department of the Army, Red River Army Depot, Texarkana, Texas*,⁴¹ the Union requested only that the Arbitrator retain jurisdiction to determine a remedy and to entertain the request for attorney fees that the Union *intended* to file. Because the Union never made a fee request to the Arbitrator, the Arbitrator's

denial of fees does not comply with 5 C.F.R. § 550.807, and the award must be modified to strike the denial of attorney fees.⁴²

Additionally, the Authority has consistently held that an arbitrator, not the Authority, is the appropriate authority for resolution of a request for attorney fees.⁴³ Therefore, our determination to modify the award is without prejudice and does not prevent the Union from filing a request for attorney fees.⁴⁴ Accordingly, we grant the Union's exception that the award is contrary to 5 C.F.R. § 550.807 and modify the award by striking the denial of attorney fees.

Because the Arbitrator's denial of attorney fees is contrary to 5 C.F.R. § 550.807, it is unnecessary for us to address the Union's arguments concerning 5 U.S.C. § 7701(g)(1).

V. Decision

We dismiss in part, and deny in part, the Agency's exceptions. We grant the Union's exceptions and modify the award to strike the denial of attorney fees and include the payment of interest on the backpay award.

³⁷ See Union's Exceptions at 11-12.

³⁸ *Id.* at 9, 12-14.

³⁹ *E.g.*, *AFGE, Local 3615*, 66 FLRA 565, 565 (2012) (*Local 3615*); *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 54 FLRA 759, 762 (1998) (*Red River*).

⁴⁰ The relevant portion of 5 C.F.R. § 550.807 provides:

(a) An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. However, if the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency, the employee or the employee's personal representative shall present the request to the appropriate authority from which the appeal was taken.

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

⁴¹ *Red River*, 54 FLRA at 761.

⁴² See *Local 3615*, 66 FLRA at 565 (striking denial of attorney fees because union never made fee request); *Red River*, 54 FLRA at 762 (same).

⁴³ *Local 3615*, 66 FLRA at 565.

⁴⁴ See *Red River*, 54 FLRA at 763.