67 FLRA No. 61

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 231
(Union)

and

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

0-AR-4842
(66 FLRA 1024 (2012))
(67 FLRA 67 (2012))

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DECISION AND ORDER
ON REMAND

February 11, 2014

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members[1]

I. Statement of the Case

Arbitrator Jerry B. Sellman found that the Agency violated an Agency policy by failing to assign an overtime opportunity to the grievant, but the Arbitrator denied the grievant backpay. The Union filed an exception to the award, and in *NTEU, Chapter 231* (*NTEU I*),[2] the Authority held that the Arbitrator erred as a matter of law in denying backpay. The Agency then filed a motion for reconsideration of *NTEU I*, and the Authority denied that motion in *NTEU, Chapter 231* (*NTEU II*).[3] Thereafter, the Agency filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), and that court subsequently granted the Authority's motion to remand this case for further evaluation of the Agency's motion for reconsideration of *NTEU I*.[4] Now on remand, this case presents three substantive questions.

The first question is whether to vacate *NTEU II*. As this decision and order on remand supersedes our prior order denying the Agency's motion for reconsideration, we vacate *NTEU II*.

The second question is whether to stay the effectiveness of *NTEU I* during the current proceedings on remand. As this decision and order concludes these remand proceedings, we deny the stay request as moot.

The third question is whether to grant the Agency's motion for reconsideration of *NTEU I*, which the Agency argues violates the Back Pay Act (the Act)[5] and the legal doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity). Because *NTEU I* is consistent with the Act, and the Act waives sovereign immunity for awarding backpay to the grievant, we deny the Agency's motion for reconsideration of *NTEU I*.

II. Background

A. Arbitrator's Award

The Arbitrator determined that the Agency violated an Agency policy when it failed to assign the grievant an overtime opportunity to which the policy clearly "entitled" him.[6] As a remedy, the Arbitrator granted the grievant the next available overtime assignment. In so doing, however, the Arbitrator rejected the Agency's argument that such an assignment was the only permissible remedy for the policy violation.[7] Rather, the Arbitrator found that "[i]f the action of the Agency . . . is deemed an unjustified or unwarranted personnel action, then [backpay] is warranted, notwithstanding the [policy's nonmonetary] remedy"[8] for employees denied overtime due to "administrative error."[9] Although the Arbitrator determined that the Agency's failure to assign the grievant overtime was "more than a mere mistake,"[10] he concluded that the policy violation was not an unjustified or unwarranted

[1] Member Pizzella did not participate in this decision because he was not a Member of the Authority when the Authority issued the original decision and order denying the Agency's motion for reconsideration nor when the Authority filed the motion to remand with the U.S. Court of Appeals for the District of Columbia Circuit on March 28, 2013.
[2] 66 FLRA 1024 (2012).
[3] 67 FLRA 67 (2012).
[4] *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir. Aug. 2, 2013) (*CBP*) (per curiam) (order granting motion for voluntary remand).
[5] 5 U.S.C. § 5596.
[6] *NTEU I*, 66 FLRA at 1025; Award at 28 ("There is no question that the [g]rievant was entitled to the overtime under [the policy].").
[7] Award at 30.
[8] *Id.* at 32.
[9] *Id.* at 30 (quoting Policy, § B(6)).
[10] *Id.* at 32.

personnel action and, thus, that the Act did not entitle the grievant to backpay.

B. Prior Authority Proceedings

Resolving a Union-filed exception to the award, the Authority in *NTEU I* held that the Arbitrator erred as a matter of law in denying the grievant backpay. The Authority determined that the Arbitrator's finding that the Agency's failure to assign the grievant overtime violated an Agency policy satisfied the first requirement of the Act – that the grievant was affected by an unjustified or unwarranted personnel action. And the Authority found that the award as a whole satisfied the second requirement of the Act – that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Specifically, the Authority found that "[t]he Arbitrator's 'i[f] . . . then' construction explicitly identifies a causal connection"[11] between the Agency's violation of the policy and the grievant's loss of pay. Because the Arbitrator's findings supported an award of backpay under the Act, the Authority found that the Act required the Arbitrator to award backpay. Accordingly, the Authority modified the award to direct the Agency to make the grievant whole for overtime pay lost because of the Agency's policy violation.

As mentioned earlier, the Agency filed a motion for reconsideration of *NTEU I*, and the Authority denied that motion in *NTEU II*.

C. D.C. Circuit Proceedings

As briefly discussed above, the Agency petitioned the D.C. Circuit to review *NTEU I* and *NTEU II*. When the Authority requested that the court remand the case for further evaluation of the Agency's motion for reconsideration of *NTEU I*, the Agency filed a response opposing the Authority's request. As relevant here, the Agency argued that the court should not remand the case without vacating *NTEU II* and staying the effectiveness of *NTEU I*. In its order granting the Authority's motion to remand the case, the D.C. Circuit denied the Agency's requests to vacate and stay the earlier decisions "without prejudice to renewal [of the requests] before the Authority."[12]

D. On Remand

Following the D.C. Circuit's order, the Agency filed a motion with the Authority to renew its earlier requests to the court to vacate *NTEU II* and stay *NTEU I*, and the Union filed an opposition to that motion. We address these filings regarding vacating and staying the Authority's earlier decisions in part III.A. below. Moreover, consistent with the court's remand order, we address the Agency's motion for reconsideration of *NTEU I* and the Union's opposition to that motion in part III.B. below.

III. Analysis and Conclusions

A. We grant in part, and deny in part, the Agency's motion to vacate *NTEU II* and stay *NTEU I*.

After the Agency filed its motion renewing its requests to the court to vacate and stay the Authority's earlier decisions, the Union requested permission to file[13] – and did file – a supplemental submission opposing that motion. Section 2429.26 of the Authority's Regulations generally requires a party filing a supplemental submission to request permission to file that submission.[14] The Authority has granted permission to file a supplemental submission where, for example, the submission responded to arguments raised for the first time in an opposing party's filing.[15]

Regarding whether to consider the parties' supplemental submissions under § 2429.26, we note that the Agency did not request permission to file its supplemental motion on remand. However, the D.C. Circuit's order specifically contemplated the filing of a supplemental motion on remand,[16] and the Agency relies on the court's order in filing its motion.[17] Under these unique circumstances, we consider the Agency's supplemental motion despite the absence of a request for permission to file it.[18] And given that the Agency's submission raises arguments to which the Union could not have previously responded, we grant the Union's request to file its opposition to the supplemental motion.[19]

[11] *NTEU I*, 66 FLRA at 1026.
[12] *CBP*, No. 13-1024, Order at 1.
[13] Union's Resp. & Opp'n to Agency's Mot. to Vacate & Stay, at 2 n.1 (citing 5 C.F.R. § 2429.26).
[14] *See* 5 C.F.R. § 2429.26.
[15] *E.g.*, *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004) (*IFPTE*).
[16] *CBP*, No. 13-1024, Order at 1 (denying Agency's requests to vacate and stay "without prejudice to renewal before the Authority").
[17] *See* Agency's Mot. to Vacate & Stay, at 1 (stating that the Agency filed its motion on remand "[p]ursuant to [the D.C. Circuit's order] . . . that the Agency's requests . . . could be renewed before the Authority").
[18] *Cf. Int'l Ass'n of Machinists & Aerospace Workers, Franklin Lodge No. 2135*, 50 FLRA 677, 680 (1995) (on its own motion, Authority provided parties with "opportunity to file a supplemental statement setting forth their positions [in a case] on remand" from the D.C. Circuit).
[19] *See IFPTE*, 59 FLRA at 999.

The Agency's first request is that we vacate *NTEU II*. In cases where an Authority decision and order on remand effectively nullified a prior Authority decision or order, the Authority has vacated the prior decision or order.[20] In that regard, we note that this decision and order on remand supersedes – and thus effectively nullifies – the prior order in *NTEU II* denying the Agency's motion for reconsideration. For that reason, we grant the portion of the Agency's motion requesting that we vacate *NTEU II*. As to the Agency's second request – that we stay the effectiveness of *NTEU I* while evaluating the Agency's motion for reconsideration – this decision and order on remand renders that request moot, and we deny it accordingly.[21]

B. We deny the Agency's motion for reconsideration of *NTEU I*.

The Agency contends that *NTEU I* violates the Act and the doctrine of sovereign immunity and, consequently, that the Authority should grant its motion for reconsideration. Although the Agency concedes that the Act waives sovereign immunity for certain backpay claims, the Agency argues that *NTEU I* exceeds the scope of that waiver by directing backpay for the grievant in violation of Section (b)(4) of the Act[22] (Section (b)(4)).

As the Agency asserts that *NTEU I* violates Section (b)(4), we begin our analysis with the text of that section:

> The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective[-]bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than [six] years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.[23]

Relying on this section, the Agency's argument proceeds as follows: (1) in this case, the Agency's policy is "the applicable . . . regulation[] . . . under which the unjustified or unwarranted personnel action" was found;[24] (2) under Section (b)(4), any "pay . . . granted . . . for the period" during which the Agency's "unjustified or unwarranted personnel action was in effect shall not exceed" the remedy authorized by the Agency's policy;[25] (3) the Agency's policy authorizes only one remedy for its violation, and that is assignment of the next available overtime opportunity; (4) by directing a backpay remedy that exceeds the remedy authorized by the Agency's policy, *NTEU I* violates Section (b)(4); and (5) as Section (b)(4) places conditions on the Act's waiver of sovereign immunity, a decision in conflict with Section (b)(4) exceeds the Act's sovereign-immunity waiver.

Relevant to the Agency's arguments about its policy, we note that arbitrators have the authority to interpret and apply agency rules and regulations in the resolution of grievances under the Statute, just as the Arbitrator did in this dispute.[26] But the Agency asserts that the Authority must defer to the Agency's own interpretation of the policy when evaluating its motion for reconsideration.[27] Even assuming that such deference generally is warranted where an agency's interpretation of its regulation differs from an arbitrator's, the Authority does not defer to an agency's purely "litigative positions"; the Authority defers only to those interpretations that an agency "publicly articulated some time prior to" arbitration "over the disputed provision."[28] The Agency does not assert that it publicly articulated its interpretation of the policy provision at issue here prior to arbitration, so we decline to defer to that interpretation. Accordingly, we assess whether the Arbitrator erred in his interpretation and application of the policy.

[20] *E.g.*, *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004) (decision and order on remand "set aside" earlier decision in 58 FLRA 685); *Small Bus. Admin.*, 56 FLRA 926, 926 (2000) (decision and order on remand vacated decision in 54 FLRA 562).

[21] *See U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1045 n.2 (2012) (in an order denying motion for reconsideration, Authority denied as moot a request to stay original decision pending resolution of the motion).

[22] 5 U.S.C. § 5596(b)(4).

[23] *Id.*

[24] Mot. for Recons. at 4 (quoting § 5596(b)(4)) (emphasis omitted).

[25] *Id.* (quoting § 5596(b)(4)) (emphasis omitted).

[26] *U.S. DOJ, INS, Wash., D.C.*, 48 FLRA 1269, 1275 (1993) (*INS*); *see also U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011) (binding agency policy considered an agency rule).

[27] Corrected Resp. of Pet'r to Resp't's Mot. for Remand at 14, *CBP*, No. 13-1024 (D.C. Cir. filed Apr. 3, 2013).

[28] *See U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1136 (1996) (quoting *FLRA v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1454 (D.C. Cir. 1989)).

When evaluating exceptions asserting that an arbitration award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[29] The pertinent provision of the Agency's policy states that the "remedy for a missed overtime opportunity *due to administrative error* shall be provision of the next overtime opportunity to the affected employee."[30] The Agency contends that this provision limits the remedies available in this case. But the Arbitrator did not find that the grievant lost his overtime opportunity due to administrative error. Rather, the Arbitrator found that the Agency's policy violation was "more than a mere mistake,"[31] and the Agency does not address this finding or attempt to show that it is inconsistent with the plain wording of, or otherwise impermissible under, the policy. In addition, the Arbitrator explicitly rejected the Agency's contention that the exclusive remedy for all policy violations is assignment of the next overtime opportunity.[32] In this regard, the provision quoted above does not state that its remedy is exclusive, or that it precludes a backpay award. As such, the Agency has not shown that the Arbitrator's finding on the availability of a backpay remedy is inconsistent with the plain wording of, or is otherwise impermissible under, the policy. Therefore, the Agency has not demonstrated that *NTEU I* exceeds the remedies that the policy authorizes.

The remainder of the Agency's arguments are premised on its claim that *NTEU I* exceeds the remedies authorized by the Agency's policy. As we have rejected that argument, we also reject the Agency's remaining arguments and find it appropriate to deny the motion for reconsideration. However, we note that there is an additional basis for denying the motion. Specifically, the Agency's statutory arguments are inconsistent with the text, history, and purpose of Section (b)(4).[33] Congress amended the Act in 1998 to include Section (b)(4),[34] and the House of Representatives committee report regarding this amendment set forth that body's motivating concern and how the amendment addressed it:

> Arbitrators and administrators [acting under § 5596] have, in some cases, applied the six[-]year limit found [in other titles of the U.S. Code]. In other cases, some arbitrators and administrators have applied no time limit, since none is specified within [§ 5596]. This provision would remove the ambiguity . . . by establishing a standard six[-]year limit in title 5.[35]

Further, both the House committee report and the conference committee report on the amendment specified that it "would clarify that any award of back pay . . . under" § 5596 "shall not exceed six years, *unless a shorter limitation period applies*."[36] This legislative history shows that Section (b)(4)'s purpose is to establish an outermost time limit on backpay awards, while allowing for a shorter limitations period where "authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted personnel action"[37] was found. In other words, Section (b)(4) merely places time limits on recovery under the Act. And as *NTEU I* did not award backpay in violation of an applicable limitations period, it is consistent with Section (b)(4). Given the Agency's concession that the Act waives sovereign immunity for backpay awards consistent with its terms, the Act provides the necessary waiver of sovereign immunity to support *NTEU I*. Therefore, this is an additional basis for denying the Agency's motion for reconsideration.

IV. Order

We deny the Agency's motion for reconsideration.

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[29] *SSA, Region IX*, 65 FLRA 860, 863 (2011) (citing *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 42 FLRA 1034, 1056-57 (1991)).

[30] Union's Exceptions, Attach., Ex. 2, at 6 ("Subsection 6") (emphasis added).

[31] Award at 32.

[32] *See INS*, 48 FLRA at 1275 (under the Statute, arbitrators have authority to interpret agency regulations).

[33] *See West v. Gibson*, 527 U.S. 212, 222 (1999) (finding that the "statutory language, taken together with statutory purposes[and] history" of Title VII of the Civil Rights Act of 1964, as amended, "produce evidence of a waiver" of sovereign immunity).

[34] *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1104, 112 Stat. 1920, 2141 (1998) (codified at 5 U.S.C. § 5596(b)(4)).

[35] H.R. REP. NO. 105-532, at 342 (1998) (U.S. House Comm. Rep.).

[36] *Id.* (emphasis added); H.R. REP. NO. 105-736, at 725 (1998) (Conf. Rep.) (emphasis added).

[37] 5 U.S.C. § 5596(b)(4).