68 FLRA No. 56

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 150
(Union)

0-AR-4964

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DECISION

February 27, 2015

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

I. Statement of the Case

In an award (the original award), Arbitrator Mollie H. Bowers found that the Agency violated the parties' collective-bargaining agreement when it failed to assign several employees (the grievants) overtime, and that the grievants were entitled to backpay under the Back Pay Act (BPA).[1] The Arbitrator rejected the Agency's claim that the parties had a binding past practice that allowed the Agency to remedy its violation by assigning the grievants another overtime opportunity (make-up overtime), finding that the alleged past practice conflicts with and was superseded by the parties' agreement. This case presents us with five questions.

The first question is whether the Authority should deny the Agency's exceptions because they fail to challenge one of the "separate and independent ground[s]" for the original award.[2] Because the exceptions challenge both of the separate and independent grounds for the original award, the answer is no.

The second question is whether the original award is deficient because the Arbitrator erred, as a matter of law, in finding that the alleged past practice conflicts with the parties' agreement. Such findings involve an arbitrator's interpretation and application of the parties' agreement, and, accordingly, are analyzed under the deferential essence standard. Because the Agency does not argue that the original award fails to draw its essence from the parties' agreement, the answer is no.

The third question is whether the original award of backpay is contrary to the BPA, because the parties' agreement allegedly allows only a remedy of make-up overtime. Because the Agency has not shown that the Arbitrator erred in finding that the agreement precludes a remedy of make-up overtime, the answer is no.

The fourth question is whether the original award conflicts with the BPA's duty to mitigate damages and waiver of sovereign immunity. Because there is no basis for finding that the BPA's duty to mitigate applies to denials of overtime opportunities or that the BPA's waiver of sovereign immunity does not apply in this case, we find that the answer is no.

The fifth question is whether the Arbitrator exceeded her authority. Because the Agency's exceeded-authority claim is premised on its arguments regarding the BPA, and we reject those arguments, we also reject the exceeded-authority claim.

II. Background and Arbitrator's Awards

Under the parties' agreement, the Agency assigns overtime to the employee who has volunteered to work overtime and who has earned the least amount of overtime pay for the year. The grievants volunteered for overtime opportunities, but the Agency assigned the overtime to other employees who allegedly fell below the grievants on the overtime roster. The Union filed five grievances alleging that the Agency violated the parties' agreement by failing to compensate the grievants with overtime pay after the Agency failed to assign them overtime opportunities to which they were entitled. After the grievances were filed, the Agency offered the grievants the opportunity to work make-up overtime. The grievants declined the offers, and the Union consolidated the grievances for arbitration.

In the original award, because the parties did not stipulate to the issue, the Arbitrator framed it as: "Whether the remedy for failing to properly assign [the grievants] to . . . overtime assignment[s] is to compensate the [grievants] for the bypassed overtime assignment[s] pursuant to the [BPA]?"[3]

The Arbitrator found that there was no dispute that the grievants should have been assigned the disputed overtime under Article 35 of the parties' agreement

[1] 5 U.S.C. § 5596.
[2] Opp'n at 10.
[3] Original Award at 1.

(Article 35), which addresses the procedures for assigning overtime.

Turning to the issue of remedy, the Arbitrator determined that backpay under the BPA, rather than make-up overtime, was the appropriate remedy. The Arbitrator rejected the Agency's claim that the parties had established a past practice of providing make-up overtime as a remedy for missed overtime opportunities. The Arbitrator found that the Union had not acceded to such a practice. In addition, the Arbitrator found that the Agency policy under which the Agency claimed that the past practice existed – the Agency's Revised National Inspectional Assignment Policy (RNIAP) – "ceased to exist when the parties entered into, and successfully concluded, negotiations concerning overtime and the procedures for assigning same."[4] The Arbitrator focused in this regard on Article 3, Section 3 of the parties' agreement, which provides, in pertinent part, that the agreement "supersedes all . . . past practices in conflict with it."[5] The Arbitrator reasoned that "[w]hen the RNIAP was replaced by Article 35, [without] language on remedy, it is no longer reasonable to interpret a defunct practice as an implied term of the contract."[6] In addition, the Arbitrator found that, absent a backpay remedy, "there is no incentive for [the Agency] to correct its behavior by adhering to the procedures [for assigning overtime] negotiated . . . by the parties at the bargaining table."[7]

Accordingly, the Arbitrator next addressed the requirements of the BPA and found those requirements satisfied. In particular, she found that the Agency's violation of the parties' agreement was an unjustified or unwarranted personnel action that directly resulted in a loss of pay to the grievants. Further, the Arbitrator found that offering make-up overtime "in no way guarantees that the [g]rievants will be offered 'like' assignments necessary to make them whole."[8] Therefore, in the Arbitrator's view, if the only remedy was make-up overtime, there would be no way "to compensate the [g]rievants for the overtime pay [that] they were originally denied due to the Agency's unjustified personnel action."[9] For these reasons, she found that backpay was the proper remedy.

In addition, the Arbitrator rejected the Agency's claim that the grievants had a duty to mitigate their losses of overtime pay by accepting make-up overtime assignments. Specifically, she found that the duty to mitigate does not apply in this case "where [g]rievants have been subjected to unjustified or unwarranted personnel actions."[10]

For these and other reasons, the Arbitrator found that the appropriate remedy for the Agency's contract violation was an award of backpay, and she awarded each grievant overtime pay. She retained jurisdiction on whether interest should be paid on the backpay amounts awarded to each grievant. In a supplemental award, the Arbitrator clarified that the Agency agreed that, if the backpay award is sustained, it will pay interest on the award.

The Agency filed exceptions to the Arbitrator's original award, but later requested to withdraw its exceptions without prejudice, and the Authority's Office of Case Intake and Publication granted the request. The Agency timely re-filed exceptions to the Arbitrator's original award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The Agency has not failed to except to a "separate and independent ground" for the original award.

In its opposition, the Union claims that the Arbitrator based her original award on "separate and independent ground[s]," and that the Agency has not excepted to both of those grounds.[11] Specifically, the Union claims that the Agency excepts only to the Arbitrator's finding that the alleged past practice violates Article 35 of the parties' agreement, and not to her finding that the alleged practice violates external law (particularly the BPA) and "several contract provisions."[12] As a result, the Union claims that it is unnecessary for the Authority to resolve the Agency's exceptions.[13]

When an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient for the Authority to find the award deficient.[14] In such circumstances, if the excepting party does not demonstrate that the award is deficient on one or more of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds.[15]

As discussed in greater detail below, the Agency argues that the Arbitrator erred by finding that the alleged

[4] *Id.* at 20.
[5] *Id.*
[6] *Id.* at 20-21.
[7] *Id.* at 21.
[8] *Id.* at 23-24.
[9] *Id.* at 24 (internal quotation marks omitted).
[10] *Id.* at 23.
[11] Opp'n at 10.
[12] *Id* at 11.; *see id.* at 10-12.
[13] *Id.* at 14.
[14] *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 81 (2012).
[15] *Id.*

past practice conflicts with the parties' agreement,[16] which is a finding that underlies both of the allegedly separate and independent bases for her original award. Further, the Agency challenges both the Arbitrator's interpretation of Article 35 and her findings regarding the BPA.[17] Accordingly, we find that the Agency has excepted to both of the separate and independent grounds for the original award, and address the merits of the Agency's exceptions.

B. The original award is not contrary to law.

The Agency argues that the original award is contrary to law in several respects. When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.[18] 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.[19] In making that assessment, the Authority defers to the Arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts."[20]

1. The Arbitrator's finding that the alleged past practice violates the parties' agreement is not contrary to law.

The Agency contends that the Arbitrator erred, as a matter of law, in finding that the alleged past practice "ceased to exist" under, and conflicts with, the parties' agreement.[21] Specifically, the Agency argues that the agreement and the practice have existed "in harmony" for a long time,[22] and that the Arbitrator erred in finding that Article 35 does not give management discretion to award make-up overtime.[23] The Agency claims that, because the past practice does not conflict with the parties' agreement, the agreement incorporates the practice.[24] Further, the Agency claims that the agreement is silent as to the appropriate remedy,[25] and, citing *Cruz-Martinez v. DHS* (*Cruz-Martinez*),[26] claims that the Arbitrator should have applied the parties' past practice.[27] Finally, the Agency argues[28] that the original award conflicts with the Authority's decision in *U.S. Department of the Navy, U.S. Marine Corps Logistics Base, Albany, Georgia* (*Navy*).[29]

In reviewing an arbitrator's award concerning whether a past practice has altered a contract term negotiated by the parties, the Authority considers the issue as a challenge to an arbitrator's interpretation and application of the parties' agreement.[30] An allegation that an arbitrator erred in this regard does not provide a basis for finding the award contrary to law.[31] Instead, the Authority applies the deferential essence standard in reviewing the arbitrator's findings.[32]

Here, although the Agency challenges the Arbitrator's interpretation of the parties' agreement, it does not argue that the original award fails to draw its essence from the agreement. And, to the extent that some of the Agency's arguments challenge the Arbitrator's factual findings, the Agency does not argue that the original award is based on nonfacts. As stated previously, in applying de novo review, the Authority defers to an arbitrator's factual findings, absent a demonstration that those findings are nonfacts.[33]

Further, the Agency's reliance on *Cruz-Martinez* and *Navy* is misplaced. *Cruz-Martinez* held that "past practices . . . can establish terms of [an] agreement that are as binding as any specific written provision[,] . . . particularly . . . where the past practice does not contradict any written provision in the" collective-bargaining agreement.[34] That decision does not support a conclusion that the Arbitrator was required, as a matter of law, to find that the particular alleged past practice in this case was binding on the parties – particularly given her finding that the alleged past practice conflicts with written provisions of the parties' agreement that were negotiated after the alleged past practice began. As for *Navy*, the Authority denied an essence exception to an arbitrator's award of make-up overtime.[35] *Navy* did not hold, as a matter of law, that an arbitrator is required to grant a make-up remedy when the requirements of the

[16] Exceptions at 17-22.
[17] *See id.* at 23-26.
[18] *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)).
[19] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[20] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012) (*IRS*).
[21] Exceptions at 18.
[22] *Id.* at 18.
[23] *Id.* at 9.
[24] *Id.* at 19.
[25] *Id.* at 20-21.
[26] 410 F.3d 1366 (Fed. Cir. 2005).
[27] Exceptions at 20-21.
[28] *Id.* at 22.
[29] 39 FLRA 576 (1991).
[30] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 691 (2014) (*DHS*); *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000).
[31] *DHS*, 67 FLRA at 691.
[32] *Id.*
[33] *IRS*, 67 FLRA at 104.
[34] 410 F.3d at 1370-71.
[35] 39 FLRA at 578-79.

BPA have been met, as in this case. In fact, in *NTEU, Chapter 231*, the Authority held that when the requirements of the BPA are met in connection with a denial of overtime, an arbitrator *must* award backpay.[36] In so holding, the Authority noted that *Navy* did not address whether the BPA allows make-up overtime as a remedy.[37]

For these reasons, we find that the Agency has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the alleged past practice "ceased to exist" under, and conflicts with, the parties' agreement.

The Agency also challenges the Arbitrator's failure to find whether the past practice existed.[38] However, given her finding that (even if it existed) the alleged past practice conflicted with the parties' agreement – which the Agency has not shown to be deficient – it was unnecessary for the Arbitrator to resolve whether the alleged past practice actually existed. Accordingly, we reject the Agency's challenge.

2. The original award is not contrary to § 5596(b)(4) of the BPA.

The Agency asserts that, under § 5596(b)(4) of the BPA, any remedy available under the BPA is restricted to limitations placed by the parties' agreement.[39] The Agency further asserts that the parties' agreement incorporates the alleged past practice of granting make-up overtime and that, therefore, any remedy is limited to make-up overtime.[40]

Section 5596(b)(4) provides, in pertinent part, that backpay "shall not exceed that authorized by the . . . collective[-]bargaining agreement under which the unjustified or unwarranted personnel action is found."[41] Here, the Arbitrator found that the parties' agreement superseded the alleged past practice.[42] Further, the Agency has not shown this finding to be deficient. As a result, there is no basis for finding that the alleged practice was incorporated into the agreement. Consequently, there is also no basis for finding that the award of backpay exceeds a limit contained in the agreement, and we find that the original award is not contrary to § 5596(b)(4).

Moreover, the Authority has found that § 5596(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" was found.[43] In other words, § 5596(b)(4) merely places time limits on recovery under the BPA.[44] As time limits on recovery were not an issue in this case, the Agency's reliance on § 5596(b)(4) is misplaced.

3. The original award is not contrary to the BPA's duty to mitigate damages or the BPA's waiver of sovereign immunity.

Even assuming that a remedy is available under the BPA, the Agency alternatively argues, the original award conflicts with the BPA's duty to mitigate damages.[45] Specifically, the Agency claims that the grievants failed to mitigate their losses by not accepting subsequent offers of make-up overtime.[46] The failure to mitigate damages under the BPA, according to the Agency, exceeds the BPA's waiver of sovereign immunity.[47]

In *U.S. DHS, U.S. CBP, Brownsville, Texas* (*DHS*), the Authority considered and rejected the same argument that the Agency makes here.[48] For the reasons given in *DHS*, we reject the Agency's duty-to-mitigate claim in this case.

In addition, because the Agency has not shown that the duty to mitigate damages bars the award of backpay or that the award is otherwise contrary to the BPA, we reject the Agency's claim that the original award is contrary to the waiver of sovereign immunity.

Accordingly, we find that the Agency has not established that the original award is contrary to law, and we deny this exception.

C. The Arbitrator did not exceed her authority.

The Agency asserts that the Arbitrator exceeded her authority, because she awarded a remedy that "exceeded the limitation of what is authorized by Congress."[49] This exception is premised on the Agency's claim that the original award is contrary to the BPA.

[36] 66 FLRA 1024, 1026-27, *recons. denied*, 67 FLRA 67 (2012), *remanded without decision sub nom. U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir. 2013), *decision on remand*, 67 FLRA 247 (2014).
[37] *Id.* at 1026.
[38] Exceptions at 11.
[39] *Id.* at 23.
[40] *Id.* at 11, 23-24.
[41] 5 U.S.C. § 5596(b)(4).
[42] Original Award at 20-21.
[43] *E.g.*, *DHS*, 67 FLRA at 692.
[44] *Id.*
[45] Exceptions at 24.
[46] *Id.* at 25.
[47] *Id.*
[48] 67 FLRA at 692.
[49] Exceptions at 23.

Because we have rejected the Agency's claims regarding the BPA, we also reject the exceeds-authority claim.

IV. Decision

We deny the Agency's exceptions.