73 FLRA No. 119

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 14
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-AR-5855

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DECISION

July 18, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

After Arbitrator Amedeo Greco issued a merits award directing the Agency to pay an employee (the grievant) a performance award, the Union requested attorney fees. In a separate fee award, the Arbitrator found that, because performance awards are discretionary under the parties' collective-bargaining agreement, they do not constitute pay under the Back Pay Act (the Act).[1] Accordingly, the Arbitrator concluded that the Union was not entitled to attorney fees under the Act. The Union excepts to this finding, arguing that the Arbitrator used the wrong legal standard to determine whether the parties' agreement requires the Agency to pay performance awards. For the reasons that follow, we deny the exception.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging that the Agency failed to objectively evaluate the grievant's work performance. In the merits award, the Arbitrator found the manner in which the Agency appraised the grievant violated the parties' agreement. As remedies, the Arbitrator directed the Agency to raise the contested element scores and pay the grievant the "monetary award he deserves" based on the increase in the overall rating.[2] No exceptions were filed to the merits award, and the Agency complied with it and implemented the directed remedies.

The Union requested attorney fees, asserting they were appropriate under the Act because the grievant "was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of . . . pay, allowances[,] or differential[s]."[3] The Union noted that the Authority has found "performance awards required by a collective[-]bargaining agreement constitute 'pay'" under the Act.[4]

In the fee award, the Arbitrator evaluated whether the parties' agreement requires the Agency to pay the grievant a performance award, thus making the Union "eligible" for attorney fees under the Act.[5] In arguing that Article 18 of the parties' agreement (Article 18) requires the payment of performance awards, the Union asserted Section 2 incorporates another agreement between the parties that regulates performance awards.[6] The performance-awards agreement states that employees with certain overall ratings "will receive an award" based on a specified formula.[7] Rejecting the Union's argument, the Arbitrator found there was "no contractual language mandating that [p]erformance [a]wards *must* be given."[8] Rather, finding Article 18, Section 1 allows the Agency "to cancel bargaining[-]unit [performance] awards altogether,"[9] the Arbitrator determined that payment of

[1] 5 U.S.C. § 5596.

[2] Exception, Attach. 2, Merits Award (Merits Award) at 8; *see also id.* at 7 (determining that the grievant's performance evaluation "deserved to be rated as '[e]xceeds' in all of the [elements at] issue, thereby raising his overall score to 4.6[,] which will earn him a several[-]hundred[-]dollar[] monetary award").

[3] Exception, Attach. 3, Att'y-Fee Request at 10 (quoting *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010)).

[4] *Id.* at 12 (citing *FAA*, 55 FLRA 1271, 1276 n.9 (2000) (*FAA*) (Member Cabaniss concurring)).

[5] Exception, Attach. 1, Fee Award (Fee Award) at 4.

[6] Exception, Attach. 5, Collective-Bargaining Agreement (CBA) Art. 18, § 2(A)(5) ("The parties agree that the [performance-awards agreement], including addendums, as modified by[,] but not inconsistent with[,] this [a]greement, will remain in force during the term of this [a]greement.").

[7] Exception, Attach. 6, Performance-Awards Agreement at 3 ("[I]f an otherwise eligible employee whose average [element] score is within the category participation rate for his or her performance award pool, that employee will receive an award based on the number of shares he or she has earned, multiplied times the value of a share in that employee's particular performance award pool.").

[8] Fee Award at 5.

[9] *Id.* (quoting CBA Art. 18, § 1(A)(4) (specifying the bargaining process to occur "[s]hould the [Agency] determine to reduce the budget for the bargaining unit award pool [that is the subject of Section 2] . . . to less than [one percent] or to cancel bargaining unit awards altogether" for budgetary reasons)).

such awards is "discretionary."[10] Consequently, he denied the Union's attorney-fee request based on the conclusion that Article 18 performance awards "do not represent 'pay'" under the Act.[11]

The Union filed an exception to the fee award on January 11, 2023, and the Agency filed an opposition on February 15, 2023.

III. Analysis and Conclusion: The Union does not establish that the fee award is contrary to the Act.

The Union argues that the fee award is contrary to the Act.[12] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[13] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[14] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[15]

The threshold requirement for an entitlement to attorney fees under the Act is a finding that an employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.[16] The Authority has found that performance awards do not constitute pay under the Act unless they are required by a statute, regulation, or collective-bargaining agreement.[17] However, if a collective-bargaining agreement requires an agency to pay performance awards, then an agency's "failure to pay them as required by the agreement constitutes the 'withdrawal or reduction'" of pay under the Act.[18]

The Union argues that the Arbitrator "misapplied" the Act when determining that performance awards under Article 18 do not constitute "pay."[19] This argument is premised upon the Union's assertion that the parties' agreement requires the Agency to pay performance awards.[20] However, the Arbitrator explicitly found that performance awards are discretionary under Article 18.[21] The Arbitrator based this finding on his interpretation of the parties' agreement, not a statute or regulation.[22] The Union does not argue that the Arbitrator's interpretation of Article 18 fails to draw its essence from the parties' agreement.[23] To the extent the Union's contrary-to-law exception challenges the Arbitrator's interpretation and application of the parties' agreement, the exception is "misplaced."[24]

To support its exception, the Union cites several cases in which arbitrators or judges made findings and contractual interpretations that certain collective-bargaining agreements required agencies to pay performance awards.[25] In each case, the Authority denied exceptions alleging that the performance-award remedies were inconsistent with the Act. The Authority's deferral to judges' and arbitrators' findings and interpretations in those cases does not establish that the Arbitrator was obligated to find that *these* parties' agreement required payment of performance awards.[26]

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[10] *Id.* at 8.
[11] *Id.*
[12] Exception Br. at 8.
[13] *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023).
[14] *Id.*
[15] *Id.*
[16] *U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 678 (2022) (*VA Hosp.*) (citing 5 U.S.C. § 5596(b)(1)).
[17] *NTEU, Chapter 67*, 68 FLRA 868, 869 (2015) (*Chapter 67*).
[18] *Id.* (quoting *FAA*, 55 FLRA at 1276 n.9).
[19] Exception Br. at 8-9.
[20] *Id.* at 13 ("The performance award in this case constituted pay under [the Act] because it was required by a collective[-]bargaining agreement.").
[21] *See* Fee Award at 8.
[22] *See id.* at 5-8 (explaining interpretation of Article 18).
[23] *See* Exception at 7 (answering "[n]o" to the question of whether the Union is "alleging that the award fails to draw its essence from the parties' collective-bargaining agreement").
[24] *See, NLRB Pro. Ass'n*, 68 FLRA 552, 556 (2015) (finding that party's "disagreement with the [a]rbitrator's interpretation of [a provision of the parties' agreement] provides no basis for finding that the award is contrary to law"); *AFGE, Loc.* 779, 64 FLRA 672, 674 (2010) (*Loc. 779*) (rejecting, as "misplaced," party's contrary-to-law exception to arbitrator's "interpretation and application of the parties' agreement").
[25] *E.g., VA Hosp.*, 72 FLRA at 678-79 (finding that award of attorney fees did not violate the Act where arbitrator concluded, and agency conceded, that grievant "was entitled to the performance award as a remedy for the contract violation"); *NLRB, Wash. D.C.*, 61 FLRA 154, 155, 163 (2005) (*NLRB*) (Member Armendariz dissenting) (finding that backpay award was not contrary to the Act where arbitrator found certain employees were "entitled to a make[-]whole remedy"); *FAA*, 55 FLRA at 1272, 1276-77 & n.9 (in repudiation case where judge awarded "make[-]whole relief for the loss of performance awards," finding remedy was "within the scope of" the Act because employees were "entitled" to the "improperly withheld" money); *GSA*, 55 FLRA 493, 496 (1999) ("defer[ring]" to arbitrator's interpretation of parties' agreement and "factual finding of a past practice" to find that performance-award remedy was not contrary to the Act); *cf. Int. on Late Payments of Mandatory Emp. Incentive Awards*, 70 Comp. Gen. 711, 711, 712 (1991) (where parties agreed performance awards were "mandatory" under agreement, finding pay under the Act "covers the incentive awards").
[26] *See AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (denying contrary-to-law exception challenging an arbitrator's failure to find a contract violation and stating that "the Authority's decisions denying exceptions to other arbitration awards did not require the [a]rbitrator, as a matter of law, to reach a particular result").

The Arbitrator did state that a higher performance rating "would have resulted in [the grievant] receiving several hundred dollars"[27] and that the grievant "deserve[d]" a performance award.[28] These statements do not explicitly find a contractual entitlement to a performance award. Even if they could, by themselves, be read as *implicitly* finding such an entitlement, they must be read in the context of the Arbitrator's *explicit*, contrary findings in the fee award.[29] In that context, the Arbitrator's statements provide no basis for concluding that he found a contractual entitlement to a performance award.[30]

For these reasons, we find that the Union has not established that the Arbitrator erred as a matter of law when he concluded that the grievant's performance award was not pay under the Act.[31] Accordingly, we deny this exception.

IV. Decision

We deny the exception.

[27] Merits Award at 2.
[28] *Id.* at 8; *see also* Fee Award at 1 (summarizing the merits award as directing the Agency to pay the grievant "the performance award he deserved").
[29] *See U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (reading arbitrator's statement in context to deny exception).
[30] *Compare Chapter 67*, 68 FLRA at 869 (where arbitrator did not find the parties' agreement "'entitled' the grievant to an award," denying exception arguing that performance award was pay under the Act), *with NLRB*, 61 FLRA at 155, 163 (where arbitrator found employees were "entitled to a make[-]whole remedy" because agency violated parties' agreement, denying exception arguing award was contrary to the Act).
[31] *See Loc. 779*, 64 FLRA at 674 (denying contrary-to-law exception challenging arbitrator's "interpretation and application of the parties' agreement"); *Chapter 67*, 68 FLRA at 869 (denying contrary-to-law exception where there was "no basis in th[e] case's record for determining that the grievant's cash performance award constitute[d] 'pay . . .' under the Act").

Chairman Grundmann, concurring:

This is an unusual case. In the merits award, the Arbitrator found the Agency violated the parties' collective-bargaining agreement and, as a remedy, awarded the grievant backpay. Under the Back Pay Act (the Act),[1] in order to award a grievant backpay, an arbitrator must find that an unjustified or unwarranted personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials.[2]

The Agency complied with the merits award and paid the grievant backpay. Thus, it seems strange for the Agency to argue, at the attorney-fee stage, that there was no award of pay, allowances, or differentials. Yet, the Agency did so and the Arbitrator agreed, expressly finding the parties' agreement did not entitle the grievant to a performance award. Had the Arbitrator found such a contractual entitlement, a performance award would have been an appropriate remedy under the Act.[3] However, as our decision today notes, the Union does not argue that the award fails to draw its essence from the parties' agreement. As such, and for the other reasons discussed in our decision, the Union does not demonstrate that the award is deficient.

Therefore, I concur.

[1] 5 U.S.C. § 5596.

[2] *E.g.*, *U.S. Dep't of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 49 (2022).

[3] *U.S. Dep't of HHS, SSA*, 48 FLRA 1040, 1045-46 (1993) (citations omitted) (noting that the Act "authorizes the payment of performance awards as a remedy for an unjustified or unwarranted personnel action").