73 FLRA No. 156

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
WINSTON-SALEM, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 25
(Union)

0-AR-5923

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DECISION

February 20, 2024

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

I. Statement of the Case

Arbitrator Lana S. Flame issued an award (the merits award) finding the Agency violated the parties' agreement by failing to take certain actions before initially denying the grievant a career-ladder promotion, which the Agency later granted. The Arbitrator awarded a make-whole remedy for the delayed promotion. The Arbitrator retained jurisdiction to resolve any disputes regarding the remedy.

Subsequently, the Union asked the Arbitrator to clarify whether the merits award's make-whole remedy included backpay for overtime opportunities the grievant was not eligible to work during the delayed-promotion period. In response, the Arbitrator issued a second award (the supplemental award), finding her retained jurisdiction covered the overtime issue and that her make-whole remedy included backpay for any overtime opportunities the grievant missed due to the Agency's contract violations.

The Agency filed exceptions to the supplemental award on exceeded-authority, fair-hearing, nonfact, and contrary-to-law grounds. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Awards

The grievant is in a career-ladder position. On March 13, 2022, he would have been eligible for a career-ladder promotion, but did not receive it because of performance deficiencies. The grievant filed a grievance. Thereafter, he improved his performance and received his promotion on July 20, 2022. Nevertheless, the grievance proceeded to arbitration.

The parties did not stipulate the issues, so the Arbitrator framed them in the merits award as follows: "Did the Agency violate Article 23 of the [parties' a]greement? If so, what shall be the remedy?"[1] The Arbitrator specifically addressed Article 23, Sections 4.A.2. and 4.B. (Sections 4.A.2. and 4.B., respectively). Section 4.A.2. states: "If an employee is not meeting the criteria for promotion, the employee will be given a written notice at least [sixty] days prior to earliest date of promotion eligibility. The written notice will state what the employee needs to do to meet the promotion[-]plan criteria."[2] Section 4.B. pertinently states: "At any time a supervisor and/or employee recognize an employee's need for assistance in meeting the career[-]ladder advancement criteria, the supervisor and employee will develop a plan tailored to assisting the employee in meeting the criteria."[3]

The Arbitrator found the grievant's supervisor recognized, as early as October 2021, that the grievant was having performance deficiencies. The Arbitrator determined the Agency failed to give the grievant a written notice stating what he needed to do to meet his promotion-plan criteria, and that the Agency should have given him this notice no later than January 12, 2022[4] – sixty days before the grievant was due for his promotion. Additionally, the Arbitrator found the Agency did not develop a plan tailored to assist the grievant in meeting his promotion-plan criteria. The Arbitrator concluded the Agency's failure to take these actions violated Sections 4.A.2. and 4.B.

Further, the Arbitrator determined the Agency placed the grievant on a mentoring plan effective March 16, and that the Agency found he met the performance standards 126 days after that – on July 20. The Arbitrator concluded that, had the Agency put the grievant on the mentoring plan by January 12, he would have met the standards 126 days later – by May 18. Therefore, the Arbitrator found the grievant's promotion should be backdated to May 18, and he should be "made whole for the period for which he has not been fully compensated or credited."[5] Citing the Back Pay Act

[1] Merits Award at 3.
[2] Exceptions, Ex. 15, Collective-Bargaining Agreement at 98.
[3] *Id.* at 99.
[4] The remaining dates in this section are from 2022 unless otherwise noted.
[5] Merits Award at 18.

(BPA),[6] the Arbitrator found the Agency committed an unjustified or unwarranted personnel action that resulted in the reduction of the grievant's pay. The Arbitrator found "the [g]rievant is entitled to be made whole for the specified period."[7]

The Arbitrator retained jurisdiction "for the exclusive purpose of resolving any issue(s) pertaining to the order of remedy in this matter."[8] She also stated, "It is within the discretion of the Arbitrator to determine whether the issue(s) presented by the party or parties is within the jurisdiction of this provision pertaining to the retention of the Arbitrator's jurisdiction."[9] She did not limit her retention of jurisdiction to any specific period of time.

More than thirty days after the merits award's issuance, the Union asked the Arbitrator to clarify whether the make-whole remedy included backpay for lost overtime opportunities. The Union explained that the Agency did not permit employees to work overtime if they were not meeting their performance standards. Thus, the Union asked the Arbitrator whether the make-whole remedy included the overtime that the grievant was not eligible to work between May 18 and July 19 because of his performance deficiencies. In response, the Agency argued that the issue of missed overtime was not properly before the Arbitrator. According to the Arbitrator, the parties declined a hearing and "agreed to submit briefs regarding the issue of whether the payment of overtime is within the [merits award's] make[-]whole remedy."[10]

After the parties submitted briefs, the Arbitrator issued the supplemental award. In that award, the Arbitrator stated the issue as: "Does the 'make[-]whole' remedy awarded by the Arbitrator in the . . . [merits a]ward . . . include the payment of overtime?"[11] The Arbitrator found: in the merits award, she "retained jurisdiction regarding [the] remedy";[12] the overtime issue was a dispute concerning the merits award's make-whole remedy; backpay for missed overtime opportunities is a lawful remedy under the BPA; and the make-whole remedy "cover[ed] any reduction in pay[,] including [backpay] for the overtime hours the [g]rievant would have had the opportunity to work but for the Agency's contractual violation."[13] Thus, the Arbitrator found she had jurisdiction to resolve the overtime issue.

The Arbitrator also found the Union submitted evidence demonstrating that "the [g]rievant would have had overtime hours available to him but for the unjustified or unwarranted personnel action[,] which resulted in depriving him of the opportunity."[14] However, the Arbitrator did not award any specific amounts of backpay. Instead, she "retain[ed] jurisdiction over the remedy to resolve any questions that may arise with respect to its application or interpretation."[15]

On October 18, 2023, the Agency filed exceptions to the supplemental award. The Union filed an opposition on November 14, 2023.

III. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Agency claims the Arbitrator exceeded her authority in several respects.[16] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.[17]

First, the Agency argues the Arbitrator exceeded her authority by issuing the supplemental award because she was "functus officio" and without jurisdiction to resolve the overtime issue.[18] Under the functus-officio doctrine, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority unless they retain jurisdiction or receive permission from the parties.[19] However, the Authority has long held that arbitrators may retain jurisdiction over a case to oversee the implementation of remedies.[20] Where an arbitrator expressly retains jurisdiction to resolve disputes over interpretation or implementation of a remedy, the arbitrator may issue supplemental awards resolving such disputes.[21]

[6] 5 U.S.C. § 5596.
[7] Merits Award at 18.
[8] *Id.* at 19.
[9] *Id.*
[10] Supp. Award at 3.
[11] *Id.*
[12] *Id.* at 7.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 8.
[16] Exceptions Br. at 6-8.
[17] *AFGE, Loc. 2338*, 73 FLRA 522, 523 (2023) (*Loc. 2338*); *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 411 (2023) (*Police*).
[18] Exceptions Br. at 7-8.
[19] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 376, 377 (2022) (*BOP Ashland*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636, 637 (2022) (*BOP Guaynabo*) (Member Abbott dissenting).
[20] *BOP Ashland*, 73 FLRA at 377.
[21] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 954 (2011) (citing *AFGE, Loc. 1156 & Laborers Int'l Union, Loc. 1170*, 57 FLRA 602, 603 (2001)).

As discussed above, in the merits award, the Arbitrator found the grievant was "entitled to be made whole."[22] The Arbitrator expressly retained jurisdiction to "resolv[e] any issue(s) pertaining to the order of remedy in this matter,"[23] and stated it was "within [her] discretion . . . to determine whether [any] issue(s) presented by the . . . parties [was] within" her retained jurisdiction.[24] By addressing whether her initial make-whole remedy encompassed any compensation for missed overtime opportunities, the Arbitrator was merely exercising her retained discretion. Therefore, she was not functus officio, and did not exceed her authority, by addressing that issue.[25]

Second, the Agency argues the Arbitrator exceeded her authority in the supplemental award because the issue of backpay for missed overtime opportunities was never submitted at arbitration.[26] When parties do not stipulate to the issues, arbitrators have the discretion to frame them,[27] and the Authority accords the arbitrator's formulation substantial deference.[28] Where an arbitrator has framed the issues, the Authority examines only whether the award is directly responsive to the issues as framed by the arbitrator.[29]

The parties did not stipulate to the issues before the Arbitrator in the merits award, so she framed the issues as including whether the Agency violated the parties' agreement and, if so, "what shall be the remedy?"[30] The Arbitrator's resolution of the overtime issue was directly responsive to that issue. Consequently, she did not exceed her authority by resolving it.[31]

Third, the Agency contends the Arbitrator exceeded her authority by failing to identify or address the statutory requirements for payment of overtime. Specifically, the Agency asserts the award is deficient because it does not reference a time period, number of hours, or any provision of the parties' agreement that entitled the grievant to overtime.[32] However, as noted above, the Arbitrator did not actually award the grievant specific amounts of overtime; she merely found her make-whole remedy included "*any* reduction in pay[,] including [backpay] for the overtime hours the [g]rievant would have had the opportunity to work but for the Agency's contractual violation."[33] Further, as discussed in Section III.D. below, the Agency does not demonstrate that the supplemental award conflicts with the BPA. Therefore, the Agency's contention provides no basis for finding the Arbitrator exceeded her authority.

We deny the Agency's exceeded-authority exceptions.

B. The Arbitrator did not deny the Agency a fair hearing.

The Agency argues the Arbitrator denied it a fair hearing by affording the Union – but not the Agency – an opportunity to present evidence on the "newly raised" overtime issue.[34] An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[35]

The Agency argues the Arbitrator denied it a fair hearing by considering, and allowing the Union to introduce evidence regarding, an issue – overtime – that was not submitted at arbitration.[36] However, as discussed in Section III.A. above, the Arbitrator had authority to resolve the overtime issue. Although the Agency claims the Arbitrator did not allow the Agency to introduce evidence or rebut the Union's arguments and evidence,[37] the Agency does not cite any record evidence that supports these claims. Moreover, the Agency does not dispute the Arbitrator's statement that both parties "declined a hearing" on the overtime issue.[38] Additionally, as discussed above, the Arbitrator did not award any specific amounts of backpay; she merely, once again, retained jurisdiction over remedial issues. Nothing in the supplemental award forecloses the Agency from disputing any Union claims about the grievant's entitlement to specific amounts of backpay in any future remedial proceedings. For these reasons, the Agency's arguments do not demonstrate the Arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced

[22] Merits Award at 18.
[23] *Id.* at 19.
[24] *Id.*
[25] *See, e.g.*, *BOP Guaynabo*, 72 FLRA at 637 (where original arbitrator retained jurisdiction but was unavailable, subsequent arbitrator did not exceed her authority because she properly exercised original arbitrator's retained jurisdiction).
[26] Exceptions Br. at 7.
[27] *Loc. 2338*, 73 FLRA at 523; *Police*, 73 FLRA at 411.
[28] *Loc. 2338*, 73 FLRA at 523.
[29] *Id.*
[30] Merits Award at 3.
[31] *See, e.g.*, *Loc. 2338*, 73 FLRA at 523 (denying exceeded-authority exception where the award was directly responsive to the issues as framed by the arbitrator).
[32] Exceptions Br. at 7.
[33] Supp. Award at 7 (emphasis added).
[34] Exceptions Br. at 9-10.
[35] *AFGE Loc. 4156*, 73 FLRA 588, 589 (2023) (*Loc. 4156*); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 503 (2023) (*Poplar Bluff*).
[36] Exceptions Br. at 9.
[37] *Id.* at 9-10.
[38] Supp. Award at 3.

the Agency as to affect the fairness of the proceeding as a whole. Thus, these claims do not demonstrate the Arbitrator deprived the Agency of a fair hearing.[39]

We deny the fair-hearing exceptions.

C. The award is not based on a nonfact.

The Agency argues the award is based on a nonfact.[40] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[41] Arguments based on a misunderstanding of an award do not demonstrate that an award is based on nonfacts.[42]

The Agency argues the supplemental award is based on the nonfact that the "[g]rievant was ready, willing, and able to work overtime hours and would have been assigned to complete overtime."[43] However, the Arbitrator did not make those findings. Rather, as stated previously, she merely found her make-whole remedy included "*any* reduction in pay[,] including [backpay] for the overtime hours the [g]rievant would have had the opportunity to work but for the Agency's contractual violation,"[44] and that the Union submitted evidence demonstrating "the [g]rievant would have had overtime hours *available to him* but for the unjustified or unwarranted personnel action[,] which resulted in depriving him of the *opportunity*."[45] Thus, the Agency's argument is based on a misunderstanding of the award. As such, it does not demonstrate the award is based on a nonfact, and we deny the nonfact exception.[46]

D. The supplemental award is not contrary to law.

The Agency argues the award is contrary to law.[47] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[48] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[49] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[50]

According to the Agency, the Union had only thirty days from receipt of the merits award to either seek clarification from the Arbitrator or to file exceptions challenging the merits award's failure to address the overtime issue.[51] Because the Union waited more than thirty days to seek clarification from the Arbitrator, the Agency claims the merits award became final, and the supplemental award is contrary to law.[52] For support, the Agency cites § 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute)[53] and the Authority's decisions in *AFGE, Council 243* (*Council 243*)[54] and *AFGE, Local 1760* (*Local 1760*).[55]

Section 7122(b) of the Statute pertinently provides, "If no exception to an arbitrator's award is filed . . . during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding."[56] In *Council 243*, the Authority found a party's exceptions untimely where: the party asked an arbitrator to clarify his award; the arbitrator responded but did not modify the award in any way; and the party then filed exceptions more than thirty days after the award.[57] In *Local 1760*, the Authority held that an arbitrator's retention of jurisdiction to resolve questions or problems that might arise concerning the award "does not render an award interlocutory."[58]

As noted previously, in the merits award, the Arbitrator did not limit her retention of jurisdiction to any specific period of time. Further, none of the cited authorities precludes an arbitrator from exercising retained jurisdiction after thirty days. As such, the cited authorities provide no basis for finding the Arbitrator's supplemental award contrary to law.

The Agency also claims the supplemental award is contrary to the BPA because the grievance did not raise the overtime issue and the Arbitrator failed to make the requisite findings that would entitle the grievant to backpay.[59] In this regard, the Agency argues the supplemental award lacks specific findings that demonstrate "the grievant was ready, willing, and able to work overtime or that there was available overtime to

[39] *Loc. 4156*, 73 FLRA at 589; *Poplar Bluff*, 73 FLRA at 503.
[40] Exceptions Br. at 8-9.
[41] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023); *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023) (*Loc. 3601*).
[42] *Loc. 3601*, 73 FLRA at 517.
[43] Exceptions Br. at 8-9.
[44] Supp. Award at 7 (emphasis added).
[45] *Id.* (emphasis added).
[46] *See, e.g.*, *Loc. 3601*, 73 FLRA at 517.
[47] Exceptions Br. at 4-6.
[48] *AFGE, Loc. 2338*, 73 FLRA 756, 758 (2023) (*AFGE*).
[49] *Id.*
[50] *Id.*
[51] Exceptions Br. at 4.
[52] *Id.* at 4-5.
[53] 5 U.S.C. § 7122(b).
[54] 67 FLRA 96 (2012).
[55] 37 FLRA 1193 (1990).
[56] 5 U.S.C. § 7122(b).
[57] 67 FLRA at 96-97.
[58] 37 FLRA at 1200.
[59] Exceptions Br. at 5-6.

work."[60] The Agency also contends arbitrators may not award premium pay for overtime under the Fair Labor Standards Act (FLSA)[61] or the Federal Employees Pay Act (FEPA)[62] unless the statutory conditions are met, and that, under *U.S. Department of HHS, SSA, Baltimore, Maryland* (*SSA*),[63] employees must establish "the performance of claimed work and its duration."[64] According to the Agency, the Union cannot do so here.[65]

With respect to the Agency's claim that the overtime issue was not raised in the grievance, as discussed in Section III.A. above, we find the Arbitrator did not exceed her authority by resolving the overtime issue. The Agency does not cite any support for the notion that, as a matter of law, the grievance needed to specifically mention the overtime issue in order for the Arbitrator to include overtime in her backpay remedy. Thus, the Agency's claim provides no basis for finding the award contrary to law.

As for the Agency's claim that the Arbitrator failed to make the requisite findings to award backpay under the BPA, as discussed above, the Arbitrator did not find the grievant was entitled to specific amounts of backpay – and nothing in the supplemental award forecloses the Agency from disputing the grievant's entitlement to specific amounts in any future remedial proceedings. However, with regard to the Agency's claim that the supplemental award lacks specific findings that demonstrate there was overtime available to work, the Arbitrator – relying on evidence submitted by the Union – expressly found to the contrary.[66] Because the Agency does not argue that finding was based on a nonfact, we defer to that finding in assessing whether the supplemental award is contrary to law.[67] For these reasons, the Agency's claims provide no basis for finding the supplemental award is contrary to law.[68]

Finally, with respect to the Agency's reliance on the FLSA and the FEPA, this case does not involve entitlement to overtime pay, for work actually performed, under those statutes. Rather, it involves whether the *BPA* authorizes backpay for *missed* overtime opportunities. Under the BPA, an employee who did not actually work overtime may receive backpay if an arbitrator finds a contractual violation resulted in the employee's failure to work overtime.[69] Thus, the fact that the grievant did not actually work overtime is immaterial for any potential backpay recovery under the BPA. As for the Agency's reliance on *SSA*, the cited part of that case involved 5 U.S.C. § 5542's standards for establishing entitlement to overtime compensation for at-home work allegedly performed after the normal tour of duty;[70] it did not involve backpay for missed overtime under the BPA. Consequently, the Agency's reliance on that decision also is misplaced.

In sum, the Agency does not demonstrate the award is contrary to law. Accordingly, we deny the contrary-to-law exceptions.

IV. Decision

We deny the Agency's exceptions.

[60] *Id.* at 5.
[61] 29 U.S.C. §§ 201-219.
[62] 5 U.S.C. § 5545.
[63] 37 FLRA 1469 (1990).
[64] Exceptions Br. at 6.
[65] *Id.*
[66] Supp. Award at 7.
[67] *AFGE*, 73 FLRA at 758.
[68] *See, e.g., U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014) (where "overtime compensation itself ha[d] not yet been provided, . . . arguments that the [a]rbitrator awarded backpay contrary to the [BPA] [were] misplaced, and . . . [did] not show[] that the award [was] contrary to the [BPA]"); *U.S. Dep't of the Army, Fort Carson, Colo.*, 65 FLRA 565, 567 (2011) (finding award was not contrary to BPA where it did "not provide that the grievant be compensated for any losses not actually sustained as a result of the [a]gency's unjustified action").
[69] *AFGE, Loc. 1034*, 68 FLRA 718, 720 (2015) (Member DuBester dissenting in part on other grounds).
[70] 37 FLRA at 1477-79.