74 FLRA No. 5

UNITED STATES
DEPARTMENT OF THE ARMY
FORT HUACHUCA, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1662
(Union)

0-AR-5916

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DECISION

September 11, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Robert B. Hoffman issued an award finding the Agency violated the parties' collective-bargaining agreement by requiring certain employees (the grievants) to attend training that: occurred on an "'in-lieu[-of]' holiday"[1] (described in more detail below); lasted more than eight hours a day, on two consecutive days; and caused the grievants to miss their contractually guaranteed lunch period on those days. The Arbitrator awarded various remedies.

The Agency filed exceptions arguing that the Arbitrator exceeded his authority and that the award is: contrary to law; based on a nonfact; and incomplete, ambiguous, or contradictory, so as to render implementation of the award impossible. For the reasons explained below, we partially dismiss and partially deny the exceptions.

II. Background and Arbitrator's Award

The grievants are firefighters who work three forty-eight-hour shifts per pay period. Each twenty-four-hour period within those shifts includes eight hours of work time and sixteen hours of "standby time."[2] The grievants were not scheduled to work on a federal holiday that fell on a Monday. Article 26, Section 2(c) of the parties' agreement provides, "If a holiday falls on the non-workday of an employee, other than Saturday or Sunday, the preceding workday is normally the employee's in-lieu-of holiday."[3] However, the Agency required the grievants to attend mandatory training on both the Saturday and the Sunday immediately preceding the Monday holiday. The training lasted more than eight hours, and the grievants were unable to take lunch periods, on both days.

The Union filed a grievance, arguing the Agency violated the parties' agreement in various respects in connection with the training. The grievance proceeded to arbitration.

At the outset of his award, the Arbitrator stated that the Union "seeks a remedy that affected employees be 'compensated' for the lost in-lieu[-of] holiday time," but he also noted that the Union stated: "This is not a backpay case. No lost pay or entitlements are being requested. The portion in remedies relating to in-lieu[-of] holiday time being reimbursed applies to any lost standby time that would have . . . been applied during the [in-lieu-of] holiday."[4] The Arbitrator then found the Agency violated the parties' agreement in three respects.

First, the Arbitrator found the Agency violated Article 26, Section 2(c) in connection with scheduling the training on a day when the grievants normally would have received an "'in-lieu[-of]' holiday" – i.e., on their scheduled workday immediately preceding the Monday holiday.[5] The Arbitrator found that the grievance "seeks as a remedy 'that all affected employees be compensated for lost in-lieu[-of] holiday time . . . on their next regularly scheduled shift.'"[6] The Arbitrator noted the Agency argued that the training did not take place on the holiday, and that regulations prohibit firefighters from receiving holiday pay. However, the Arbitrator found "[t]he Union counter[ed] that it [was] not seeking pay, but that the affected employees be 'compensated for lost in-lieu[-]of time.'"[7] The Arbitrator determined that 5 C.F.R. § 550.1306(a) does not allow firefighters to receive holiday pay or even "paid holiday time off when not working on a holiday,"[8] but does allow firefighters "to use annual or sick leave, as appropriate, or . . . [to] be granted excused absence at the agency's discretion."[9] The Arbitrator found that one fire chief sent out an email

[1] Award at 6.
[2] Exceptions, Enclosure 2, Collective-Bargaining Agreement (CBA) at 77.
[3] CBA at 56.
[4] Award at 2 (quoting Union's Supplemental Br.) (internal quotation marks omitted).
[5] *Id.* at 5-6.
[6] *Id.* at 5.
[7] *Id.*
[8] *Id.* (quoting 5 C.F.R. § 550.1306(a)).
[9] *Id.* at 6 (quoting 5 C.F.R. § 550.1306(a)) (internal quotation marks omitted).

stating: "We will make up the non-regular duty time for these individuals on their next scheduled shift (for Sunday . . . only). . . . Captains, please do not schedule training on the [Wednesday or Thursday of the holiday week] to allow for payback of the non-regular duty required time ([eight] hours)."[10] The Arbitrator found that this email signaled that the Agency "accepted Sunday as the 'in-lieu[-of]' holiday," and he concluded that "the grievance shall be allowed for such 'make[-]up' compensation."[11]

Second, the Arbitrator determined the Agency violated Article 35, Sections 2(b)(1) and 3(c) of the parties' agreement by requiring the grievants to attend training that lasted more than eight hours on Saturday and Sunday. Article 35, Section 3(c) states:

> Firefighter training may be conducted on Sundays and [h]olidays only when absolutely necessary (i.e.[,] serious backlog, new life[-]saving procedures, etc.). Any training time scheduled outside of normal duty hours[] will be made up at the earliest available time on an hour[-]for[-]hour basis by rearranging the normal duty hours. Based on mission requirements, this compensation will be accomplished no later than the following shift.[12]

Because the grievants' training lasted nine hours on Sunday, the Arbitrator directed the Agency to "remedy this violation per the provision for doing so in" Article 35, Section 3(c).[13] However, the Arbitrator found Article 35, Section 3(c) did not apply to the training held on Saturday, and that "[t]here [was] no like provision in the [parties' agreement] for a making-up [of] hours as found for the Sunday hours when exceeding eight[] hours."[14] Nevertheless, he also cited Article 35, Section 2(b)(1), which pertinently states that "work time shall not exceed eight . . . hours for any one shift except to support unforeseen emergency events," and "[t]he normal eight[-]hour workday . . . will not be extended because of emergency response(s)."[15] Thus, with regard to Saturday, he directed the Agency to "use a compensation method as a remedy for the affected employees."[16]

Third, the Arbitrator found the Agency violated Article 35, Section 2(b) of the parties' agreement when it denied the grievants lunch periods during the training. Article 35, Section 2(b) states, in pertinent part, "The onsite lunch is established between 1200 and 1300 hours."[17] The Arbitrator noted the Agency admitted it required the grievants to attend training on Saturday and Sunday during their normally designated lunch period. He found that, but for the Agency's contract violation, the "affected employees would have received an additional hour of pay for each day and otherwise not suffered any reduction in pay," and he directed, "They shall be made whole promptly."[18]

On September 7, 2023, the Agency filed exceptions to the award. The Union filed an opposition on October 7, 2023.

III. Analysis and Conclusions

A. The Agency's exceptions regarding the lunch-period remedy are moot.

The Agency acknowledges that "the Arbitrator did not expressly grant [backpay]" to remedy the denial of lunch periods, but contends the remedy "that the [employees] be 'made whole'" could be read as a backpay award when considered in the context of the Arbitrator's other statements.[19] The Agency contends that any remedy of backpay for the lunch-period denial would be: (1) contrary to the Back Pay Act;[20] (2) based on a nonfact;[21] and (3) incomplete, ambiguous, and contradictory, making implementation of the award impossible and demonstrating the Arbitrator exceeded his authority by disregarding specific limitations on his authority.[22]

The Union argues that: neither it nor the Arbitrator referenced "[r]eceiving any kind of [backpay] or paid time off";[23] "the intended remedy will be made up during a regularly scheduled shift";[24] and the Arbitrator was directing the Agency to "[f]ollow the procedures and provide [sixty] minutes of designated standby time during the next scheduled duty day for each affected employee."[25]

When an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different

[10] *Id.*
[11] *Id.*
[12] CBA at 78.
[13] Award at 13.
[14] *Id.* at 12.
[15] CBA at 77.
[16] Award at 12.
[17] CBA at 77.
[18] Award at 13.
[19] Exceptions Br. at 6.
[20] *Id.* at 5-6 (citing 5 U.S.C. § 5596).
[21] *Id.* at 6-7.
[22] *Id.* at 7-8.
[23] Opp'n Br. at 5.
[24] *Id.*
[25] *Id.* at 6.

interpretation.[26] Because the Union interprets the award as not awarding any backpay or paid time off, we interpret the award the same way. As such, we dismiss, as moot, the Agency's exceptions regarding the lunch-period remedy.[27]

B. The portion of the award concerning the in-lieu-of holiday is not contrary to law.

The Agency argues the portion of the award concerning the in-lieu-of holiday is contrary to 5 C.F.R. § 550.1306(a) (§ 550.1306(a)) because that regulation prevents the grievants from receiving holiday pay or even "paid holiday time off when not working on a holiday."[28] According to the Agency, the Arbitrator disregarded those limitations and awarded the grievants an in-lieu-of holiday.[29] The Agency further contends that 5 U.S.C. § 5545b precludes firefighters from receiving holiday pay or in-lieu-of holiday pay.[30]

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.[31] 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.[32] In conducting that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[33] Exceptions that are based on a misunderstanding of an award do not demonstrate the award is contrary to law.[34]

As discussed in Section II above, the Arbitrator acknowledged that § 550.1306(a) does not allow firefighters to receive holiday pay or even "paid holiday time off when not working on a holiday."[35] However, he also stated that the regulation allows firefighters "to use annual or sick leave, as appropriate, or [to] . . . be granted excused absence at the agency's discretion."[36] The Arbitrator then cited the fire chief's email stating that the Agency would make up the time "on [the employees'] next scheduled shift," and directing captains not to schedule the employees for training on Wednesday or Thursday of the holiday week, "to allow for payback of the non-regular duty required time ([eight] hours)."[37] The Arbitrator found that this email signaled that the Agency "accepted Sunday as the 'in-lieu[-of]' holiday,"[38] and then stated that "the grievance shall be allowed for *such* 'make[-]up' compensation."[39] Further, at the outset of his award, the Arbitrator acknowledged the Union's claim that "[t]he portion in remedies relating to in-lieu[-of] holiday time being reimbursed applies to any *lost standby time* that would have . . . been applied during the [in-lieu-of] holiday."[40]

Reading the Arbitrator's remedy of "'make[-]up' compensation"[41] in context,[42] we believe that the most reasonable reading of the award is that the Arbitrator was not awarding holiday pay or "paid holiday time off."[43] Rather, he was directing the Agency to provide the grievants with a remedy that § 550.1306(a) would allow, such as an "excused absence" during their next scheduled shift – a remedy that he expressly noted the Agency has "discretion" to grant under § 550.1306(a).[44] As such, we do not read the award as requiring the Agency to take any actions that conflict with § 550.1306(a). Consequently, the Agency's exception is based on a misunderstanding of the award, and we deny the exception.[45]

C. The portion of the award concerning the in-lieu-of holiday is not so incomplete, ambiguous, or contradictory as to make implementation impossible, and the Arbitrator did not exceed his authority in connection with that portion of the award.

The Agency argues that the Arbitrator exceeded his authority by issuing an award that is so incomplete, ambiguous, or contradictory as to make implementation of

[26] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 500, *recons. denied*, 73 FLRA 628 (2023).
[27] *Id.*
[28] Exceptions Br. at 3 (emphasis omitted) (quoting 5 C.F.R. § 550.1306(a)).
[29] *Id.* at 3-5.
[30] *Id.* at 4.
[31] *U.S. Dep't of the Army, U.S. Army Garrison, Directorate of Emergency Servs., Fort Huachuca, Ariz.*, 73 FLRA 919, 920 (2024).
[32] *Id.*
[33] *AFGE, Loc. 2338*, 73 FLRA 845, 848 (2024).
[34] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (*Park Serv.*).
[35] Award at 5 (quoting § 550.1306(a)).
[36] *Id.* at 6 (quoting § 550.1306(a)) (internal quotation marks omitted).
[37] *Id.* (internal quotation mark omitted).
[38] *Id.*
[39] *Id.* (emphasis added).
[40] *Id.* at 2 (emphasis added) (internal quotation mark omitted).
[41] *Id.* at 6.
[42] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 861 (2024) (reading an arbitrator's statement in context of their other statements to ascertain award's meaning); *Park Serv.*, 73 FLRA at 420 (same).
[43] Exceptions Br. at 3 (emphasis omitted) (quoting § 550.1306(a)).
[44] Award at 6.
[45] *Park Serv.*, 73 FLRA at 420 (denying a contrary-to-law exception based on a misunderstanding of the award); *NTEU*, 73 FLRA 315, 320 (2022) (Chairman DuBester concurring) (same).

the award impossible.[46] Specifically, the Agency claims, in connection with the in-lieu-of-holiday issue, "the Arbitrator awarded 'make[-]up' compensation without clarifying in any legal or certain terms how that should be applied."[47]

The Union contends that the Agency may not raise these arguments to the Authority because the Agency failed to first request a clarification from the Arbitrator after he issued the award.[48] Even assuming the arguments are properly before us, they lack merit for the following reasons.[49]

In order for the Authority to find an award deficient as incomplete, ambiguous, or contradictory, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[50] As discussed in Section III.C. above, we read the award as directing the Agency to provide the grievants with a remedy that § 550.1306(a) would allow, such as an "excused absence" during their next scheduled shift.[51] The Agency provides no basis for finding this direction to be impossible to implement.

Further, the Agency does not argue that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons not encompassed by the grievance. As such, the Agency does not demonstrate that the Arbitrator exceeded his authority.[52] Accordingly, we deny the Agency's exception.

IV. Decision

We partially dismiss and partially deny the Agency's exceptions.

[46] Exceptions Br. at 7-8.
[47] *Id.* at 8.
[48] Opp'n Br. at 7 (citing Art. 10, § 5 of the parties' agreement); *see also* CBA at 19 (authorizing arbitrators to retain jurisdiction "when necessary to clarify" awards).
[49] *See, e.g.*, *AFGE, Loc. 916*, 73 FLRA 778, 789-90 (2024) (assuming, without deciding, argument was raised to arbitrator, but rejecting argument on the merits).
[50] *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 700, 702 (2023), *recons. denied*, 73 FLRA 827 (2024).
[51] Award at 6.
[52] *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022) (stating that 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 not encompassed by the grievance).