

66 FLRA No. 183

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 231
(Union)

and

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

0-AR-4842

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DECISION

September 25, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Jerry B. Sellman filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator concluded that the Agency violated an Agency regulation by failing to assign overtime to the grievant. As to the appropriate remedy, the Arbitrator denied the Union's request for a backpay remedy and, instead, directed the Agency to offer the grievant the next available overtime assignment.

For the reasons that follow, we conclude that the Arbitrator's denial of a backpay remedy is contrary to law, and we modify the award to direct the Agency to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of the Agency regulation.

II. Background and Arbitrator's Award

The Agency maintains a port of entry at the Port of Scobey, Montana. The port operates from 8:00 a.m. to 6:00 p.m. When the port is closed, it is monitored remotely by cameras, but when the cameras are not functioning, a customs and border protection

officer (officer) is assigned to spend the night at the port. Award at 5. The Agency's Revised National Inspectional Assignment Policy (RNIAP) sets forth overtime-assignment principles and provides that "[e]mployees with the lowest earnings will normally receive priority in assignments within their appropriate participating group." *Id.* at 4 (quoting RNIAP Section B, Subsection 4). The RNIAP further provides that employees from the group who are on duty should be the first assigned for jobs that occur immediately after their tour of duty. *Id.*

On the day in dispute, the grievant contacted the chief officer an hour before the port's closing time to inform him that the cameras were not functioning. *Id.* at 5. The chief officer discussed with the grievant the need to assign an officer to remain at the port if the cameras were not fixed, and he asked who was the "low earner." *Id.* The grievant told the chief officer that he was the low earner and was available for the assignment. The chief officer told the grievant that he intended to assign the grievant to remain at the port on overtime if the cameras were still not functioning before the port's closing time. *Id.* at 6.

Just before port closing, the cameras were fixed, and the port closed. *Id.* But just after the port closed, the security center informed the chief officer that the cameras had stopped functioning again. The chief officer assigned the port director to return to the port and remain overnight. *Id.* at 6-7.

The Union filed a grievance alleging that the Agency violated the RNIAP by failing to assign the grievant to return to the port and remain at the port on overtime. *Id.* at 8-9. The grievance was not resolved and was submitted to arbitration. As relevant here,¹ the Arbitrator framed the issues as whether the Agency violated the RNIAP by failing to assign the overtime assignment to the grievant, and, if so, what should be the appropriate remedy. *Id.* at 3.

The Arbitrator found that the RNIAP clearly provides that, when assigning overtime, the Agency should take into consideration and give priority in assignments to employees with the lowest earnings. He further found that: (1) the grievant was the employee with the lowest earnings on the day in dispute; (2) management knew that fact; and (3) management initially intended to assign him the overtime. *Id.* at 27. He acknowledged that a series of disputed events occurred at the end of the workday, and that these events resulted in the grievant's missed overtime opportunity. But the Arbitrator concluded that there was "no question"

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¹ The Agency filed a motion to dismiss, which the Arbitrator denied. As the parties do not contest the denial of the motion, it will not be discussed further.

that the grievant was entitled under the RNIAP to have been assigned the disputed overtime. *Id.* at 28. Accordingly, he stated that the issue was whether the Agency was otherwise justified in assigning overtime to the port director, and he found that the Agency failed to demonstrate any exception or compelling reason for not following the RNIAP. *Id.* at 28-29. For these reasons, the Arbitrator concluded that the Agency violated the RNIAP by failing to assign the grievant to the disputed overtime. *Id.* at 30.

Having concluded that the Agency violated the RNIAP, the Arbitrator addressed the appropriate remedy. He noted that the Union sought an award of backpay under the Back Pay Act (BPA) while the Agency claimed that the sole remedy for the violation was assignment to the next available overtime opportunity, as set forth in the RNIAP.² *Id.*

The Arbitrator acknowledged the Agency's argument that the RNIAP remedy seeks to make employees whole by equalizing overtime opportunities. *Id.* at 31. But the Arbitrator agreed with the Union that the RNIAP remedy was not the sole remedy available for violations of the RNIAP, and he found that backpay was available if the requirements of the BPA were met. *Id.* at 31-32. He stated: "If the action of the Agency in refusing to follow the RNIAP . . . is deemed an unjustified or unwarranted personnel action, then [backpay] is warranted, notwithstanding the [RNIAP] remedy." *Id.* at 32. The Arbitrator then stated that he did "not deem the action of the Agency to rise to the level of an unjustified or unwarranted personnel action that resulted in a reduction of pay of the [g]rievant as envisioned by the [BPA]." *Id.* He explained that, although the "action of the [c]hief [o]fficer was more than a mere mistake, . . . the ensuing circumstances provide some justification for the 'on-the-spot' decision that had to be made." *Id.*

Under these "facts and circumstances," the Arbitrator determined that the appropriate remedy was to offer the grievant the next available overtime assignment. *Id.* Accordingly, he granted that remedy and denied backpay. *Id.* at 32-33. The Arbitrator stated that, "[i]f the evidence had demonstrated that the Agency was engaging in a pattern of misassigning overtime, then a different result would have been appropriate." *Id.* at 32.

² The Agency cited Section B, Subsection 6 of the RNIAP, which provides: "The remedy for a missed overtime opportunity due to administrative error shall be provision of the next overtime opportunity to the affected employee." Award at 30 (quoting the RNIAP).

III. Positions of the Parties

A. Union's Exception

The Union contends that the Arbitrator's denial of backpay and the award of the next available overtime assignment are contrary to the BPA. Exception at 11-17. Specifically, the Union claims that the Arbitrator erroneously found the Agency's violation of the RNIAP -- a governing Agency regulation -- was not an unjustified or unwarranted personnel action within the meaning of the BPA. *Id.* at 11, 13 (citing *U.S. DOT, FAA*, 64 FLRA 922 (2010) (*FAA*)). In addition, the Union asserts that the award shows that the Arbitrator found that the grievant lost overtime pay as a result of the Agency's violation of the RNIAP. *Id.* According to the Union, this is most clearly shown by the Arbitrator's acknowledgment that, if the Agency's refusal to follow the RNIAP was an unjustified or unwarranted personnel action, then backpay was warranted. *Id.* (citing Award at 32).

B. Agency's Opposition

The Agency contends that the Arbitrator's remedy is not deficient because: (1) it is specified by the RNIAP; and (2) arbitrators have discretion in fashioning remedies. Opp'n at 6-7. The Agency asserts that the Authority has upheld remedies awarding the next available overtime assignment on the basis of the "great latitude" of arbitrators in fashioning remedies. *Id.* at 7-8 (citing *U.S. Dep't of the Navy, U.S. Marine Corps Logistics Base, Albany, Ga.*, 39 FLRA 576 (1991) (*USMC Logistics Base*); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 25 FLRA 969 (1987) (*Robins AFB*)).

Alternatively, the Agency contends that the Arbitrator's findings do not support an award of backpay. *Id.* at 9. In particular, the Agency asserts that the Arbitrator found that the disputed personnel action did not result in a reduction of the grievant's pay. *Id.* at 10. In support, the Agency quotes the Arbitrator's statement that the Agency's action did not "rise to the level of an unjustified or unwarranted personnel action *that resulted in a reduction of pay of the [g]rievant* as envisioned by the [BPA]." *Id.* (quoting Award at 32 (internal quotation marks omitted) (emphasis added by the Agency)). In addition, the Agency maintains that such a finding of no causal connection is consistent with its argument to the Arbitrator that the RNIAP remedy of the next overtime assignment is "self-correcting." *Id.*

IV. Analysis and Conclusions

The Union argues that the award is contrary to the BPA. 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. *E.g.*, *FAA*, 64 FLRA at 923. 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. In making that assessment, the Authority defers to the Arbitrator's underlying factual findings. *Id.*

When a union has excepted to an arbitrator's failure to award backpay as contrary to the BPA and the Authority has determined that the arbitrator's findings support an award of backpay under the BPA, the Authority has concluded that "the employees who were affected by the . . . unwarranted action are entitled to backpay." *NAGE, Local R4-45*, 55 FLRA 695, 698-99 (1999) (Member Cabaniss dissenting as to another matter) (emphasis added); *cf. NAGE, Local R5-188*, 54 FLRA 1401, 1409-10 (1998) (Member Wasserman dissenting) (Authority determined, contrary to the arbitrator, that the grievant was "entitled" to an award of attorney fees). In other words, the Authority has found that where an arbitrator's findings support an award of backpay under the BPA, the arbitrator's failure to award backpay is contrary to the BPA. *See NAGE, Local R4-45*, 55 FLRA at 698-99; *cf. Ollett v. Dep't of the Air Force*, 36 F. App'x 427, 428 2002 WL 1001063 at *2 (Fed. Cir.) (unpublished) (holding that, if an arbitrator finds that the disputed personnel action was unjustified or unwarranted and that the personnel action resulted in the employee's loss of pay, then the arbitrator "must award backpay in accordance with the provisions of [the BPA].").

We acknowledge that the Authority has stated that there is "nothing in the [BPA] that requires a monetary award for every unjustified or unwarranted personnel action." *NTEU, Chapter 98*, 60 FLRA 448, 450 (2004) (Chairman Cabaniss dissenting) (*Chapter 98*); *AFGE, Local 916*, 57 FLRA 715, 717 n.7 (2002) (*Local 916*). But, as the Authority later clarified, *Chapter 98* and *Local 916* involved situations where the arbitrators found that the requirements of the BPA were not met. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 7-8 (2007) (*Puget Sound Naval Shipyard*). Therefore, as the Authority held in *Puget Sound Naval Shipyard*, reliance on *Chapter 98* and *Local 916* is misplaced in cases where the arbitrator finds a causal connection between the unjustified or unwarranted personnel action and an employee's loss of pay. *Id.* at 7.

We also acknowledge the Agency's argument that backpay is not required because the Authority has upheld awards of the next available overtime opportunity on the basis of the "great latitude" of arbitrators in fashioning remedies. Opp'n at 7 (citing *USMC Logistics Base; Robins AFB*). But the Agency's reliance on

USMC Logistics Base and *Robins AFB* is misplaced. In both *USMC Logistics Base* and *Robins AFB*, the unions challenged the arbitrators' make-up overtime remedies as failing to draw their essence from the collective bargaining agreements at issue -- not as contrary to the BPA. *USMC Logistics Base*, 39 FLRA at 578; *Robins AFB*, 25 FLRA at 970. Therefore, these decisions did not address the issue involved here: whether the BPA requires a backpay remedy when the requirements of the BPA are met.

Based on the foregoing, when the Authority determines that an arbitrator's findings support an award of backpay under the BPA, then Authority precedent supports finding that the arbitrator was required to award backpay. Accordingly, we address whether the Arbitrator's findings support an award of backpay under the BPA.

To support an award of backpay under the BPA, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *E.g.*, *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).

As to the first requirement, the Authority has repeatedly held that a violation of a governing agency regulation is an unjustified or unwarranted personnel action. *E.g.*, *FAA*, 64 FLRA at 923. It is not disputed that the RNIAP is an Agency regulation that governs overtime assignments. Further, the Arbitrator found that the Agency violated the RNIAP, Award at 30, and there are no exceptions to that finding. Thus, as a matter of law, the first requirement of the BPA for an award of backpay is satisfied. *See FAA*, 64 FLRA at 923.

With regard to the second requirement of the BPA, we conclude, based on the award as a whole, that this requirement is satisfied. In this regard, the award clearly states: "If the action of the Agency . . . is deemed an unjustified or unwarranted personnel action, then [backpay] is warranted." Award at 32. The Arbitrator's "[i]f . . . then" construction explicitly identifies a causal connection. *See id.* As we have held that the Agency's violation of the RNIAP was an unjustified or unwarranted personnel action, "then," in accordance with the findings of the Arbitrator, a loss of pay resulted, and backpay "is warranted." *Id.*

Moreover, we find misplaced the Agency's reliance on the Arbitrator's statement that the Agency's action did not "rise to the level of an unjustified or unwarranted personnel action that resulted in a reduction of pay of the [g]rievant as envisioned by the [BPA]." Opp'n at 10 (quoting Award at 32 (internal quotation

marks omitted) (emphasis added by the Agency)). In particular, the Arbitrator's explanation of that wording supports a conclusion that he was referring to only the "unjustified or unwarranted personnel action" requirement of the BPA, and not the requirement that the personnel action result in a loss of pay. In this regard, he explained that there was "some justification for the 'on-the-spot' decision" made by the chief officer, and he explained that he would have reached "a different result" if the Agency had been "engaging in a pattern of misassigning overtime." Award at 32. These explanations show that, in the wording cited by the Agency, the Arbitrator was assessing whether the chief officer's actions were an unjustified or unwarranted personnel action, and not whether the grievant lost overtime pay as a result of the Agency's violation of the RNIAP. As noted above, we overturn the Arbitrator's finding that the Agency's actions did not rise to the level of an unjustified or unwarranted personnel action. Therefore, the language on which the Agency relies does not contradict our conclusion that the BPA's requirements are met.

In summary, the Arbitrator's findings support a conclusion that, as a matter of law, the requirements of the BPA were met. Thus, consistent with the above-cited Authority precedent, the grievant was entitled to backpay, and the Arbitrator's denial of a backpay remedy is contrary to the BPA. Accordingly, we modify the award to direct the Agency to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of the RNIAP.

V. Decision

The award is modified to direct the Agency to make the grievant whole for the overtime pay he lost as the result of the Agency's violation of the RNIAP.