66 FLRA No. 59

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

and

NATIONAL TREAURY
EMPLOYEES UNION
CHAPTER 97
(Union)

0-AR-4627

_____

DECISION

November 4, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

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

The Arbitrator found that the Agency violated the parties' agreement by failing to sufficiently notify the Union of available overtime opportunities and, after releasing the grievants for lack of work, failing to recall them when those opportunities became available. As a remedy, she awarded the grievants backpay. For the following reasons, we dismiss the Agency's exceptions in part, deny them in part, set aside the award in part, and remand it in part.

II. Background and Arbitrator's Award

The Agency released the grievants, who are seasonal employees, due to lack of work.[2] Award at 2. When overtime work became available during the release, the Agency offered that work to other employees, but not to the grievants. *Id.* at 2, 5. The Union filed a grievance, which was unresolved and submitted to expedited arbitration. *Id.* at 2. The Arbitrator framed the relevant issues as: (1) "Did the Agency provide [the Union] with notice and an opportunity to discuss the distribution of overtime?"; (2) "Did the Agency violate the [parties' agreement] by offering and awarding overtime to [other] employees while seasonal employees were [releas]ed?"; and (3) "If the Agency violated the [parties' agreement], what is the appropriate remedy?" *Id.* at 2-3.

The Arbitrator found that the Agency failed to provide the Union with sufficient notice and opportunity to discuss the distribution of overtime. *Id.* at 4. In this connection, she determined that the Agency "merely advised the Union that [fifty] overtime hours were available," and that the Union "never was contacted for the purpose of discussing how the overtime would be distributed." *Id.* (emphasis omitted). Thus, she found that the Agency violated Article 24, Section 2(A)(1) (Article 24-2(A)(1)) of the parties' agreement.[3] *Id.* In addition, the Arbitrator found that "[e]ven assuming, as the Agency represents, that overtime . . . was offered in a manner consistent with past practice, the Agency remains bound by the terms of [the parties' agreement]." *Id.*

The Arbitrator also found that the Agency violated Article 24, Section 2(A)(2) (Article 24-2(A)(2))[4] of the parties' agreement by releasing the grievants for lack of work, but then failing to recall them when overtime work became available.[5] *Id.* at 4-6. In this regard, the Arbitrator determined that, as "underscore[d]" in the seasonal employment agreement, the grievants are

[1] Member Beck's dissenting opinion is set forth at the end of this decision.

[2] Seasonal employees are permanent employees who work for "'annually recurring periods of employment totaling less than twelve . . . months a calendar year in which [they] are periodically placed in non-pay status[,]'" i.e., "released." Award at 5 (emphasis omitted). Although the Arbitrator frequently uses the term "furloughed" instead of "released," *see id.* at 2-4, we use the term "released" throughout this decision.

[3] Article 24-2(A)(1) provides, in pertinent part: "When overtime becomes available, the [Agency] will contact the [Union] to discuss equitable distribution." Exceptions, Attach. 4, Master Agreement at 89.

[4] Article 24-2(A)(2) provides, in pertinent part: "First consideration for overtime will be given to those employees who are permanently assigned to the job." Exceptions, Attach. 4, Master Agreement at 89.

[5] We note that although the Arbitrator referred to Article 24, Section 2(B) in making this determination, she was actually interpreting Article 24-2(A)(2). *See* Award at 5.

permanent employees.[6] *Id.* at 5. Thus, she determined that under Article 24-2(A)(2), the grievants were "entitled to first consideration for overtime" but did not receive it. *Id.*

With regard to the remedy, the Arbitrator stated "[i]t cannot be determined which of the [g]rievants would have performed overtime work had it been offered to them or how many of the [fifty] available hours each would have worked." *Id.* at 7. Accordingly, she directed that "each [g]rievant be compensated for [fifty] overtime hours at the applicable overtime rate of pay." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

In support of its exceptions, the Agency submits an affidavit from Agency counsel (the disputed affidavit) attesting to the events that allegedly transpired during the expedited arbitration hearing. Exceptions, Attach. 4 at 1-3. Citing that affidavit, the Agency argues that the Arbitrator denied it a fair hearing by "not allow[ing] the Agency to present any evidence or testimony whatsoever in support of its position" and denying the Agency an opportunity to present a closing statement, in violation of Article 43, Sections 4(A)(15) and (19) (Articles 43-4(A)(15) and 43-4(A)(19), respectively) of the parties' agreement.[7] *Id.* at 11-17. In addition, the Agency contends that the Arbitrator erred by failing to consider evidence that the parties had established a past practice regarding notice of overtime. *Id.* at 26.

The Agency also contends that the award fails to draw its essence from the parties' agreement in four respects. *Id.* at 22-33. First, the Agency alleges that, by finding that the Agency failed to provide the Union with sufficient notice of the overtime work, the award fails to draw its essence from the second sentence of Article 24-2(A)(1) (Article 24-2(A)(1)-2)[8] because "[n]othing in th[at] provision requires the Agency to explicitly invite the Union to discuss the overtime." *Id.* at 25. Second, the Agency asserts that, "[t]o the extent that the [A]rbitrator[] . . . f[ound] that the Agency was required to recall seasonal employees when overtime was offered" or "discuss with the Union whether it was appropriate to recall the seasonal employees to work overtime," the award is contrary to Article 14, Section 6 (Article 14-6).[9] *Id.* at 24, 27-28. Third, the Agency argues that the award conflicts with the first sentence of Article 24-2(A)(1) (Article 24-2(A)(1)-1) and Section 24, Section 1(A) (Article 24-1(A))[10] because the Arbitrator awarded overtime to all of the grievants, even though they had not worked the minimum of forty hours per week required under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1). *Id.* at 29. Fourth, the Agency maintains that the award conflicts with Article 3, Section 1(A)(3) (Article 3-1(A)(3)) and Article 3, Section 2 (Article 3-2),[11] which the Agency claims "retained [its] right to reduce its inventory by offering overtime to non-seasonal employees, rather than recalling the seasonal employees." *Id.* at 31-33.

The Agency further alleges that the award is contrary to law in three respects. *Id.* at 17-22. First, the Agency contends that the award is contrary to the decision in *Adams v. Internal Revenue Service*, 314 F.3d 1367 (Fed. Cir. 2003) (*Adams*), which, according to the Agency, held that agencies are "not obligated to place seasonal employees in a working status at a time outside of their regular season even if the workload would justify it." Exceptions at 17. Second, the Agency claims that the award violates the Back Pay Act (BPA), 5 U.S.C. § 5596, because the Arbitrator "did not explicitly find" that the Agency's disputed actions "resulted in the withdrawal or reduction of . . . the grievants' pay." *Id.* at 34-35. In this connection, the Agency argues that "there is no factual basis for [the Arbitrator's] finding that the unanticipated additional workload would have justified the Agency recalling all fifty [grievants]." *Id.* at 36. Third, the Agency argues that the award is contrary to the FLSA insofar as the Arbitrator found that the grievants were entitled to overtime pay at one and a

[6] The seasonal employment agreement provides, in pertinent part: "[T]he [Agency] will continue . . . providing work opportunities outside your permanent [p]osition where possible." Award at 5 (emphasis and citation omitted).

[7] Article 43-4(A)(15) provides, in pertinent part: "The parties have the right to present and cross examine witnesses and issue opening and closing statements." Exceptions, Attach. 4, Master Agreement at 140. Article 43-4(A)(19) provides, in pertinent part: "The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him or her by the . . . parties[.]" *Id.*

[8] The pertinent wording of Article 24-2(A)(1)-2 is set forth *supra* note 3.

[9] Article 14-6 provides, in pertinent part:

> A. The Union chapter with representational jurisdiction over the positions from which a release or recall is occurring will be sent a copy of every release/recall list[.]
>
> B. The Union will receive notice of when a release or recall is to be effected.

Exceptions, Attach. 4, Master Agreement at 57.

[10] Article 24-2(A)(1)-1 provides, in pertinent part: "Overtime will be distributed as equitably as possible among qualified employees." Exceptions, Attach. 4, Master Agreement at 89. Article 24-1(A) provides, in pertinent part: "Employees who are required by the [Agency] to work overtime will be compensated in accordance with applicable law and regulations." *Id.*

[11] Article 3-1(A)(3) provides, in pertinent part: "The [Agency] retains the right . . . to assign work, . . . and to determine the personnel by which operations shall be conducted." Exceptions, Attach. 4, Master Agreement at 2. Article 3-2 provides, in pertinent part: "The [Agency] retains all other rights in accordance with applicable laws and regulations." *Id.*

half times their regular rate. *Id.* at 18, 29, 35. In this regard, the Agency asserts that the grievants "were not eligible to receive overtime" under the FLSA because they "were not otherwise working the statutory [min]imum forty[] hour workweek[.]" *Id.* at 18.

B. Union's Opposition

As an initial matter, the Union contends that the Authority should not consider the disputed affidavit because the Agency is attempting to "creat[e] a new record and ask[] the [Authority] to act as a finder of fact." Opp'n at 6-7. The Union also contends that the Arbitrator did not deny the Agency a fair hearing because she did not "expressly forbid [the Agency] from calling any witness[es] -- [the Agency] simply did not do so." *Id.* at 8.

The Union argues that the award draws its essence from Articles: 24-2(A)(1)-1; 24-2(A)(1)-2; 3-1(A)(3); 3-2; and 14-6. *Id.* at 15-22. The Union further argues that § 2429.5 of the Authority's Regulations (§ 2429.5) bars the Agency's essence exceptions concerning Articles 14-6 and 24-2(A)(1)-1 because the Agency could have raised these arguments before the Arbitrator, but did not do so.[12] *Id.* at 17-22.

In addition, the Union claims that the award is not contrary to law. *Id.* at 10-13, 22-25. First, the Union maintains that *Adams* is inapposite because that decision "simply allows an agency to release an employee -- even when work is available -- in order to comply with . . . [Office of Personnel Management (OPM)] regulation[s]." *Id.* at 12. In this regard, the Union maintains that "[t]he Agency acknowledges that the [grievants] . . . were not released [in order to] comply with OPM regulations." *Id.* Second, the Union alleges that the award does not violate the BPA because the Arbitrator found that "'*each* [g]rievant was harmed' and that 'to make the [g]rievants whole, it is appropriate to order that *each* [g]rievant be compensated . . . .'" *Id.* at 24 (emphasis in original) (quoting Award at 7). Third, the Union asserts that the award does not conflict with the FLSA because, by finding that each grievant be compensated at "the appropriate rate of pay," the Arbitrator "merely required the Agency to compensate the employees at the legal rate for work which would have otherwise been outside a normal workweek." *Id.* at 11.

IV. Preliminary Issues

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[13] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (*JFK Airport*).

A. Section 2429.5 does not bar the Agency from submitting the disputed affidavit.

The Union contends that the Authority should not consider the disputed affidavit. Opp'n at 6-7. The disputed affidavit allegedly attests to the events that transpired at the arbitration hearing. Exceptions, Attach. 3 at 1-3.

The Authority previously has permitted a party to submit, in support of exceptions, a statement that sought to reflect what transpired in an arbitration proceeding that lacked a formal transcript. *See Soc. Sec. Admin., Dall. Region*, 65 FLRA 405, 407 (2010) (*SSA*) (citing *NTEU, Chapter 45*, 52 FLRA 1458, 1461 (1997)). Specifically, the Authority has held that § 2429.5 does not bar such a statement, and has accepted such a statement insofar as it constituted arguments in support of exceptions. *Id.*

The disputed affidavit is submitted in support of the Agency's exceptions and seeks to reflect what transpired at the arbitration hearing, for which there is no formal transcript. Accordingly, consistent with *SSA*, we find that § 2429.5 does not bar the Agency from submitting the disputed affidavit insofar as it contains arguments in support of the Agency's exceptions. Thus, we consider the disputed affidavit to that extent.

B. Section 2429.5 bars the Agency's exceptions, in part.

The Agency argues that the Arbitrator denied it a fair hearing by not allowing it to present any evidence (including testimony) or a closing statement, in violation of Articles 43-4(A)(15) and 43-4(A)(19). Exceptions at 11-17. However, there is no indication in the record, including the disputed affidavit, that the Agency argued before the Arbitrator that Articles 43-4(A)(15) and 43-4(A)(19) entitled it to present testimony and a closing statement. As this argument could have been, but was

[12] The pertinent wording of § 2429.5 is set forth below.

[13] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here. *See* 5 C.F.R. § 2425.1. However, we note that, like the prior version of § 2429.5, the revised version of § 2429.5 provides that the Authority will not consider any evidence that could have been, but was not, presented to the arbitrator.

not, raised before the Arbitrator, we dismiss the Agency's exception under § 2429.5. *See JFK Airport*, 62 FLRA at 417.

The Union contends that § 2429.5 bars the Agency's essence exception arguing that the award conflicts with Article 14-6 insofar as the Arbitrator found that the Agency was required to recall the grievants or discuss the possibility of a recall with the Union. Opp'n at 17-18. However, the record does not indicate what arguments, if any, the Union made to the Arbitrator regarding these matters. As such, it is not clear that the Agency should have known to raise Article 14-6 before the Arbitrator. Accordingly, we find that § 2429.5 does not preclude the Agency from raising its essence argument concerning Article 14-6, and we will address that argument.[14]

V. Analysis and Conclusions

A. The Arbitrator did not fail to provide a fair hearing.

The Agency argues that the Arbitrator erred by failing to consider evidence that the parties had established a past practice regarding notice of overtime. Exceptions at 26. We construe this argument as a contention that the Arbitrator failed to provide a fair hearing. *See, e.g., U.S. Dep't of Housing & Urban Dev.*, 64 FLRA 247, 250 (2009). An award will be found deficient on this ground when the excepting party establishes that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*). However, the Authority has held that arbitrators have considerable latitude in the conduct of hearings and that a party's objection to the manner in which the arbitrator conducted the hearing does not, by itself, provide a basis for finding the award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In particular, an arbitrator's exclusion of testimony does not, by itself, establish that the arbitrator denied a fair hearing. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 320, 323 (2010) (*FAA*).

Here, Agency counsel states in the disputed affidavit that "[t]he [A]rbitrator issued [her] decision over my objection that the Agency ha[s] the right to submit evidence and testimony in support of its position prior to the [A]rbitrator's ruling." Exceptions, Attach. 3 at 2. In this connection, the Agency contends that its witness planned to testify about the Agency's past practice of providing notice of overtime. Exceptions at 26. The Union argues that the Arbitrator did not "expressly forbid [the Agency] from calling any witness[es] -- [the Agency] simply did not do so." Opp'n at 8.

It is unclear from the record whether the Arbitrator, in fact, did preclude the Agency from presenting any testimony or other evidence in support of its position on this issue at the hearing. In any event, the Arbitrator found that "[e]ven assuming, as the Agency represents, that overtime . . . was offered in a manner consistent with past practice, the Agency remains bound by the terms of [the parties' agreement]." Award at 4. Consequently, the Agency's evidence of past practice, even if not considered by the Arbitrator, is not material. *See Local 1668*, 50 FLRA at 126. Moreover, as previously mentioned, an arbitrator's exclusion of testimony, by itself, does not demonstrate that the arbitrator denied a fair hearing. *See FAA*, 65 FLRA at 323. Accordingly, the Agency has not established that the Arbitrator denied the Agency a fair hearing, and we deny the exception.

B. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576. Moreover, where an arbitrator interprets an agreement as imposing a particular requirement, the fact that the agreement is silent with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement. *See U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*).

[14] We note that the Union also contends that § 2429.5 bars the Agency's essence exception arguing that the awarded remedy conflicts with Article 24-2(A)(1)-1. Opp'n at 19. However, as discussed further below, it is unnecessary to decide whether that exception is properly before us.

The Agency argues that the award fails to draw its essence from Article 24-2(A)(1)-2 because "[n]othing in th[at] provision requires the Agency to explicitly invite the Union to discuss overtime." Exceptions at 25. As set forth above, Article 24-2(A)(1)-2 provides, in pertinent part, that "[w]hen overtime becomes available, the [Agency] will contact the [Union] to discuss equitable distribution." *Id.*, Attach. 4, Master Agreement at 89. Article 24-2(A)(1)-2 does not outline what form the discussion must take, and the Agency does not establish that it was implausible, irrational, unfounded, or in manifest disregard of the parties' agreement for the Arbitrator to interpret that provision as requiring the Agency to "explicitly invite the Union to discuss . . . overtime." Exceptions at 25. Moreover, the fact that Article 24-2(A)(1)-2 is silent with respect to this requirement does not demonstrate that the award fails to draw its essence from the parties' agreement. *See Johnson Med. Ctr.*, 58 FLRA at 414. As such, the Agency's argument does not demonstrate that the award fails to draw its essence from Article 24-2(A)(1)-2.

The Agency also argues that the award fails to draw its essence from Article 14-6 "[t]o the extent that the [A]rbitrator[] . . . f[ound] that the Agency was required to recall seasonal employees when overtime was offered" or "discuss with the Union whether it was appropriate to recall the seasonal employees to work overtime." Exceptions at 24, 27-28. With regard to her finding that the Agency was required to recall the grievants, the Arbitrator based this finding on Article 24-2(A)(2) and the seasonal employment agreement. Award at 5. Article 24-2(A)(2) provides, in pertinent part, that "[f]irst consideration for overtime will be given to those employees who are permanently assigned to the job." Exceptions, Attach. 4, Master Agreement at 89. The seasonal employment agreement provides, in pertinent part, that "the [Agency] will continue . . . providing work opportunities outside your permanent [p]osition where possible." Award at 5 (emphasis and citation omitted). Interpreting these provisions, the Arbitrator found that seasonal employees are permanent employees, and that the Agency thus was required to give those employees the first opportunity to work overtime. *Id.* The Agency does not challenge the Arbitrator's interpretations of these provisions on essence grounds, and these interpretations support her conclusion that the Agency had to recall the grievants when overtime became available. The Agency cites Article 14-6, which provides that "[t]he Union . . . will be sent a copy of every release/recall list" and "receive notice of when a release or recall is to be effected." Exceptions, Attach. 4, Master Agreement at 57. However, the Agency does not explain how this wording precluded the Arbitrator's finding that Article 24-2(A)(2) required the Agency to recall the grievants. With regard to the Arbitrator's alleged finding regarding discussion of the appropriateness of recall with the Union, although Article 14-6 does not expressly require discussions, that it is silent with respect to that requirement does not demonstrate that the award fails to draw its essence from the parties' agreement. *See Johnson Med. Ctr.*, 58 FLRA at 414. For the foregoing reasons, the Agency does not demonstrate that the award fails to draw its essence from the Article 14-6.

Finally, the Agency alleges that the award fails to draw its essence from Articles 3-1(A)(3) and 3-2, which the Agency claims "retained the right to reduce its inventory by offering overtime to non-seasonal employees, rather than recalling the seasonal employees." *Id.* at 31-33. Articles 3-1(A)(3) and 3-2 provide, in pertinent part, that "[t]he [Agency] retains the right to assign work, . . . to determine the personnel by which operations shall be conducted" and "all other rights in accordance with applicable laws and regulations." *Id.*, Attach. 4, Master Agreement at 2. Nothing in these provisions precluded the Arbitrator from finding that the Agency was required to offer overtime opportunities to the grievants. As the Agency does not establish that the award is in manifest disregard of those provisions, or is otherwise irrational, implausible, or unfounded, the Agency does not demonstrate that the award fails to draw its essence from Articles 3-1(A)(3) and 3-2. For the foregoing reasons, we deny the Agency's essence exceptions.[15]

C. The award is contrary to law, in part.

When an exception involves an award's consistency with law, the Authority reviews any question

[15] We note that the Agency also alleges that the award conflicts with Article 24-2(A)(1) and 24-1(A) because the Arbitrator awarded overtime to all of the grievants, even though they had not worked the minimum of forty hours per week required under the FLSA. Exceptions at 29. Even assuming that the Agency's exception is properly before us, as discussed below, we find that the award is contrary to the FLSA. Accordingly, it is unnecessary to resolve the essence exception challenging the overtime remedy.

We also note that the Arbitrator did not find, and the Agency does not claim, that the parties intended either the parties' agreement or the seasonal employment agreement to "mirror the applicable OPM regulations and statutory provisions that govern the competitive service." Dissent at 11. Thus, the dissent has no basis for addressing that issue. Further, the dissent's reliance on the Federal Circuit's interpretation of the agreement in *Adams* is misplaced because, as discussed in the next section, the Arbitrator was not bound by the court's interpretation. *See U.S. Army Missile Material Readiness Command*, 2 FLRA 432, 438 (1980) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("'[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.'")).

of law raised by an exception and the award de novo. *See 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)). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Federal Circuit precedent

The Agency contends that the award is contrary to *Adams*, 314 F.3d 1367. Exceptions at 17. In *Adams*, the Federal Circuit held that where an agency released seasonal employees, despite having available work, in order to comply with OPM regulations defining seasonal employment as lasting for less twelve months, the release was not an adverse action furlough because it was consistent with the employees' employment agreements. *Id*. As noted previously, *Adams* did not establish, as a matter of law, that the Arbitrator was compelled to interpret the seasonal employment agreement at issue here in the same way that the Federal Circuit interpreted the agreement at issue in *Adams*. Accordingly, the Agency's reliance on *Adams* does not provide a basis for finding the award contrary to law, and we deny the exception.

2. The BPA and/or FLSA

Under the BPA, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials. *See AFGE, Local 48*, 56 FLRA 1082, 1083 (2001). A violation of a collective bargaining agreement provision constitutes an unjustified or unwarranted personnel action under the BPA. *See U.S. Dep't of Justice, INS*, 42 FLRA 222, 232 (1991). The Authority has held that, where an arbitrator awards backpay to several grievants without determining which of those grievants would have received overtime assignments had the agency complied with the agreement, an award of backpay to all of the grievants violates the BPA. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010) (*BOP*); *AFGE, Local 1286, Council of Prison Locals*, 51 FLRA 1618, 1621 (1996).

The Agency argues that the award violates the BPA because the Arbitrator "did not explicitly find . . . that the Agency's violation of any notice provision 'resulted in the withdrawal or reduction of . . . the grievants' pay.'" Exceptions at 34-35. Although the Arbitrator determined that the Agency violated the parties' agreement, she found that "[i]t cannot be determined which of the [g]rievants would have performed overtime work had it been offered to them or how many of the [fifty] available hours each would have worked." Award at 7. As such, her award of backpay to all of the grievants violates the BPA. *See BOP*, 64 FLRA at 776. Accordingly, we set aside the award of backpay.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g., U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). As we have set aside the entire remedy but left undisturbed the Arbitrator's finding of a contract violation, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[16]

VI. Decision

The exceptions are dismissed in part and denied in part, and the award is set aside in part and remanded in part.

[16] In so doing, we note that the Agency also challenges the award of backpay on the ground that it is contrary to the FLSA, *see* Exceptions at 18, 29, 35, and the Union contends that § 2429.5 bars the Agency's exception, Opp'n at 19. Specifically, the Agency argues that the Arbitrator erroneously found that the grievants were entitled to overtime pay at one and half times their regular rate. Exceptions at 18, 29, 35. In this connection, under the FLSA, an agency is required to compensate nonexempt employees for all hours of work in excess of forty hours a week at a rate equal to one and one-half times the employee's hourly regular rate of pay. *See* 29 U.S.C. § 207(a)(1). The Arbitrator found that "each [g]rievant be compensated for [fifty] overtime hours at the applicable overtime rate of pay." Award at 7. Although it is unnecessary to reach this issue -- because we are setting aside the award of backpay as contrary to the BPA -- we note that, to the extent that the Arbitrator found that the grievants were entitled to fifty hours of overtime at a rate of time-and-a-half, even if they had not yet worked forty hours in a week, the award also would be contrary to the FLSA.

Member Beck, dissenting:

I agree with the Majority that the Arbitrator's remedy must be vacated, but I would go further and conclude that the Award must be vacated because it fails to draw its essence from the contract provisions that are in dispute.

The Arbitrator confuses two terms that are not interchangeable: (1) the regulatory definition of seasonal employees as "*permanent employees*," who are periodically placed in nonduty/nonpay status in accordance with pre-established conditions of employment, *Adams v. IRS*,[*] 314 F.3d 1367, 1370-71 (Fed. Cir. 2003) (emphasis added) (citing 5 C.F.R. § 340.401(a)), and (2) "employees who are *permanently assigned*" to a job under the CBA for purposes of determining which employees should have "first consideration" for overtime assignments, Exceptions, Attach. 4, Article 24, Section 2.A.2 (emphasis added).

The contract provisions and conditions of employment that are specified in the Seasonal Employment Agreement mirror the applicable Office of Personnel Management regulations and statutory provisions that govern the competitive service. *See Adams*, 314 F.3d at 1370; Exceptions, Attach. 4, Article 22, Section 2.A. According to these Employment Agreements, a seasonal employee is subject to "periodic release to nonduty/nonpay status," Exceptions, Attach. 2, Ex. 1 at 1, and "there will be periods of time in which you will be in . . . nonduty/nonpay status," *see* Exceptions, Attach. 2, Ex. 1 at 2.

It defies common sense that an employee who is in a nonduty/nonpay status could be eligible for overtime when he is not eligible to work a single eight-hour shift or forty hours in a given week (both of which are prerequisites for overtime eligibility). *See AFGE, Local 2006*, 65 FLRA 465, 468 (2011) (citing 5 U.S.C. § 6121(6)) (overtime is work in excess of eight hours in a day or forty hours in a week); *see also FDIC*, 64 FLRA 1177, 1182 (2010) (citing 5 C.F.R. § 550.112).

The Arbitrator's interpretation of Article 24 is not a plausible interpretation of the parties' agreement. Seasonal employees who have been released from work cannot plausibly considered to be "permanently assigned" to a job.

[*] *Adams* addresses the same CBA provisions and the same type of Seasonal Employment Agreements that are in dispute in this case.