

67 FLRA No. 3

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

0-AR-4820

DECISION

October 15, 2012

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Vern E. Hauck, 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 Article 30 of the parties' collective-bargaining agreement (parties' agreement) when it failed to timely investigate the grievant's alleged misconduct and to propose the grievant's suspension. As a remedy, the Arbitrator reduced the grievant's ten-day suspension to five days and awarded the grievant backpay. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is a border patrol officer at the Canadian border in Washington State. Award at 3. On December 5, 2009, the grievant was working as the primary officer at a port of entry station. *Id.* During his shift, a vehicle containing four individuals entered his lane. *Id.* When the grievant ran the occupants' passports through the card-reader, the Agency's enforcement-communications system notified the grievant that two of the individuals in the vehicle were suspected of being, or known to be, involved in drug smuggling. *Id.*; Exceptions at 3. Nevertheless, the grievant failed to

follow the Agency's secondary-inspection procedures, which required him to detain the vehicle and direct secondary officers to conduct an inspection of the vehicle and its occupants. Award at 3-4.

After discovering that the grievant failed to enter secondary-inspection results into the Agency's database, the grievant's supervisor instructed him to "supply the missing data" to "correct" the secondary-inspection log. *Id.* The grievant then entered incorrect information into the Agency's database, indicating that he had detained the vehicle and conducted a proper secondary inspection of the vehicle. *Id.* at 4. When Agency officials discovered the information was incorrect, the Agency removed the grievant's firearm and placed him on "light duty." *Id.* As a result, the grievant was not eligible for overtime, holiday pay, or differential pay. *Id.*

The grievant's supervisor conducted the grievant's mid-year employee proficiency review on April 6, 2010, while the grievant was still on light duty, and commented that the grievant's performance was "excellent." *Id.* at 4-5. Approximately eight months later, the Agency proposed the grievant's removal for negligence in the performance of his duties, and for entering incorrect information into a law enforcement database. *Id.* at 4. Finally, eighteen months after the Agency began its investigation of the grievant's conduct, the Agency reduced the proposed removal to a ten-day suspension. *Id.* The Agency restored the grievant's firearm and returned him to normal duty immediately thereafter. *Id.* at 4, 14; *see also* Exceptions at 5.

The Union filed a grievance challenging the grievant's ten-day suspension. Award at 2. When the parties could not resolve the matter, they submitted it to expedited arbitration. *Id.* at 2, 5. The Arbitrator framed the issue as: "Was the Agency's decision to suspend [the grievant] for [ten] days in conformance with the parties' [a]greements and for such cause as to promote the efficiency of the [s]ervice? If not, what should be the appropriate remedy?" *Id.* at 2.

The Arbitrator found that the Agency's decision to suspend the grievant was "for the good of the [s]ervice; [was] pursuant to the [parties' agreement]; and, [was] pursuant to the [applicable] [t]able of [o]ffenses and [p]enalties." *Id.* at 13. However, the Arbitrator also found that the grievant acted in good faith and without intent to defraud the Agency. *Id.* at 12. Given these findings, the Arbitrator found the proposed "[ten] day suspension . . . to be too harsh." *Id.* at 12-13, 15.

In addition, the Arbitrator concluded that the Agency violated Article 30 of the parties' agreement.¹ *Id.* at 15, 17. The Arbitrator found that Article 30 required the Agency to act in a "prompt and timely manner" . . . when the need arises for an adverse action that results in a reduction [of] pay attributable to the grievant's light duty status." *Id.* at 14 (citing Article 30.1.B of the parties' agreement). The Arbitrator found that the Agency's eighteen-month delay in taking action against the grievant was not "prompt and timely," but "unreasonably excessive." *Id.* at 14-15, 17. The Arbitrator also found that the parties did not dispute that the grievant "experienced a reduction of pay . . . while the grievant was on light duty." *Id.* at 14.

As a remedy, the Arbitrator reduced the grievant's ten-day suspension to five days and directed the Agency to pay the grievant backpay for the wages and benefits he lost from the date of the grievant's mid-year proficiency review² to "the date the grievant's firearm was restored and [the grievant] was resultantly taken off light duty." *Id.* at 13, 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency does not dispute the Arbitrator's reduction of the length of the grievant's suspension. Exceptions at 9. Instead, the Agency asserts that the award is contrary to law because it violates the Back Pay Act.³ *Id.* at 9-10. According to the Agency, the

¹ Article 30 concerns adverse actions, and states in pertinent part:

Section 1.B. The Employer shall determine when the need arises for such adverse actions, and such actions shall be carried out in a prompt and timely manner. An employee will be subject to adverse action only for such cause as will promote the efficiency of the Service

Exceptions, Attach., Joint Ex. 1.

² The Arbitrator found that the date of the grievant's mid-year proficiency review "confirms a very clear and unambiguous date" when the action taken against the grievant no longer "promote[s] the efficiency of the [s]ervice." Award at 15.

³ The Back Pay Act, 5 U.S.C. § 5596, provides in relevant part:

(b)(1) An employee of an agency who . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

Arbitrator found that it was the Agency's removal of the grievant's firearm and its related placement of the grievant in a light-duty assignment that "directly resulted in the . . . reduction of the grievant's pay." *Id.* at 13. However, the Agency argues, the Arbitrator did not make a finding that the Agency's decision to remove the grievant's firearm constituted an unjustified or unwarranted personnel action. *Id.* at 10, 13-16. The Agency further notes that the Arbitrator found that a reasonable suspension was warranted under the circumstances. *Id.* at 10, 19-20. Thus, the Agency contends that the Arbitrator did not make a finding that the grievant's suspension constituted an unjustified or unwarranted personnel action. *Id.* Consequently, the Agency argues that the Arbitrator did not find an unjustified or unwarranted personnel action as required under the Back Pay Act. *Id.* at 10, 16-19. Accordingly, the Agency concludes, because the Arbitrator did not find an unjustified or unwarranted personnel action, the award fails to satisfy the Back Pay Act's requirement that a causal connection be shown between an unjustified or unwarranted personnel action and the grievant's reduction in pay. *Id.*

The Agency also asserts that the Arbitrator exceeded his authority by deciding an issue not submitted to arbitration. *Id.* at 11, 20-22. Specifically, the Agency argues that the Arbitrator exceeded his authority when he addressed "whether, and for how long, the Agency should have removed [the grievant's] firearm." *Id.* at 21.

B. Union's Opposition

The Union asserts that the Agency misconstrues the award. Opp'n at 12. According to the Union, the Arbitrator found that the unjustified personnel action was the Agency's violation of Article 30 of the parties' agreement concerning prompt and timely processing of proposed adverse actions. *Id.* at 10, 12-13. The Union further argues that the undisputed evidence establishes that the grievant suffered a reduction of pay as a result of the Agency's violation. *Id.* at 12-14. Therefore, the Union contends, the award establishes a causal connection "between the unjustified personnel action, which was the violation of Article 30," and the Arbitrator's finding that this action caused the grievant to sustain a reduction of pay. *Id.* at 14. Accordingly, the

(i) an amount equal to all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned or received during the period if the personnel action had not occurred

5 U.S.C. § 5596(b)(1).

Union argues, the award meets the Back Pay Act's requirements. *Id.* at 9. The Union also asserts that the Arbitrator did not exceed his authority because the award "directly responds" to the issue the Arbitrator framed. *Id.* at 18.

IV. Preliminary Issue

As a preliminary matter, the Union contends that the Authority should not consider additional legal arguments and evidence submitted with the Agency's exceptions. *Id.* at 16. Specifically, the Union argues that the Authority should disregard Attachments B⁴ and C⁵ to the Agency's exceptions because the Agency failed to introduce those documents during the arbitration hearing. *Id.* The Union also argues that the Authority should disregard references in the Agency's exceptions to witness testimony because the parties did not prepare a transcript of the expedited-arbitration hearing. *Id.* The referenced testimony relates to the Agency's claim that the only arguable basis for the grievant's reduction of pay was its removal of his firearm and his related placement on light duty. Exceptions at 6.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.⁶ 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., AFGE, Council 215*, 66 FLRA 771, 773 (2012) (declining to consider an argument that the award failed to draw its essence from the parties' agreement because the argument was not made during the arbitration hearing); *U.S. Dep't of Housing & Urban Dev.*, 64 FLRA 247, 249 (2009) (refusing to consider documents existing at the time of the arbitration hearing, but not presented to the arbitrator). There is no dispute here that the Agency could have, but did not, present either of the documents to the Arbitrator. Therefore, we do not consider Attachments B and C. In addition, because the witness testimony referenced by the Agency is not relevant to our disposition of the Agency's exceptions, *infra* Section V.A, we need not address the Union's argument in this regard.

⁴ Attachment B is an arbitrator's award in another matter. Exceptions, Attach. B.

⁵ Attachment C is Article 24 of the parties' agreement, addressing the possession of firearms. Exceptions, Attach. C.

⁶ Section 2425.4 (c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." 5 C.F.R. § 2425.4. Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator." *Id.* § 2429.5.

V. Analysis and Conclusions

A. The award is not contrary to the Back Pay Act.

The Agency asserts that the award is contrary to the Back Pay Act because the Arbitrator failed to find an unjustified or unwarranted personnel action that resulted in a reduction of the grievant's pay. Exceptions at 10, 16-19.

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*. *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 the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, *see id.*, unless the appealing party establishes that those factual findings are deficient as nonfacts, *see, e.g., AFGE, Local 1164*, 66 FLRA 74, 78-79 (2011); *SSA*, 65 FLRA 523, 526 (2011).

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action and (2) the personnel action resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Laredo, Tex.*, 66 FLRA 567, 568 (2012); *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008) (*Air Force*).

Here, the Arbitrator found that the Agency violated Article 30 of the parties' agreement. Award at 15, 17. As noted above, the Arbitrator found that Article 30 of the parties' agreement required the Agency to act in a "prompt and timely manner". . . when the need arises for an adverse action that results in a reduction [of] pay attributable to the grievant's light duty status." *Id.* at 14. The Arbitrator concluded that the Agency's eighteen-month delay in taking action against the grievant was not "prompt and timely," but "unreasonably excessive." *Id.* at 14-15, 17. The Authority has consistently held that an arbitrator's finding that an agency violated the parties' agreement constitutes an unjustified or unwarranted personnel action. *Air Force*, 63 FLRA at 61. Thus, the Arbitrator's finding satisfies the first requirement of the Back Pay Act. *Id.* Regarding the second requirement, the Arbitrator found that the Agency's violation of the parties' agreement "result[ed] in a reduction [of] pay attributable to the grievant's light

duty status.” Award at 14, 16. This finding satisfies the second requirement of the Back Pay Act. *Air Force*, 63 FLRA at 61.

The Agency does not challenge these findings, nor does it argue that the Arbitrator’s interpretation of Article 30 fails to draw its essence from the parties’ agreement. Instead, the Agency argues that the Arbitrator found no unjustified or unwarranted personnel action that resulted in the grievant’s reduction in pay. Exceptions at 13-14. Specifically, the Agency argues that its removal of the grievant’s firearm is the action that caused the grievant’s loss of pay. *Id.* Because the Arbitrator did not find the Agency’s removal of the firearm (or the grievant’s suspension) to be an unjustified or unwarranted personnel action, the Agency contends, the Arbitrator failed to find a causal connection between an unjustified or unwarranted personnel action and the grievant’s reduction in pay. *Id.*

The Agency’s argument does not provide a basis for setting aside the award. As set forth above, the Arbitrator found that the grievant experienced a reduction in pay because the Agency violated the parties’ agreement by failing to take action against the grievant in a “prompt and timely manner.” *Id.* at 14-17. These findings satisfy the Back Pay Act’s requirements for a backpay award. Moreover, the Agency does not dispute the Arbitrator’s implicit determination, encompassed within the Arbitrator’s finding of a contract violation, that had the Agency complied with the parties’ agreement by acting in a “prompt and timely manner,” Award at 15, the Agency would have restored the grievant’s firearm sooner, “resultantly tak[ing him] off light duty,” *id.* at 16, and thereby allowing him to return to normal duty sooner. As the Agency concedes that the Arbitrator “correctly ascertained” that the removal of the firearm caused the grievant a reduction in pay, Exceptions at 13, the causal connection between the unjustified and unwarranted personnel action in this case – the contract violation – and the grievant’s reduction in pay is established. And the case cited by the Agency is therefore inapposite. *U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 160, 164 (2010) (finding a backpay award contrary to the Back Pay Act where the arbitrator failed to find a causal nexus between the removal of the grievant’s firearm and a loss in pay or benefits).

For these reasons, we deny the Agency’s contrary-to-law exception as the Agency fails to show that the award is inconsistent with the Back Pay Act.

B. The Arbitrator did not exceed his authority.

The Agency also argues that the Arbitrator exceeded his authority by deciding an issue not submitted to arbitration. Exceptions at 21. Specifically, the Agency argues that because the Arbitrator directed the Agency to pay the grievant backpay through “the date the [grievant’s] firearm was restored,” the Arbitrator made a determination as to “whether, and for how long, the Agency should have removed [the grievant’s] firearm.” *Id.* at 20-21.

It is well established that an arbitrator exceeds his authority when he resolves an issue not submitted to arbitration. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him. *U.S. Dep’t of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000). And absent a stipulated issue, the arbitrator’s formulation of the issue is accorded substantial deference. *Id.*; *U.S. Dep’t of the Army, Corps of Eng’rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

The Arbitrator framed the issue as: “Was the Agency’s decision to suspend [the grievant] for [ten] days in conformance with the parties’ [a]greements and for such cause as to promote the efficiency of the [s]ervice? If not, what should be the appropriate remedy?” Award at 2. In resolving the issue, the Arbitrator found that the Agency failed to comply with Article 30 of the parties’ agreement, and then in his backpay analysis, he considered an appropriate time-frame for an award to the grievant of backpay. *Id.* at 14-16. These findings are directly responsive to the framed issue and make no explicit reference to whether and/or for how long the Agency should have removed the grievant’s firearm. Further, to the extent the Arbitrator made an implicit finding on the firearm-removal issue, such a finding, as noted above, is encompassed within the Arbitrator’s determination that the Agency’s delay violated the parties’ agreement. Accordingly, we deny the Agency’s exceeded-authority exception.

VI. Decision

We deny the Agency’s exceptions.