

**Social Security Administration, Baltimore, MD and AFGE, Local 1923**

Federal Labor Relations Authority

0-AR-3358; 57 FLRA No. 94; 57 FLRA 538

September 28, 2001

The agency had a shortage of Benefits Authorizers and offered BA work as overtime for higher-level Claims Authorizers. The union was not notified of the CABA overtime project and demanded to bargain. The union and the agency reached an agreement on the CABA overtime. The grievant filed a grievance that he had been improperly denied the opportunity to work CABA overtime. The agency denied the grievance saying the grievant was not qualified for CABA overtime. The grievance went to arbitration. The union argued that CABA overtime should have been offered and given in a fair and equitable manner under the agreement. The agency stipulated that the grievant was qualified for CABA overtime, but he did not volunteer for CABA overtime. The arbitrator found the grievant was not given the chance to participate in the CABA overtime project. The arbitrator ordered the parties to estimate the average time worked by other CABA overtime participants and to pay the grievant back pay of that averaged amount. The arbitrator also granted reasonable attorney's fees to the union (101 FLRR 2-1033). The agency excepted to the award, arguing that it was based on a nonfact, was contrary to management's right to assign work, was based on faulty credibility determinations and was contrary to the Back Pay Act. The agency's stipulation that it would have allowed the grievant to work overtime had he volunteered was not a nonfact and the exception was denied. Because of the agency's stipulation, the Authority found the award did not affect management's right to assign work. The Authority rejected the agency's exception regarding credibility determinations because it was mere disagreement with the arbitrator's evaluation of evidence and testimony and not a basis for finding the award deficient. The Authority then found that arbitrator made the proper findings for an award under the Back Pay Act and rejected the agency's exception.

Before: Cabaniss, Chair; Pope and Armendariz, Members

Decision

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Hugh D. Jascourt 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 sustained a grievance which alleged that the Agency had violated the parties, agreement by improperly denying the grievant the opportunity to work overtime.

For the following reasons, we deny the Agency's exceptions.

## II. Background and Arbitrator's Award

In April 1998, management implemented the Claims Authorizer/Benefits Authorizer (CABA) project, which involved higher-graded Claims Authorizers (CAs) performing the work of Benefit Authorizers (BAs) on an overtime basis to account for the "shortage of BAs during a period of extremely high BA workload." Award at 2. The Union was not notified of the commencement of the CABA project in April 1998. Subsequent to learning of the project's existence, the Union sought to bargain on the matter, and on September 18, 1998, the Partnership Council reached a Memorandum of Understanding (MOU) on the project.

In February 1999, the Union filed a grievance claiming that the grievant, a CA with BA experience from 1979-1991, had been improperly denied the opportunity to work CABA overtime since October 1998, in violation of Articles 3, 10 and 24 of the parties' collective bargaining agreement.<sup>1</sup> The grievance requested that the grievant have the immediate opportunity to work BA overtime and receive backpay for all the overtime the grievant could have worked since October 1, 1998. See Attachment 1 to Agency's Exceptions. At Step 1, the grievance was denied on the basis that "relief is outside (of) jurisdictional authority," and no reason was stated for denial at Step 2. Award at 3. However, at Step 3, the Agency denied the grievance on the basis that the grievant was not eligible to participate in the CABA project since the Partnership Council, "by consensus vote, determined that only those CAs who held positions working BA workloads within the last 5 years, prior to the signing of the [a]greement, would be eligible to participate in the project."<sup>2</sup>Id. In this respect, the denial noted that the grievant last held a position as a BA in April 1991. In the absence of a resolution, the grievance was submitted to arbitration.

The parties agreed at the hearing that the following issue was before the Arbitrator for resolution:

Did the Agency not afford the Grievant the opportunity to work available overtime in the Claims Authorizer/Benefits Authorizer (CABA) Project from September 28, 1998, to June 1999? If so what should the remedy be?[]

Id. In addressing the scope of this issue, the Arbitrator emphasized at the outset that "the Agency stipulated that had [the] Grievant volunteered for the CABA

project he would have been allowed to have worked overtime."Id. The Arbitrator explained that this stipulation was made by the Agency in response to the Arbitrator's question regarding "whether the Agency was dropping its argument that the grievant was denied participation because he was ineligible for the CABA project."Id. On the basis of this stipulation, the Arbitrator advised that there was no need to address the grievant's qualifications to work on the CABA project. In the Arbitrator's view, "the issue was narrowed down to what the Grievant did or needed to do to make himself available or what the Agency did or failed to do."3Id. at 4, citing Tr. at 27-28.

On the merits, the Arbitrator found, contrary to the Agency's allegation, that the grievant did not request to opt out of the CABA project. The Arbitrator rejected the testimony of the Agency's sole witness, who stated that the grievant specifically asked her to stop the grievant's supervisor from pressuring him to participate in the CABA project. The Arbitrator found that the grievant had "expressed that the 5-year criterion was unfair" and that "[i]t is obvious that Grievant desired to be on the project and was not seeking a way to be excused from it."Id. at 6. In addition, the Arbitrator concluded that the grievant's failure to volunteer for the CABA project was not "dispositive" of the agreed upon issue to be resolved at arbitration, namely whether the grievant was afforded the opportunity to volunteer. Id. at 7.

The Arbitrator found that the Agency limited volunteers to CAs who had been BAs within the past five years. The Arbitrator concluded that grievant was never given the opportunity to volunteer for the project since "the category of CAs it asked was intended to exclude him."Id. The Arbitrator also noted the Agency's concession that the grievant would not have been allowed to participate if he had volunteered in August or September because the CABA project had already begun in April. In light of these circumstances, the Arbitrator determined that the "[g]rievant cannot be required to have engaged in what he could have reasonably perceived to be a futile act."Id. In sum, the Arbitrator concluded that "once the Agency never solicited Grievant to volunteer, he was never given the option to participate."Id. Consequently, the Arbitrator concluded that the Agency violated Article 10, Section E2 of the parties, agreement which requires that "overtime will be offered to employees on an equitable basis."Id. at 8.

The Arbitrator ordered backpay as a remedy, concluding that "[w]ere it not for the Agency's unlawful abrogation of the Agreement by not affording Grievant the opportunity to work overtime on the CABA [p]roject, it is clear. . .that Grievant would have accepted, if asked, overtime work on the CABA [p]roject."Id. The Arbitrator directed the parties to determine the amount of overtime based on the average number of overtime hours worked by other employees or some other formula that the parties agreed was appropriate. Also, the Arbitrator directed the Agency to place in the grievant's file the same letter of commendation that was provided to other employees who worked on the CABA project. In addition, the Arbitrator concluded that "[i]n view of the unjustified personnel action of the

Agency in denying overtime to Grievant, . . . it [wa]s in the interest of justice to award reasonable attorney fees" payable to the Union. Id. at 9. Lastly, the Arbitrator retained jurisdiction over the issues of backpay and attorney fees in the event that the parties could not reach agreement on the respective amounts.

### III. Positions of the Parties

#### A. Agency's Exceptions

The Agency argues that the Arbitrator's award is deficient on the following four grounds: (1) based on nonfact; (2) contrary to management's right to assign work; (3) based on faulty credibility determinations; and (4) contrary to the Back Pay Act.

First, the Agency claims that the Arbitrator's formulation of the Agency's stipulation, as reflected in the Arbitrator's award, is "worded. . . somewhat differently" from the stipulation to which the Agency agreed at the arbitration hearing.<sup>4</sup> Exceptions at 7. The Agency maintains that this difference in wording is significant since the stipulation "as read into the record by the Arbitrator clearly included as the issue to be resolved questions of eligibility," while the stipulation as stated in the decision "eliminated any language concerning the grievant's eligibility." Id. The Agency claims that it never agreed to the version of the stipulation as stated in the Arbitrator's decision and that this version is a nonfact.

Moreover, the Agency claims that "in his analysis of the case, the Arbitrator completely reversed his position in reference to the stipulation." Id. at 8. In this respect, the Agency focuses on the Arbitrator's statement that "[i]n view of the five-year criterion, even had Grievant volunteered at the onset of the project, it is clear he would not have been accepted---notwithstanding the stipulation by the Agency." Id. at 8, quoting Award at 7 (emphasis added by Agency). The Agency maintains that "[t]he Arbitrator cannot state [that] the stipulation is applicable when it prevents the Agency from raising the issue of eligibility and at the same time, decide that the stipulation is inapplicable on the exact same issue of the grievant's eligibility for overtime." Id.

Second, the Agency alleges that the award interferes with its right to assign work under § 7106(a)(2)(B), namely the right to establish qualifications and to determine whether particular employees have met those qualifications. The Agency contends that "management determined that it would only select employees for the CABA project who have had BA experience within the last 5 years," in light of recent changes in the processing of the BA cases included in the backlog, and that such CAs "would be better able to process th[e]se cases with a minimum amount of review or training." Id. at 5, 6.

Third, the Agency takes issue with the Arbitrator's rationale for discrediting the testimony of its witness. In particular, the Agency excepts to the inference drawn

by the Arbitrator as to what action the witness would have taken had the grievant not wanted to perform overtime work on the CABA project.

Fourth, the Agency argues that the Arbitrator's award is inconsistent with the Back Pay Act because the Union never proved that the Agency committed a prohibited personnel action which resulted in the withdrawal or reduction of the grievant's pay. Also, the Agency claims that the grievant is not entitled to back pay since he was "never assigned or performed the duties of the BA in the CABA project." *Id.* at 10.

#### B. Union's Opposition

The Union maintains that the Agency's exceptions fail to establish that the Arbitrator's award is deficient on any basis. The Union argues that the Agency, by stipulating to the issue of whether the grievant was afforded the opportunity to work overtime, has effectively precluded itself from arguing that the award is contrary to § 7106(a)(2)(B) of the Statute. Furthermore, the Union argues that "the [a]ward does not impinge in any manner whatsoever upon management rights." *Opposition* at 10. The Union also argues that the Agency's nonfact claim should be denied since the Agency failed to prove that the central fact underlying the award was clearly erroneous, but for which a different result would have been reached. In this respect, the Union maintains that the award is directly responsive to the stipulated issue and, therefore, should not be overturned. Regarding the Arbitrator's credibility determinations, the Union argues that such determinations must be "accorded substantial deference." *Id.* at 12. Lastly, the Union maintains that the Arbitrator made the necessary findings to support his award of backpay.

#### IV. Analysis and Conclusions

##### A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator. See, e.g., *United States Dep't. of the Air Force, Lowry Air Force Base, Denver, Colorado*, 48 FLRA 589, 593 (1993); *Gen. Serv. Admin., Region 2*, 46 FLRA 1039, 1046-47 (1992). An award will not be found deficient based on an arbitrator's determination on any factual matters that the parties disputed below. *Id.* at 594. In addition, an arbitrator's legal conclusions cannot be challenged on the grounds of nonfact. See, e.g., *NFFE, Local 561*, 52 FLRA 207, 210-11 (1996); *United States Dep't of the Navy, Philadelphia Naval Shipyard*, 39 FLRA 590, 605 (1991).

We find that the award is not deficient as based on a nonfact. The Arbitrator's finding that the Agency stipulated that the grievant would have been allowed to work overtime had he volunteered for the project is a factual finding. Our review of the entire record in this case, including the transcript of the arbitration hearing,

does not establish that this finding is clearly erroneous, as the Agency claims. According to the Agency, the wording of the stipulation that was read into the record, as opposed to the wording set forth in the award, included the issue of the grievant's eligibility for the CABA project.<sup>5</sup> While the Arbitrator did, in fact, make a remark about eligibility, the Arbitrator was clearly attempting to clarify the limited scope of the issue before him. As relevant here, the Arbitrator found, and the transcript reflects, that the main thrust of the Agency's position at the hearing was not that the grievant was ineligible or unqualified for the project but, rather, that the grievant had requested not to participate in the CABA project. See Award at 3, 4; Tr. at 24-25. The Arbitrator's questions at the hearing were designed to narrow the matter to be resolved at arbitration to comport with the issue that the parties agreed was before the Arbitrator---namely, whether the Agency "[did] not afford the grievant the opportunity to work available overtime." Award at 3. It was in this context that the Arbitrator set forth the Agency's stipulation that the grievant would have been accepted and allowed to work on the project had he volunteered. Thus, the Agency has not established that the Arbitrator's finding is clearly erroneous.

In addition, the Arbitrator concluded that consideration of both the Agency's stipulation and the agreed-upon issue "must necessarily imply that at the hearing the Agency agreed [g]rievant was qualified to perform the overtime work." Award at 8. In view of this conclusion and our finding above that the Arbitrator did not misstate the Agency's stipulation, we reject the Agency's claim that the award is deficient because the Arbitrator "reversed his position" regarding the effect of the stipulation. Exceptions at 8.

The allegedly inconsistent portion of the award, to which the Agency refers, appears in the section pertaining to whether the Agency afforded the grievant an opportunity to work overtime. In that section, the Arbitrator considered evidence regarding how the Agency solicited volunteers for the project, including testimony that volunteers were chosen based on recent BA experience within five years of the CABA project. See Award at 7. The Arbitrator concluded that since the "Agency was asking only certain CAs to volunteer and the category of CAs it asked was intended to exclude [the Grievant],. . .[the Grievant] was never given the option to participate."Id. To emphasize the point that the grievant was not provided a meaningful opportunity to volunteer for the project, the Arbitrator further noted that "in view of the five-year criterion, even had Grievant volunteered at the onset of the [p]roject, it is clear he would not have been accepted---notwithstanding the stipulation by the Agency."Id. We find that the Arbitrator's statement does not represent a reversal of the stipulation, but rather, merely underscores the Arbitrator's rationale for his conclusion that the grievant did not have, a meaningful opportunity to volunteer for the CABA project. Thus, nothing in the Arbitrator's discussion of the stipulation in this respect provides a basis for finding that the award is deficient on nonfact grounds.<sup>6</sup>

In sum, we conclude that the Agency has failed to establish that the award is based on a nonfact.

B. The award does not affect management's right to assign work.

As the Agency's exceptions involve the award's consistency with applicable law, the Authority reviews the questions of law raised by the award and the Agency's exceptions de novo. NTEU, Chapter 24, 50 FLRA 330, 332 (1995). In applying a standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. NFFE, Local 1437, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to an arbitrator's underlying factual findings. See id.

As discussed above, the Arbitrator found, based on the Agency's stipulation and the agreed-upon issue for arbitration, that the grievant was qualified for the CABA project and would have been selected had he volunteered. The Agency's exception that the award affects its right to determine the grievant's qualifications is nothing more than an attempt to disclaim a binding stipulation. The Authority has held that parties are bound by their stipulations of fact. See Soc. Sec. Admin., 51 FLRA 1700, 1707 (1996) (Authority denied agency's claim that award affected management's rights to determine grievant's qualifications where parties stipulated to arbitrator that grievant had requisite qualifications for promotion). Accordingly, we deny the Agency's claim that the award affects management's rights.

C. The award is not deficient based on the Arbitrator's credibility determinations.

The Agency takes issue with the Arbitrator's rationale for discrediting the testimony of its witness. The Authority has consistently held that exceptions which constitute disagreement with an arbitrator's evaluation of evidence and testimony presented, especially the credibility of witnesses and the weight to be given their testimony, provide no basis for finding an award deficient. See United States Dep't of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, S.C., 57 FLRA 72, 75 (2001); United States Dep't of Labor, Wash., D.C., 55 FLRA 1019, 1023 (1999). In line with this precedent, the Agency's contention, which challenges the credibility finding of the Arbitrator, does not provide a basis for finding the award deficient.

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

We reject the Agency's claim that the award does not meet any of the requirements under the Back Pay Act.

Under the Back Pay Act, 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 directly resulted in

the withdrawal or the reduction of an employee's pay, allowances or differentials. See United States Dep't of Health and Human Services, 54 FLRA 1210, 1218 (1998) (DHHS). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. See United States Dep't of Defense, Dep't of Defense Dependents Schools, 54 FLRA 773, 785 (1998). We find that the Arbitrator made sufficient findings in this case to support the order of backpay, consistent with the Act.

The Arbitrator determined that the Agency violated Article 10, Section E2 of the parties, agreement by failing to offer overtime to the grievant on an equitable basis. This finding satisfies the Act's requirement of an unjustified or unwarranted personnel action. In addition, the Arbitrator found that "were it not for the Agency's unlawful abrogation of the Agreement by not affording the grievant the opportunity to work overtime on the CABA project, it is clear. . .that the grievant would have accepted, if asked, overtime work on the CABA project." Award at 8. This finding demonstrates, as required by the Act, that the grievant was affected by a violation of the agreement that "resulted in" lost employee benefits, within the meaning of the Act. Therefore, the Arbitrator's findings support the award of backpay. See United States Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon, 55 FLRA 28 (1998) (backpay remedy was justified for employees wrongfully denied the opportunity to work overtime). Cf. 54 Comp. Gen. 1071, 1074 (1975) ("an unjustified personnel action may involve acts of omission as well as commission, whether such acts involve. . .a failure to afford an opportunity for overtime work").

Accordingly, we deny the Agency's exception that the award is contrary to the Back Pay Act.

## V. Decision

The Agency's exceptions are denied.

1 As relevant here, the Arbitrator noted that Article 10, Section E2 of the collective bargaining agreement provides that overtime will be offered to employees on an equitable basis in accordance with a roster established under Paragraph 1 of Section E. Award at 3.

2 At the hearing, the Union disagreed with the Agency's statement that the parties reached consensus on the five-year criterion. See Tr. at 59-61.

3 The Arbitrator also refused to address the Agency's claim, raised for the first time at the hearing, that the grievant was ineligible to participate in the CABA project because he sought to participate after the project began. The Arbitrator essentially found that this issue was not timely raised and was not consistent with the Agency's stipulation.

4 In this regard, the stipulation as stated by the Arbitrator in his award reads in relevant part:

the Agency stipulated that had Grievant volunteered for the CABA project he would have been allowed to have worked overtime. Because this stipulation was put together in fragments, th[e] Arbitrator advised the Union it did not need to get into the Grievant's prior qualifications because the issue was narrowed down to what the Grievant did or needed to do to make himself available or what the Agency did or failed to do.

Award at 3-4. The Arbitrator's rendition of the stipulation as reflected in the transcript and to which the Agency claims that it agreed provides, in pertinent part:

On that basis then, I'm advising the Union then, that we don't need to get into then, what the grievant's prior qualifications are, because the issue is really somewhat narrowed down, as to what he did to make himself available, or whether he needed to make himself available, or whatever other aspects go into it, his eligibility that would be dependent upon whatever was required of him, if anything, to be in that status.

Tr. at 27-28.

5 It is apparent from the Agency's arguments that the Agency views the term "eligibility" as encompassing "qualifications."

6 Even assuming arguendo that this statement by the Arbitrator is erroneous, it would not establish that the award is deficient on nonfact grounds. Notwithstanding this statement, the Arbitrator made sufficient factual findings to the effect that the grievant had not been offered the opportunity to volunteer, and that it would have been futile for the grievant to volunteer in August or September 1998 because the project had already begun in April 1998. See Award at 7. These findings are clearly consistent with the matters covered by the stipulation in the award, and are responsive to the issue, as framed by the Arbitrator and agreed-upon by the parties at arbitration, of whether the Agency afforded the grievant the opportunity to work the CABA overtime. Thus, the Agency has not established that this statement represents a central fact underlying the award, but for which a different result would have been reached by the Arbitrator.