

***U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Milan,  
Mich. and American Federation of Government Employees, Local 1741***

Federal Labor Relations Authority  
63 FLRA No. 75  
0-AR-4172  
March 31, 2009

**Related Index Numbers**

4.30 Federal Laws and Programs, Back Pay Act  
74.341 Types of Orders, Restitution, Liability for Back Pay

**Ruling**

The FLRA denied the agency's contrary to law exception to an award granting time-and-a-half back pay, with interest, for employees who were required to work under a new roster.

**Meaning**

The record supported the union's contention that the agency was aware that back pay was requested as a remedy. The agency's arguments that the award was contrary to the Back Pay Act were not raised at arbitration, so the FLRA didn't address them.

**Case Summary**

The employee filed a class action grievance, claiming that the agency violated the bargaining agreement by implementing an augmented roster. The roster required certain employees at the correctional institution to guard prisoners in addition to performing their usual administrative duties. The agency argued that the employee couldn't file a class action grievance, but the arbitrator disagreed, noting that in nowhere in the agreement did the term "grievance" have a restricted meaning. He found that according to the agreement, there would normally be 7.5 hours between shifts and 56 hours off on days off. The arbitrator concluded that in establishing the roster, the agency failed to comply with the agreement's procedures. As a remedy, he ordered time-and-a-half back pay for employees who were required to work under the new augmented roster, with 5 percent interest.

The agency filed an exception, arguing that the award was contrary to the Back Pay Act because there was no evidence that any employee was required to work more than eight hours in a day or 40 hours in a week, the requirements for overtime pay. The agency also claimed that according to 5 USC 7121(b)(1)(C)(i) and (ii), only a union may invoke arbitration. The union argued that the agency was aware that it requested overtime back pay as a remedy, and that the grievance was not filed by a union. The FLRA acknowledged that it will not consider arguments that could have been raised, but were not, before the arbitrator. The record supported the union's contention of agency awareness, so the agency's failure to raise the arguments meant that the FLRA refused to hear them.

The agency also argued that the award was contrary to the Back Pay Act because the arbitrator failed to establish a causal relationship between the roster's implementation and any loss of pay or differentials. As the Back Pay Act was the only potential waiver of sovereign immunity, the award was deficient, the agency contended. The FLRA noted that according to case law, a sovereign immunity objection may be made regardless of whether it was previously presented. However, this argument was an extension of, and depended upon, the claim that the arbitrator failed to satisfy the Back Pay Act. As this argument was not raised before the arbitrator, the FLRA denied the sovereign immunity claim.

Judge / Administrative Officer

Carol Waller Pope, Chairman and Thomas M. Beck, Member

## Full Text

### Decision

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### Decision

#### I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Barry Goldman 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 concluded that the Agency violated the parties' agreement when it implemented an Augmented Correctional Service Roster (augmented roster). As a remedy, the Arbitrator ordered backpay for bargaining unit employees who were required to work under the terms of the augmented roster. For the reasons that follow, we dismiss and/or deny the Agency's exceptions.

#### II. Background and Arbitrator's Award

A class action grievance was filed by an employee claiming that the Agency violated the parties' agreement by implementing the augmented roster, which required certain employees to work in positions responsible for guarding prisoners in addition to performing their usual administrative assignments. The parties did not resolve the grievance and it was submitted to arbitration by the employee, who had become the Union president by the time arbitration was involved. See Award at 2. At arbitration, the parties did not stipulate to the issues, nor did the Arbitrator frame them.

The Arbitrator first considered and rejected several procedural arguments. As relevant here, the Arbitrator rejected the Agency's contention that the employee, as an individual, could not file a class action grievance. The Arbitrator concluded that under Article 31, Section c of the parties' agreement, any employee could file a grievance and that the term "'grievance' is nowhere given a restricted meaning."<sup>1</sup> *Id.* As to the merits, the Arbitrator found that the Agency did not comply with the procedures set forth in Article 18 of the parties' agreement in establishing the augmented roster. See *id.* at 6-7. The Arbitrator found that, as a result, a roster committee was not formed and, in particular, that Article 18, Section u, which provides that "ordinarily" there will be 7 1/2 hours off between shifts and 56 hours off on "days off," was violated. See *id.* at 7. Accordingly, the Arbitrator sustained the grievance and provided the following remedy: "All bargaining unit members who ... have been required to report to work ... with less than 56 hours off between shifts shall be compensated at time and one half for all such time plus interest at the rate of 5%." *Id.* at 8.

#### III. Positions of the Parties

##### A. Agency's Exceptions

The Agency argues that the remedy ordered by the Arbitrator is contrary to the Back Pay Act, 5 U.S.C. § 5596. According to the Agency, the Arbitrator did not establish a causal relationship between the implementation of the augmented roster and any loss of pay or differentials. See Exceptions at 4. Similarly, the Agency argues that the award is contrary to 5 C.F.R. § 550.111 because there is no evidence that any employee was required to work more than 8 hours in a day or 40 hours in a week.<sup>2</sup> See *id.* at 5-6. The Agency claims that, as the award does not satisfy the causal-connection requirement of the Back Pay Act, and as the Back Pay Act is the "only potential waiver" of sovereign immunity for the award, the award is contrary to law. See *id.* at 6.

The Agency also argues that the Arbitrator's interpretation of the parties' agreement as permitting the employee to file the grievance in this case conflicts with § 7121(b)(1)(C)(i) and (ii) of the Statute.<sup>3</sup> See *id.* at 8. According to the Agency, under that section, only a union, and not an individual employee, may invoke arbitration. *Id.* The Agency argues that the Arbitrator allowed a class-action grievance to proceed to arbitration even though it was filed by an individual employee. See *id.*

##### B. Union's Opposition

The Union argues that the Agency's exceptions that the award is contrary to the Back Pay Act, 5 C.F.R. § 550.111, and § 7121(b)(1)(C)(i) and (ii) of the Statute are barred by § 2429.5 of the Authority's Regulations.<sup>4</sup> The Union asserts that these issues could have been, but were not, presented to the Arbitrator.

#### IV. Preliminary Issues

The Union claims that it requested overtime as a remedy in the grievance, in its opening statement at the arbitration hearing, and in its post-hearing brief. See Opposition at 4; Union's Post-hearing brief at 12-20. According to the Union, the Agency did not object to the remedy on the basis of either the Back Pay Act or 5 C.F.R. § 550.111 until it filed its exceptions. See Opposition at 3. In addition, the Union contends that although the Agency contested before the Arbitrator whether the grievance was properly filed and whether arbitration was properly invoked, the Agency did not raise § 7121 (b) until it filed its exceptions. The Union contends that because these arguments could have been, but were not, raised below, they are barred by § 2429.5.

The record supports the Union's contentions that, as to the remedy, the Agency was aware of the request for overtime at the time of the arbitration hearing and, with respect to the requirement of the grievance procedure, that the Agency was aware of the fact, and objected on the ground, that the grievance was filed by an individual. Award at 4, 7. There is no indication in the award that the Agency raised to the Arbitrator its claims regarding the Back Pay Act, 5 C.F.R. § 550.111, or § 7121(b). As the Agency could have raised, but did not raise, these objections to the Arbitrator, they are barred by § 2429.5 of the Authority's Regulations. See *United States Dep't of Def., Educ. Activity*, 60 FLRA 254, 256 (2004) (section 2429.5 barred Authority consideration of agency's claim that portion of award was inconsistent with Back Pay Act); *United States Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 87, 91 (2002) (section 2429.5 barred consideration of agency exception that award of attorney fees was inconsistent with Back Pay Act).

#### V. Analysis and Conclusions

Like the foregoing exceptions that the Authority found barred by § 2429.5, the Agency did not raise to the Arbitrator the principle of sovereign immunity. However, unlike the foregoing exceptions, a sovereign immunity objection may be raised without regard to whether it was raised below. See *Dep't of the Treasury, IRS v. FLRA*, 521 F.3d 1148, 1152 (9th Cir. 2008). Accordingly, we resolve the claim on the merits. In this regard, the Authority reviews questions of law raised by an arbitrator's award and an exception to it 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 this determination, the Authority defers to the arbitrator's underlying factual findings. See *id.*

It is clear that a Federal agency is subject to a monetary claim only if the statute on which the claim is based unambiguously establishes a waiver of sovereign immunity permitting such claim. See *Lane v. Pena*, 518 U.S. 187 (1996). However, it is equally clear that the Back Pay Act constitutes a waiver of sovereign immunity. See, e.g., *United States Dep't of HHS*, 54 FLRA 1210, 1217 (1998).

Here, the Agency's claim that the award is inconsistent with the principle of sovereign immunity is expressly an extension of, and depends on, its exception that the Arbitrator failed to satisfy the requirements of the Back Pay Act. See Exceptions at 6. That is, the Agency does not claim that the Back Pay Act does not apply to it. In fact, the Agency's argument that the award fails to satisfy the causal-connection requirement of the Back Pay Act assumes that the Act applies. See *id.*

Consistent with the foregoing, the Agency's claim that the award fails to satisfy the causal-connection requirement of the Back Pay Act is barred by § 2429.5 of the Authority's Regulations. Accordingly, as the Agency's sovereign immunity claim depends on its claim that the award fails to satisfy one of the requirements of the Back Pay Act, the sovereign immunity claim is denied.

#### VI. Decision

The Agency's exceptions are dismissed and denied.

<sup>1</sup>Article 31, Section c provides: "Any employee has the right to file a formal grievance with or without the assistance of the Union." See Award at 4.

<sup>2</sup>5 C.F.R. § 550.111 provides in pertinent part that "overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is -- (1) [officially ordered or approved; and (2) [performed by an employee[.]"

<sup>3</sup>Section 7121(b)(1)(C)(i) and (ii) provides that any negotiated grievance procedure section shall:

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee ... to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding[.]

<sup>4</sup>Section 2429.5 provides, as relevant here, that "[t]he Authority will not consider ... any issue[] which was not presented in the proceedings before the ... arbitrator."

#### **Statutes Cited**

5 USC 5596

5 USC 7121(b)(1)(C)(i)

5 USC 7121(b)(1)(C)(ii)

#### **Regulations Cited**

5 CFR 550.111

5 CFR 2429.5

#### **Cases Cited**

60 FLRA 254

58 FLRA 87

521 F.3d 1148

50 FLRA 330

53 FLRA 1703

518 U.S. 187

54 FLRA 1210