

**72 FLRA No. 86**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
CONSOLIDATED MAIL  
OUTPATIENT PHARMACY  
LEAVENWORTH, KANSAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 85  
(Union)

0-AR-5664

DECISION

August 27, 2021

Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and James T. Abbott, Members  
(Chairman DuBester concurring)

Decision by Member Abbott for the Authority<sup>1</sup>

**I. Statement of the Case**

In this case, Arbitrator J.E. Nash sustained the Union's grievance alleging that the Agency violated the training provisions of the parties' agreement. As remedies, the Arbitrator ordered the Agency and the Union to establish a training record-keeping system and awarded backpay to each of the grievants. The Agency filed exceptions to only the backpay portion of the award on contrary-to-law, essence, and nonfact grounds. Because we find that the Arbitrator's award of backpay is contrary to the Back Pay Act (BPA),<sup>2</sup> we set aside that portion of the award.

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

The Union filed a grievance alleging the Agency violated the parties' agreement by failing to provide job training to employees. The Union charged that the Agency instructed employees to falsely attest that they had

<sup>1</sup> Member Abbott (He/Him) notes that the adoption of gender-neutral policies and the use of gender-neutral language in any form of communication "not only promotes acceptance and makes employees feel secure at work," but also "attracts a wider variety of talent and skill sets, but also brings in new perspectives on the current way of work." Lisa Pradhan, *Gender Neutrality at the Workplace: How it Helps Companies be Better Employers*, Nagarro (June 23, 2021), <https://www.nagarro.com/en/blog/gender-neutrality-at-workplace>. According to Jody Herman, public policy scholar at the Williams Institute at UCLA law school, it is inevitable "that employers are going to be faced with an increasing percentage of employees over time who have nonbinary identities," because there is greater prevalence of gender ambiguity among young people." Yuki Noguchi, *He, She, They: Workplaces Adjust As Gender Identity Norms Change*, NPR (Oct. 16, 2019, 5:05 AM), <https://www.npr.org/2019/10/16/770298129/he-she-they-workplaces-adjust-as-gender-identity-norms-change>. In the Federal workforce, Executive Order 14020 established a White House Gender Policy Council to "promot[e] workplace diversity, fairness, and inclusion across the Federal workforce," and "advance gender equity and equality . . ." Establishment of the White House Gender Policy Council, 86 Fed. Reg. 13,797, 13,797 (March 8, 2021). Because our statutory mandate tasks the Authority to "provide leadership in establishing policies and guidance" in the federal labor relations arena, 5 U.S.C. § 7105(a)(1), Member Abbott believes the Authority should strive to issue its decisions in a gender-inclusive manner and establish policies that require parties to incorporate gender-neutral language in filings submitted to the Authority. Consequently, Member Abbott reaffirms his commitment to encouraging the Authority (and all Federal administrative tribunals) to issue decisions that move towards the full inclusion of gender-neutral language.

<sup>2</sup> 5 U.S.C. § 5596.

completed certain trainings, including safety training, and failed to provide other job-specific training. The Agency denied the grievance and asserted it was not filed in compliance with the parties' agreement.<sup>3</sup> The Union invoked arbitration.

The Arbitrator framed the issue as whether the Agency "[f]ail[ed] . . . to properly train employees as mandated by the [parties'] agreement."<sup>4</sup> As to the Agency's argument that the grievance was filed untimely, the Arbitrator found that the grievance was "on-going" and thus timely.<sup>5</sup>

As relevant here, the Arbitrator found that the Agency violated the parties' agreement when it failed to provide mandatory training under their agreement. The Arbitrator found that the Agency was acting in "bad faith" and that its reluctance to provide sufficient information enabling proper consideration of the matter before him justified an adverse inference.<sup>6</sup> He also found that by withholding this information, the Agency precluded the Union's "ability to muster sufficient evidence to make its case,"<sup>7</sup> because he could not determine which employees were aggrieved. The Arbitrator sustained the grievance, and as a remedy ordered the Agency to pay \$1,000 in backpay to each employee for each of the past seven years that employees were denied "performance bonuses and the opportunity for upward mobility" by the Agency.<sup>8</sup> "In fashioning a fair and equitable award[.]" the Arbitrator relied on the language of the parties' agreement with respect to mandatory training, its purpose, and the conditions for administering such training.<sup>9</sup>

On August 27, 2020, the Agency filed exceptions to the award. The Union did not file an opposition.

<sup>3</sup> Award at 4.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7. In this regard, the Arbitrator found there was a "nexus between the training withheld, and the associated loss of money or benefits." *Id.* at 5. The Arbitrator also found that the training provided employees "the opportunity – though not a guarantee – for upward mobility, the concomitant elevated salary, and amplified job security – where applicable." *Id.*

<sup>9</sup> *Id.* at 7.

<sup>10</sup> Exceptions Br. at 7-8. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 623 (2020) (then-Member DuBester concurring) (citing *NAIL, Loc. 5*, 70 FLRA 550, 552 (2018) (then-Member DuBester concurring)). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the relevant legal standards. *Id.* Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.* (citing *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019)).

### III. Analysis and Conclusion: The award is contrary to the BPA.

The Agency argues, as relevant here, that the award is contrary to the BPA.<sup>10</sup> The Authority has held that a grievant may be entitled to compensation under the BPA 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.<sup>11</sup> A violation of a collective-bargaining agreement constitutes an unjustified or unwarranted personnel action under the first prong.<sup>12</sup> The second prong is only met where there is a *causal connection* between a violation of the parties' agreement and a withdrawal or reduction in pay, allowances, or differentials.<sup>13</sup> In other words, backpay is only authorized if the arbitrator has found that but for the unwarranted action, the loss of pay, allowances, or differentials would not have occurred.<sup>14</sup> The Agency asserts that because the Arbitrator did not make such a finding, the awarded remedy of \$1,000 per year for seven years for each employee is contrary to the Back Pay Act.<sup>15</sup>

In this case, the Arbitrator determined that the Agency violated certain provisions of the parties' agreement.<sup>16</sup> Specifically, he found the Agency violated the parties' agreement when it neglected to provide information related to the arbitration proceeding requested

<sup>11</sup> *U.S. Dep't of VA, San Diego Healthcare Sys., San Diego, Cal.*, 70 FLRA 641, 642 (2018) (*VA San Diego*) (then-Member DuBester concurring, in part, dissenting in part); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex-Allenwood, White Deer, Pa.*, 68 FLRA 841, 843 (2015) (Chairman Pope concurring); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005).

<sup>12</sup> *U.S. Small Bus. Admin.*, 70 FLRA 745, 747 (2018) (internal quotation and citation omitted).

<sup>13</sup> *NTEU, Chapter 143*, 68 FLRA 871, 873-74 (2015) (*NTEU*) (Member Pizzella concurring) (citing *AFGE, Loc. 916*, 57 FLRA 715, 717 (2002)).

<sup>14</sup> *U.S. Dep't of VA, Cleveland Reg'l Off., Cleveland, Ohio*, 59 FLRA 248, 251 (2003) (*VA Cleveland*) (citing *U.S. Dep't of HHS*, 54 FLRA 1210, 1218-19 (1998)). And an employee "is only entitled to receive compensation 'equal to all or any part of the pay, allowances, or differentials, as applicable[.] which the employee normally would have earned or received during the period if the personnel action had not occurred.'" *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (*Warner Robins*) (quoting 5 U.S.C. § 5596(b)(1)(A)(i)).

<sup>15</sup> Exceptions Br. at 7-8.

<sup>16</sup> Award at 7.

by the Union.<sup>17</sup> Accordingly, he made an adverse inference and sustained the grievance.<sup>18</sup> Thus, the award satisfies the BPA's first requirement.

However, the award fails to satisfy the BPA's second requirement.<sup>19</sup> The Arbitrator did not find, and the record does not establish, that the Agency's failure to implement training as mandated in the parties' agreement resulted in a loss of pay to the grievants. In particular, the Arbitrator made no finding that but for the Agency's failure to follow the training requirements in the parties' agreement, the grievants would have been promoted or received performance bonuses.<sup>20</sup> In fact, the Arbitrator recognized that with training grievants would have the "potential" but "not a guarantee" of a promotion and pay increase.<sup>21</sup>

Consequently, the Arbitrator's award fails to establish a causal connection between an unwarranted personnel action and a loss of pay or bonuses.<sup>22</sup> Therefore, the award of backpay is contrary to the BPA.<sup>23</sup> Because we set aside the backpay portion of the Arbitrator's award as contrary to law,<sup>24</sup> we do not address the Agency's

remaining exceptions.<sup>25</sup>

#### IV. Decision

We set aside the award's backpay remedy as contrary to law.

<sup>17</sup> *Id.* We note that the Arbitrator referred to the information sought by the Union as if the information was sought in discovery. *See id.* at 6-7. However, it is more accurately described as an information request, and such information may be provided if a union establishes a particularized need for the requested information. *U.S. Dep't of HUD*, 71 FLRA 616, 619 (2020) (then-Member DuBester concurring).

<sup>18</sup> Award at 6.

<sup>19</sup> *See U.S. Dep't of VA, Med. Ctr., Kan. City, Mo.*, 51 FLRA 762, 766-67 (1996) (setting aside backpay where the record did not support a causal connection between the unjustified and unwarranted personnel action and the monetary loss).

<sup>20</sup> The Arbitrator never explains how "but for" the withheld training, each and every employee would have been compensated \$1,000 a year for the past seven years. *See* 5 U.S.C. § 5596(b)(1)(A)(i) (entitling an employee to "an amount equal to all or any part of the pay, allowances, or differentials . . . the employee normally would have earned or received . . . if the personnel action had not occurred"). The Authority has previously held that the finding of a causal connection may not be the product of speculative fiction. *See Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 338, 339 (2017) ("speculative" connection between agency's violation and lost pay insufficient because "the causal connection between the violation and a loss of pay, allowances, or differentials must be 'clear'" (quoting *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 56 FLRA 434, 437-38 (2000)); *AFGE, Loc. 1286, Council of Prison Locs.*, 51 FLRA 1618, 1620-21 (1996) (where arbitrator illogically awarded "[a] sum equal to [eight] times the hourly wage of the highest paid of the seven grievants," without finding that the grievants would have been entitled to this amount if they had received the disputed overtime assignment, backpay violated BPA); *see also U.S. Dep't of the Army, Aviation Applied Tech. Directorate, Fort Eustis, Va.*, 38 FLRA 362, 366-67 (1990) (where the arbitrator awarded backpay to all three grievants, backpay was only lawful for the grievant who would have received the disputed overtime assignment).

<sup>21</sup> Award at 5; *see Warner Robins*, 56 FLRA at 543 (setting aside backpay where "the [a]rbitrator ha[d] not made a finding that the grievant suffered an *actual*, as opposed to *potential*, loss of a monetary award" (emphasis added)); *see also SSA, Balt., Md. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) (finding that the phrase "pay, allowances, or differentials" includes only payments and benefits of the sort that an employee normally earns or receives as part of the regular compensation for performing their job).

<sup>22</sup> *See U.S. DHS, U.S. CBP*, 65 FLRA 160, 164 (2010) (Member Beck dissenting) (setting aside awarded backpay where the award did not establish a nexus between the removal of the grievant's firearm and a loss of pay); *see also U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't*, 72 FLRA 94, 95 (2021) (Chairman DuBester dissenting) (finding the causal connection requirement not met where arbitrator found there was "no certain way" to determine which employees would have received pay but for the agency's violation); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010) (same).

<sup>23</sup> *U.S. Marine Corps., Marine Corps. Air Station Miramar*, 71 FLRA 1017, 1019 (2020) (citing *NTEU*, 68 FLRA at 874 (finding the second prong of the BPA test not satisfied); *VA Cleveland*, 59 FLRA at 251 (holding that the arbitrator did not find and the record did not establish that the agency's failure to follow the parties' agreement procedures resulted in the loss of pay)).

<sup>24</sup> *See VA San Diego*, 70 FLRA at 642 & n.17 (where award was contrary to the BPA, and in the absence of any other applicable waiver of sovereign immunity, "the award must be set aside").

<sup>25</sup> The Agency also argues that: the award fails to draw its essence from the parties' agreement and the award is based on nonfacts. *See Exceptions Br.* at 8-10.

**Chairman DuBester, concurring:**

In the particular circumstances of this case, I agree that the award is contrary to the Back Pay Act (BPA). I write separately to explain why I reach that conclusion, and why this case is distinguishable from *U.S. Department of the Navy, Commander, Navy Region Hawaii, Federal Fire Department (Navy)*,<sup>1</sup> in which I dissented.

The Arbitrator here stated that there was a “nexus between the training withheld[]” from the grievants “and the associated loss of money or benefits.”<sup>2</sup> He found this because the Agency had “invested a substantial amount of time, effort, and resources in developing [the] training materials; identified its deliverance as both necessary and mandatory, and integrated it into a system designed to enhance the potential for upward mobility, improved performance in current position, cross training, and safety.”<sup>3</sup> At the same time, however, the Arbitrator expressly determined that the withheld training provided employees “the opportunity – *though not a guarantee* – for upward mobility, the concomitant elevated salary, and amplified job security.”<sup>4</sup>

In other words, while the Arbitrator found that the Agency’s contractual violation adversely affected the grievants’ potential for promotions, he also found that receiving the withheld training would not have guaranteed their promotions. And the Arbitrator did not otherwise find that the Agency’s violations resulted in the withdrawal or reduction of the grievants’ pay, allowances, or differentials. As such, I agree with the majority that the award of backpay fails to satisfy the BPA’s second requirement.

In reaching that conclusion, I emphasize that this case is distinguishable from *Navy*. There, the majority set aside an attorney-fee award because the arbitrator had not awarded backpay,<sup>5</sup> despite the arbitrator’s finding that the agency’s own actions had “proximately caused” his inability to retroactively calculate lost overtime and “directly resulted” in his inability to award backpay.<sup>6</sup> I dissented, concluding that because the arbitrator had “clearly found that the grievants were entitled to backpay – and that this backpay would have been awarded but for the [a]gency’s own actions” – the BPA’s second requirement was met.<sup>7</sup>

Here, the Arbitrator similarly found that the Agency failed to provide the Union requested information that was sufficient to pursue the grievance. But the Union’s argument to the Arbitrator on this point was that

the Agency “failed to provide documentation signifying that [certain] . . . training had been completed[.]”<sup>8</sup> The Arbitrator did not find, and there is no basis for us to conclude, that the withheld information would have allowed the Union to demonstrate that any grievants would have been *promoted*. And, given the Arbitrator’s finding that the withheld training would not have guaranteed any promotions, I do not find any basis for concluding that the Agency’s withholding of information precluded the Union from demonstrating the required “but-for” connection. In short, unlike in *Navy*, there is no basis for concluding that the Agency’s own actions prevented the Union from making its case under the BPA.

Accordingly, I concur.

<sup>1</sup> 72 FLRA 94 (2021) (Chairman DuBester dissenting).

<sup>2</sup> Award at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> 72 FLRA at 95.

<sup>6</sup> *Id.* at 94.

<sup>7</sup> *Id.* at 96.

<sup>8</sup> Award at 3.