

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD)	
LOCALS 222, AFGE, AFL-CIO,)	
)	Arbitrator: Roger Kaplan
Union,)	
)	Issue: Award
v.)	
)	
U.S. DEPARTMENT OF HOUSING)	
AND URBAN DEVELOPMENT,)	
)	
Agency.)	
)	

UNION'S BRIEF

The Union, by and through its undersigned attorneys, Snider & Associates, LLC, hereby submits its brief on the arguments and states in support thereof:

1. The Union alleges that the Agency has violated the Collective Bargaining Agreement (Articles 1, 2, 3, 4 and 11), Back Pay Act, other applicable agreements and all other applicable law, rule and regulation when it failed to timely process and pay awards.
2. The Agency violated Article 11 of the CBA, Section 11.02(3) when it failed to process performance awards on a continuous and repeated basis for the past six (6) years.
3. These acts also serve to violate the Back Pay Act as an unwarranted and unjustified personnel action that causes a reduction in benefits. The statute of limitations for such violations under the Act is six (6) years.

The Union respectfully requests the following remedies:

1. Cease and Desist Order that the Agency timely process and pay awards prospectively.
2. Payment of backpay and interest owed for awards that have not been paid in the current year.
3. Payment of interest for violations of the Back Pay Act over the past six (6) years.
4. Reasonable attorney fees, costs and expenses.

ISSUE

The stipulated issue in this matter is: "What is an appropriate remedy for failure to make timely payments?"

ARGUMENT

I. INTRODUCTION

In order to facilitate the expeditious processing of this case, the Parties agreed that the only issue before the Arbitrator is that of remedy or damages for failure to make timely payments of approved awards.

The Parties agreed to a number of stipulations and exhibits that make up the entire record:

1. The Collective Bargaining Agreement (CBA) between the Agency, Housing and Urban Development (HUD) and the Union (AFGE) Section 11.02 states: "All employees who have received an Outstanding Performance rating for the year shall be eligible for: (an award)..."
2. The CBA further states in Section 11.02 that "Management shall process the award granted within three (3) pay periods of the date of the decision to make the awards or the appraisal date, whichever is later." Section 11.06 of the Agreement states: "Recognizing that awards are most effective when presented as promptly as possible after the performance or act that is being recognized, Management agrees to make awards as promptly as possible after the decision is made by Management to grant an award."
3. HUD's Performance Management Plan States on page 9: Reason for Appraisal Delays: "(1) The employee has not worked under a performance plan for 90 days. The rating is delayed until the employee works under a performance plan for 90 days, at which point a rating will be given. (2) Sufficient performance information does not exist for a new supervisor who has not supervised an employee for at least 90 days or a reviewing official to rate."
4. All Bargaining unit employees have been paid their Awards for years 2003 thru 2005.
5. The Agency failed to timely pay thousands of Bargaining Unit employees their Awards under the CBA provisions cited above.

6. The Agency has not given any employee any other remedy for the stipulated failure to timely pay these Awards.

The Union contends that the Agency must pay the Grievants interest for the failure to timely pay the Awards within three pay periods or as promptly as possible after the decision is made to grant an award. The failure by the Agency was a violation of the CBA and under the principles of make-whole relief, the Grievants are entitled to compensation for the delay in use, benefit and enjoyment of their earned Awards.

II. The Agency violated the CBA by not timely processing payment of granted Awards.

As stipulated, the relevant provision of the CBA provides in part:

“Management shall process the award granted within three (3) pay periods of the date of the decision to make the awards or the appraisal date, whichever is later.... Recognizing that awards are most effective when presented as promptly as possible after the performance or act that is being recognized, Management agrees to make awards as promptly as possible after the decision is made by Management to grant an award.”

See Section 11.02; See *also* Section 11.06.

With regard to the thousands of Grievants, the Agency violated these provisions of the CBA by failing to timely pay Awards. The Agency contends that some of the Awards were timely processed, pursuant to the CBA, on the appraisal date. The Agency argues that due to delays in appraisal ratings the Awards were not processed until that later date rather than within three pay periods of the date of the decision to make the award. However, there is no evidence in the record that any of the untimely processing of Awards to any Grievants were due to appraisal delays.

The Agency's Performance Management Plan provides only two reasons for appraisal delays: (1) The employee has not worked under a performance plan for 90 days; and (2) sufficient performance information does not exist for a new supervisor who has not supervised an employee for at least 90 days or a reviewing official to rate. The Agency did not proffer any evidence to suggest that some Grievants did not receive their Awards timely because that employee had not worked under a performance plan for 90 days. Furthermore, the Agency did not provide any evidence that those employees were then rated as soon as possible after the 90 day period. See HUD's Performance Management Plan States, page 9; See *also* CBA, Section 11.06.

Similarly, the Agency did not proffer any evidence that sufficient performance information did not exist for a new supervisor who has not supervised an employee for at least 90 days or a reviewing official to rate that

employee. There is no evidence that sufficient performance information did not exist for any Grievants that received Awards. The Agency cannot simply rely on the fact that a new supervisor had not supervised a Grievant for 90 days when the Award was not timely paid. The Agency must show that there was not sufficient information to rate the employee because that supervisor did not supervise the employee for 90 days. The fact that the Grievant was eligible for an Award and the Award was approved is direct evidence that contradicts any contention by the Agency that there was not sufficient information to rate the performance of the Grievants.

A. The failure to timely process the Awards violated the CBA and constitutes an unjustified or unwarranted personnel action under the Back Pay Act.

The Backpay Act, 5 U.S.C. § 5596(b)(2), provides in relevant part that an award of backpay is authorized if two conditions are met: (1) The aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) The personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances or differentials. The Union contends that the untimely payments constitute an unwarranted and unjustified personnel action.

1. Violations of a CBA or other law, statute or regulation have been found to be unjustified or unwarranted personnel actions.

A violation of a collective bargaining agreement provision constitutes an unjustified or unwarranted personnel action. See **National Labor Relations Board WASHINGTON, D.C. (Agency) and National Labor Relations Board UNION (Union)**, 61 FLRA 154, 61 FLRA No. 31, 0-AR-3915 (August 11, 2005); See *AFGE, Local 916*, 57 FLRA 715, 717 (2002), citing *United States Dep't of Defense, Dep't of Defense Dependents Schools*, 54 FLRA 773, 785 (1998). In *NLRB*, the Arbitrator determined that the Agency violated the CBA when it did not process performance awards in a timely manner. As such, the Agency's conduct constituted an unjustified or unwarranted personnel action.

In **American Federation of Government Employees, Local 446 and United States Department of Veterans Affairs, Medical Center, Asheville, NC**, 58 FLRA 361 (March 4, 2003), the Fair Labor Relations Authority (FLRA or Authority) stated that: "The failure to pay an employee in violation of the FLSA constitutes an unwarranted personnel action resulting in a withdrawal or reduction of pay under the Back Pay Act." See *AFGE, Local 446*, 58 FLRA at 2-3. The Authority explained that violations of the FLSA, and therefore, the CBA, can be unwarranted and unjustified personnel actions under the Back Pay Act. *Id.*

In that case, the FLRA addressed and dismissed the Agency's argument that there is no unwarranted personnel action because the CBA does not authorize the payment of interest. The Authority modified the Arbitrator's award of backpay to include interest. The Authority explained that the Back Pay Act provides that "interest must be paid on backpay awards that are authorized under the Act." See *AFGE, Local 446, 58 FLRA at 2*. Furthermore, other cases have held that a judgment under the Back Pay Act can include interest on amounts due under another statute or regulation. See *Rivas v. United States Postal Service*, 72 M.S.P.R. 383, 393 (1996) (finding an agency's calculation of an award under the Back Pay Act may include the payment of interest on the total amount due under the Prompt Payment Act); *Antunes v. United States Postal Service*, 61 M.S.P.R. 408, 410 (1994) (same). In this matter, the Union requests that the Arbitrator find interest damages under the Back Pay Act even if the backpay was awarded under the CBA or another statute, law and/or regulation.

The Arbitrator in ***AFGE, Local 446***, awarded backpay to the grievants after concluding that the Agency violated the FLSA and the CBA; however, refused to provide interest under the Back Pay Act because the CBA did not authorize such payments. *AFGE, Local 446, 58 FLRA at 2-3*. The Union filed exceptions to the award, contending that the Arbitrator's conclusion that the grievants were not entitled to interest is inconsistent with the Back Pay Act. *Id.*

The Authority modified the award to include interest. It concluded that an award of backpay was authorized under the Back Pay Act. Pursuant to Section 5596(b)(2) of the Back Pay Act, interest must be paid on backpay awards that are authorized under that Act. See *AFGE, Local 3134, 56 FLRA 983, 984 (2000)*; *United States Dep't of the Navy, Naval Trng. Ctr., Orlando, Fla.*, 53 FLRA 103, 109 (1997) (Emphasis added). As previously stated, an award of backpay is authorized under the Act 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 the reduction of an employee's pay, allowances, or differentials. *AFGE, Local 446, 58 FLRA at 2-3*; See *United States Dep't of the Treasury, United States Customs Serv., Port of N. Y. and Newark*, 57 FLRA 718, 722 (2002).

In ***AFGE, Local 446***, according to the Authority, the failure to pay an employee in violation of the CBA and FLSA constituted an unwarranted personnel action resulting in a withdrawal or reduction of pay under the Back Pay Act. *AFGE, Local 446, 58 FLRA at 3*; See *United States Dep't of Commerce, NOAA, Office of Marine and Aviation Op., Marine Op. Ctr., Va.*, 57 FLRA 430, 436 (2001). Because an award of backpay was authorized under the Act, the employees were entitled to interest under the Back Pay Act, though the CBA did not explicitly provide for such payments. See *Id.*

As in that case, the Agency in this matter does not dispute that it violated the CBA by failing to timely process the Awards. The Agency's administrative

error in not processing the Grievants' Awards timely was a violation of statutes, regulation and the CBA, which required proper and timely processing within three pay periods or the appraisal date and as soon as possible after the date of the decision to make the award. Therefore, the Agency's actions constituted an unjustified or unwarranted personnel action and the Grievants are entitled to interest on the backpay. The only difference in facts from **AFGE, Local 446** is that in this matter the Agency actually corrected its violation by providing payment of the Awards at some later date. However, this fact does not preclude the Arbitrator from finding that an award of backpay was *authorized* under the Act.

2. **The fact that the Agency ultimately paid the Awards does not preclude a finding that backpay was authorized under the Act.**

In ***Federal Education Association and Department of Defense, Dependent Schools***, FMCS 98-16014, Appeal Pending (0-AR-3229) (August 25, 1999), the tribunal addressed numerous laws, rules and regulations that supported the Union's position that grievants were entitled to interest:

The Federal Personnel Manual, FPM Sec. 8-3-f provides that:

Unjustified or unwarranted personnel action means an act of commission or an act of omission (i.e., failure to take an action or confer benefit) that an appropriate authority subsequently determines on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, executive order, rule, regulation or mandatory personnel policy established by an Agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions.

Id. at 2-3.

As previously cited, the Back Pay Act provides that:

(b)(1) An employee of an agency who, on the basis of timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance 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 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-

(2)(A) *An amount payable under paragraph (1)(A)(i) of this subsection **shall be payable with interest,***

(B) Such interest (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(C)(4) For the purpose of this subsection... "*personnel action*" includes the emission or failure to take an action or confer a benefit.

Section 550.906 of the Act provides for Interest Computations:

(a) Interest begins to accrue on the date or dates (usually one (sic) or more pay dates) on which the employee would have received the pay, allowances, and differentials if the unjustified or unwarranted personnel action had not occurred. ...

(f) The agency shall compute the amount of due, and shall issue the interest payment within 30 days of the date on which accrual of interest ends.

Id. at 2-3; See 5 U.S.C. 5596 (Emphasis Added).

It is clear from both the Federal Personnel Manual and Back Pay Act that the failure to timely process or pay Awards is an unwarranted and unjustified personnel action. The Agency failed to confer a benefit to the Grievants. Furthermore, the Grievants were entitled to interest "on correction of the personnel action," dating back to the time at which the employee would have received the payment if the unjustified or unwarranted personnel action had not occurred. It does not matter that the correction was made by the Agency without any judicial intervention.

3. **The fact that the Arbitrator did not award backpay does not preclude a finding that a remedy is appropriate under the Act.**

Support for the Union's position that interest may be awarded can be drawn from cases that award attorney's fees under the Back Pay Act even if backpay was not awarded. Those cases find that the attorney's fees are proper damages because the backpay was authorized. The threshold requirement for entitlement to attorney's fees under the Back Pay Act, 5 U.S.C. § 5596, is the same for interest - a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of

the grievant's pay, allowances, or differentials. See *United States Dep't of Defense, Defense Distribution Region East, New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).

In ***Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, MD and AFGE, Local 1923 Federal Labor Relations Authority***, 0-AR-3285; 57 FLRA No. 75; 57 FLRA 417 (July 23, 2001), the Authority dismissed the Agency's argument that as a matter of law and regulation the Arbitrator was precluded from awarding attorney's fees under the Back Pay Act without awarding backpay. *Id.* at 5-6. In rejecting the Agency's argument, the FLRA stated, as argued by the Union in this matter, that:

There is no requirement in our precedent or the Back Pay Act that an award of backpay be in the same proceeding as the proceeding that determines entitlement to attorney fees. Rather, as long as employees have, in fact, been determined to be entitled to an award of backpay under the Back Pay Act, that this award was made in advance of the proceeding at issue has no bearing on a party's entitlement to the other remedies provided for in the Back Pay Act.

Id. at 5-6; See also *United States Dep't of Defense, Dependents Schools*, 54 FLRA 514, 519 (1998).

In ***AFGE, Local 1923***, the Arbitrator found that the grievant was subjected to an unjustified and unwarranted personnel action that resulted in "withholding of [the] [g]rievant's WIGI [Wage in Grade Increase] and interest on his retroactive back pay." *AFGE, Local 1923*, 57 FLRA at 8. Like the Grievant in that case, the Grievants in this matter were subjected to an unjustified and unwarranted personnel action that resulted in withholding of their Awards. Just as the Grievant in ***AFGE, Local 1923*** was entitled to attorney's fees, the Grievants in this matter are entitled to interest on the backpay¹.

B. The failure to timely pay the Awards did result in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employees.

The Union contends that the untimely processing of Awards did result in the withdrawal or reduction of pay, allowances or differentials. The Authority has previously determined that "performance awards required by a collective bargaining agreement that are improperly withheld from bargaining unit employees constitute 'pay, allowances, or differentials,' within the meaning of the Act, and the agency's failure to pay them as required by the agreement

¹ The Grievants in this matter also request attorney's fees pursuant to the Back Pay Act, but believe those damages are appropriate when interest damages are awarded. If the Arbitrator does not award interest damages then the Grievants argue, in the alternative, that attorney's fees are appropriate because backpay was authorized under the Act.

constitutes the 'withdrawal or reduction' of those benefits." *NLRB*, 61 FLRA at 22-23, *citing*, *Fed. Aviation Admin.*, 55 FLRA 1271, 1276 n.9, (2000).

In that case, the Arbitrator determined that the personnel action resulted in the improper withholding of performance awards for some employees. Accordingly, to the extent that employee performance awards were improperly withheld, the decision demonstrates that employees suffered a withdrawal or reduction of those benefits. *See, e.g., Pueblo Depot Activity, Pueblo, Colo.*, 50 FLRA 310, 311-12 (1995) (award of backpay appropriate upon determining which employees were affected); *United States Dep't of the Army, Aviation Applied Technology Directorate, Fort Eustis, Va.*, 38 FLRA 362, 367 (1990) (allowing for modification of a backpay award where it could be determined which employee was eligible for backpay.)

Furthermore, in ***U.S. Department Of Labor and American Federation of Government Employees, Local 948, National Council Of Field Labor Locals***, 61 FLRA 64 (June 29, 2005), the Authority upheld an Arbitrator's remedy of back pay and interest for employees whose transit subsidy payments were delayed in violation of the agreement. The Arbitrator in that case found that the Agency violated the parties' collective bargaining agreement and past practice when it failed to provide transit subsidies to new enrollees in the program upon the date that the public transportation expenses were incurred. As a remedy, the Arbitrator ordered the Agency to provide backpay and interest to the employees and to comply with the CBA.

In concluding that the benefits denied to employees constitute pay, allowances and differentials under the Back Pay Act, 5 U.S.C. § 5596, the Arbitrator addressed the regulations propounded by the Office of Personnel Management, which defines "pay, allowances, and differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency during periods of Federal employment." 5 C.F.R. § 55 0.8 03. *See AFGE, Local 948*, 61 FLRA at 9.

Similar to the subsidies in that case, the Awards in this matter did constitute pay, allowances or differentials. The Agency conceded that timely processing of performance awards was required by the CBA as soon as possible after the date of the decision to grant an award. The Agency improperly withheld such Awards from thousands of Grievants. Furthermore, pursuant to the CBA, the employees were entitled to such monetary employment benefits.

III. The appropriate remedy for the Agency's failure to comply with the provisions of the CBA is an award of interest damages under the Back Pay Act.

In ***U.S. Department Of Labor and American Federation of Government Employees, Local 948, National Council Of Field Labor Locals***, 61 FLRA 64 (June 29, 2005), the Authority dismissed the Agency's exceptions to the award that it was contrary to the Back Pay Act and further addressed the Agency's argument that the interest damages are not provided for in the CBA or statute. It stated:

It is the Back Pay Act, not the various pay and other benefits statutes that establish the right of an employee to recover remedies, including interest, for lost pay, allowances, or differentials as a result of an unjustified or unwarranted personnel action by the Agency. The acts and statutes themselves rarely address what happens when those benefits are improperly denied - that is the function of the Back Pay Act.

Id.

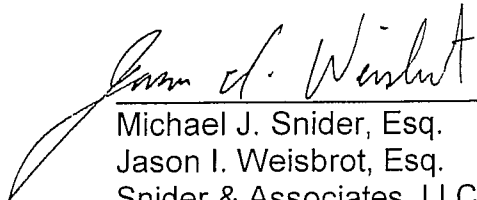
This point was missed by the Arbitrator in ***National Labor Relations Board, Washington, D.C. and National Labor Relations Board Union***, 61 FLRA 41, 61 FLRA No. 6, 0-AR-3911 (June 10, 2005), who held that the Agency violated the parties' CBA by deferring the implementation of performance awards, but did not grant interest because the employees had already received their awards and there was no express language in the CBA providing for interest on backpay or other monetary awards. Nonetheless, the Arbitrator in that case did note that a remedy of interest might be appropriate where there is evidence of willful or repeated contract violations: "interest award would be appropriate if...the Agency again deferred or delayed performance awards...." *Id.* at 13. In this matter, the Agency repeatedly violated the contract provisions over a six year period which resulted in the withdrawal of benefits to thousands of employees.

While the Agency correctly notes that all bargaining unit employees were paid their Awards for the time period between 2003 and 2005, the Agency did not give any employee any other remedy for the stipulated failure to timely process payment of these Awards. The appropriate remedy is interest damages to make the Grievant whole and put each employee in the position he/she would have been but for the Agency's failure to comply with the CBA.

CONCLUSION

For the foregoing reasons, the Arbitrator should grant judgment in favor of the Union.

Respectfully Submitted,



Michael J. Snider, Esq.
Jason I. Weisbrot, Esq.
Snider & Associates, LLC
Attorneys for Union/Grievants
104 Church Lane, Suite 201
Baltimore, MD 21208
Phone: 410-653-9060
Fax: 410-653-9061

Certificate of Service

I certify that a copy of the foregoing was provided to the Arbitrator and appropriate Agency representatives by fax, hand-delivery, e-mail or by placing it in the U.S. mail with the first class postage attached and properly addressed as of the date indicated below.

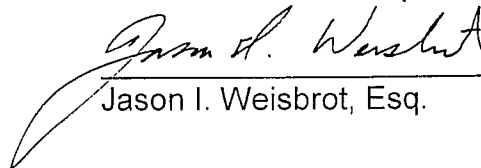
SENT BY E-MAIL AND CERTIFIED MAIL:

Arbitrator Roger Kaplan

SENT BY E-MAIL AND CERTIFIED MAIL:

Mr. James Keys
HR Specialist
Labor and Employee Relations
U.S. Department of Housing & Urban Development
Washington, DC 20410
Phone: 202-708-0614 X 2589
Fax: 202-708-2155

August 28, 2006
Date



Jason I. Weisbrot, Esq.

Cc: Ms. Carolyn Federoff, President
AFGE Nat'l Council of HUD Locals 222