

**65 FLRA No. 123**

UNITED STATES  
DEPARTMENT OF THE NAVY  
MILITARY SEALIFT COMMAND  
ATLANTIC REGION  
HAMPTON, VIRGINIA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 53  
(Union)

0-AR-4227

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DECISION

February 28, 2011

Before the Authority: Carol Waller Pope, Chairman,  
and Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn 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 determined that the Agency improperly classified as exempt from the Fair Labor Standards Act (FLSA) certain positions held by bargaining unit employees. For the reasons that follow, we deny the Agency's exceptions.

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

The Union submitted several grievances alleging that all of its bargaining unit members, General Schedule (GS)-12 and below, should be classified as non-exempt under the FLSA and should receive any backpay owed to them as a result of being classified as exempt. The Agency denied the grievances and the Union invoked arbitration. First Interim Opinion and Award (First Award) at 1, 6-7. Following an

evidentiary hearing, the Arbitrator issued two separate interim awards.

In the first award, the Arbitrator identified the following issue:

"Is the grievance not arbitrable because of procedural defects?" *Id.* at 3. The Arbitrator found the dispute to be arbitrable. *Id.* at 2, 17-24.<sup>1</sup>

In a second interim opinion and award (Second Award), the Arbitrator framed the following issues:

1. Are the employees in the positions at issue in this proceeding properly exempt from coverage under the FLSA?
2. Did the Agency act in good faith and did it have reasonable grounds to believe that its acts and/or omissions were in compliance with the FLSA, so as to avoid the imposition of liquidated damages?
3. Did the Agency willfully violate the FLSA by failing to pay overtime, thereby requiring the application of a three-year statute of limitations?

Second Award at 3. The second award addressed only those positions for which evidence had been received. *Id.* at 93. The Arbitrator left the remaining positions and the second and third issues open for a subsequent hearing. *Id.* During the subsequent hearing, the parties reached a settlement agreement that resolved the remaining issues but the Agency retained its right to file exceptions regarding the Arbitrator's determination that electronics technicians (ET) and environmental protection specialists (EPS) were FLSA non-exempt. Third Opinion and Award (Third Award) at 1. The Arbitrator, upon reviewing the settlement agreement, issued a final award, the third award; deemed the first and second awards to be final awards; and retained jurisdiction to resolve any future issues arising from implementation of the settlement agreement. *Id.*

In the second award, the Arbitrator noted, as relevant here, that the FLSA contains a presumption that employees who work more than forty hours a week are entitled to overtime pay for the excess hours. Second Award at 41.<sup>2</sup> He also noted that an

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1. As the Agency does not except to this finding, we do not address it further.

2. The remainder of this decision addresses only the ET and EPS positions.

employer claiming that an exemption to the FLSA applies to a particular position has the burden of proving that the position satisfies each requirement of the exemption being asserted. *Id.* at 41-42. During the arbitration, the Agency asserted that the administrative exemption under 5 C.F.R. § 551.206,<sup>3</sup> and/or the professional exemption under 5 C.F.R. § 551.207<sup>4</sup> applied to the positions in dispute. *Id.* at 9, 38.

The Arbitrator found that the duties of ETs include support of all Agency shipboard communications, navigation, radar, and electronic systems, and oversight of the repair of shipboard electronics by contractors. *Id.* at 65. He found that the case law, Department of Labor (DOL) Opinion Letters<sup>5</sup>, and interpretations by the Office of

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3. Under 5 C.F.R. § 551.206, as it existed when the Arbitrator issued his awards, administrative employees had to meet all of the following criteria to be exempt:

(a) *Primary duty test.* The primary duty test is met if the employee's work –

- (1) Significantly affects the formulation or execution of management programs or policies; or
- (2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
- (3) Involves substantial participation in the executive or administrative functions of a management official.

(b) *Nonmanual work test.* The employee performs office or other predominantly nonmanual work which is –

- (1) Intellectual and varied in nature; or
- (2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) *Discretion and independent judgment test.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

5 C.F.R. § 551.206 (2005). The current version of Subpart B of Part 551 of title 5 of the Code of Federal Regulations was amended on September 17, 2007.

4. Although the Agency contended before the Arbitrator that the professional exemption also applied, the Agency now claims that only the administrative exemption applies. *See* Exceptions at 8-9.

5. When the FLSA was enacted in 1938, the Secretary of Labor was given the authority to promulgate regulations to define the scope of FLSA exemptions. *See* 29 U.S.C. § 213(a)(1). When the FLSA was amended in 1974 to

Personnel Management (OPM) cited by the Union support a finding that ETs are FLSA non-exempt. *Id.* at 67-68. Further, he found that the Agency produced no evidence that its ETs have duties distinguishable from the ETs described in the cases and opinions cited by the Union. *Id.* at 68-69. Finally, the Arbitrator found that the record established that an ET is “plainly a technician” whose duties do not significantly affect the execution of management programs or policies, are line, rather than staff, in nature, and do not involve the frequent exercise of discretion and independent judgment. *Id.*

The Arbitrator found that duties of the sole EPS include coordinating the Agency's disposal of hazardous materials and conducting annual shipboard environmental assessments. *Id.* at 69. The Arbitrator found that the evidence established that the “overwhelming majority” of the EPS's work time is devoted to inspection work that does not involve any of the criteria of the administrative exemption that the Agency asserted. *Id.* at 73. In this regard, the Arbitrator found that EPS inspection work is governed by detailed guidelines and regulations. *Id.* For these reasons, the Arbitrator found that the Agency's determination that the EPS position is FLSA exempt was not supported by the evidence. *Id.* at 74.

The Arbitrator, having determined that the Agency erred in classifying the ET and EPS positions as FLSA-exempt, ordered that the Agency reclassify the positions as FLSA-non-exempt. *Id.* at 92.

### III. Positions of the Parties

#### A. Agency's Exceptions

The Agency contends that the Arbitrator's determination that the ET and EPS positions are FLSA non-exempt is contrary to OPM and DOL government-wide regulations because it was based on position titles and “gross characterizations of duties” rather than on the duties that individuals holding these positions actually perform. Exceptions at 7. Among the “gross characterizations” that the Agency alleges the Arbitrator relied upon were statements in DOL regulations that ordinary inspection work is generally non-exempt and that work requiring reliance upon regulations is non-exempt. *Id.* The

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include specific groups of federal employees, it authorized the Civil Service Commission to promulgate such regulations applicable to those employees. OPM now performs that function. *See* 29 U.S.C. § 204(f).

Agency maintains that each position must be assessed on its particular facts, and that prior decisions by courts, OPM, or arbitrators about a named position carry little weight except to the extent that the actual duties performed were similar or identical. *Id.* at 8. Further, the Agency contends that the Arbitrator applied the independent judgment and discretion criteria of the administrative exemption in 5 C.F.R. § 551.206 to the ET and EPS positions so strictly as to effectively render the exemption meaningless. *Id.* at 9.

With regard to the ET position, the Agency contends that the Arbitrator's error is "obvious" because of evidence that the marine surveyor position, which the Arbitrator determined to be exempt, has duties similar to those of the ET position. *Id.* at 10. The Agency also contends that the Arbitrator failed to consider, or give appropriate weight to, evidence that the ET's duties are primarily administrative rather than technical, and that ETs represent management when performing their duties. *Id.* at 10-14.

With regard to the EPS position, the Agency contends that the evidence was undisputed that the sole EPS advises and acts as a representative of management and, therefore, is an administrative employee. *Id.* at 15. The Agency also contends that the record established that the EPS's work is varied and intellectual and the EPS must frequently exercise discretion and independent judgment in performing his work. *Id.* at 16-17. Finally, the Agency contends that the Arbitrator appeared to confuse the EPS position with the safety and occupational health specialist position even though the two positions involve substantially different duties. *Id.* at 18.

#### B. Union's Opposition

The Union contends that although the Agency's stated exception is that the Arbitrator's determinations are contrary to law, the Agency's actual disagreement is with the Arbitrator's findings of fact, the degree of consideration he gave to testimony, and his application of the regulations to the facts he found. Opp'n at 7, 13 & 15. Therefore, according to the Union, the Authority should reject the Agency's exceptions. *Id.*

Regarding the ET position, the Union asserts that it was appropriate for the Arbitrator to base his determination on prior decisions by courts, the OPM, and arbitrators concerning technicians with duties similar to those of the ETs, and that the Agency failed to distinguish any of those decisions despite

having had the opportunity to do so. *Id.* at 17-18. The Union also notes that the Arbitrator did not rely strictly on the precedents but also considered the ET position's actual duties as described in testimony. *Id.* at 19. As for the Agency's argument that the Arbitrator should have found the ET position to be exempt, as he did for the marine surveyor position, the Union contends that this runs counter to the Agency's argument that the Arbitrator should have based his determination on the actual duties of the ET position. *Id.* at 21. Moreover, the Union contends that the Arbitrator clearly distinguished the duties of the two positions. *Id.*

Regarding the EPS position, the Union contends that the Agency's exception is based on an allegation that the Arbitrator mischaracterized the position's duties and, as such, is not grounds for filing an exception. *Id.* at 23-24.

#### IV. Analysis and Conclusions

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.*

OPM's regulations, at Subpart B of § 551 of title 5 of the Code of Federal Regulations, establish the criteria used to determine an employee's status under the FLSA. However, the designation of an employee as FLSA exempt or non-exempt rests on the duties actually performed by the employee. 5 C.F.R. § 551.202(e).<sup>6</sup> *See U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 284 (2000) (citing *Berg v. Newman*, 982 F.2d 500 (Fed. Cir. 1992) and other cases) (*U.S. Dep't of the Navy*). Section 551.202, sets out the following principles governing determinations as to whether an exemption applies to a position: (a) an employee is presumed to be FLSA non-exempt; (b) exemption criteria are to be narrowly

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6. At the time the Arbitrator issued the awards, this provision was in 5 C.F.R. § 551.202(i).

construed; (c) the burden of proof rests with the agency that asserts the exemption; and (d) if there is reasonable doubt as to whether an employee meets the exemption criteria, the employee should be designated FLSA non-exempt. 5 C.F.R. § 551.202 (a) – (d) (2005).

The Agency argues that the Arbitrator failed to comply with OPM and DOL regulations because his determination was based on position titles and “gross characterizations of duties” instead of on the actual day-to-day duties. Exceptions at 7. However, the Arbitrator specifically recognized that his determination of the exemption status of the ET and EPS positions required consideration of the three criteria set out in the administrative exemption in 5 C.F.R. § 551.206. Thus, he applied the three criteria -- the “primary duty” test, the “nonmanual work” test, and the “discretion and independent judgment” test -- to the actual duties of the positions. Second Award at 65-74.<sup>7</sup> Further, the Arbitrator properly recognized that a position had to meet all criteria of the administrative exemption in order to be FLSA exempt. *Id.* at 73; *see also* 5 C.F.R. § 551.206 (an administrative employee must meet all exemption criteria).

Applying these criteria to the ET position, the Arbitrator considered testimony from both an ET incumbent and a supervisor regarding actual duties, and found their testimony to be consistent. Second Award at 24-26. In so doing, he found that the record establishes that the ET’s duties do not meet the “primary duty” test in that the position’s duties “do not significantly affect the execution of [m]anagement programs or policies and [the incumbent’s] duties are fundamentally line, rather than staff, in nature.” *Id.* at 68. Regarding the position’s inspection duties, the Arbitrator found that these do not meet the “nonmanual work” test because the work “involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining what procedure to follow, or determining whether prescribed standards or criteria are met.” *Id.* The Arbitrator based his finding on cases, DOL opinions, and OPM Letters describing the duties of electronics technicians as well as on the Agency’s failure to produce any evidence that the ET position’s duties are distinguishable. *Id.* at 68-69. As for the

“discretion and independent judgment” test, the Arbitrator found that both the record and case precedents establish that the ET position’s duties “do not involve the frequent exercise of discretion and independent judgment, but must be accomplished within [Agency] guidelines, regulations, and supervisory review and approval.” *Id.* at 69.

Applying the administrative exemption criteria to the EPS position, the Arbitrator considered testimony from the EPS incumbent and a supervisor regarding actual duties, and found their testimony to be consistent. *Id.* at 27-28. In so doing, he found that the record establishes that inspection duties take up “the overwhelming majority of [the incumbent’s] work time” and that this work does not meet any of the tests for the administrative exemption. *Id.* at 73. In addition, the Arbitrator found that the record establishes that the inspections are governed by detailed and comprehensive guidelines and regulations. *Id.*

As the Authority noted in *U.S. Dep’t of the Navy*, in making FLSA exempt status determinations, “a trial court must have before it sufficient facts concerning the daily activities of the position to justify its legal conclusion.” *U.S. Dep’t of the Navy*, 56 FLRA at 284 (citation omitted). The Agency has not established that the Arbitrator failed to consider the positions’ actual duties. Indeed, it is clear that the Arbitrator based his determinations on the testimony of position incumbents and supervisors regarding actual duties. Accordingly, the Authority finds that the award is in compliance with government-wide regulations because the determinations that the ET and EPS positions are exempt were based on evidence of actual duties.

With regard to the Agency’s contentions that the Arbitrator failed to give appropriate weight to evidence that the ETs’ duties are primarily administrative, that ETs represent management, that the work of the EPS is varied and intellectual, that the EPS frequently exercises discretion and independent judgment in performing his work, and that the duties of the EPS are similar to those of the exempt position of safety and occupational health specialist, the Authority will not find the award deficient on the basis of these contentions. The Authority has long held that disagreement with an arbitrator’s evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See AFGÉ, Local 3295*, 51 FLRA 27,

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7. These three tests are set out in greater detail at n. 3, *supra*. A fourth test contained in both exemptions, an “80-percent” test, was applicable only to GS-5 and GS-6 employees. Both the ET and EPS positions have higher grades.

32 (1995).<sup>8</sup> Finally, regarding the Agency's contention that the Arbitrator applied the criteria of the administrative exemption from the FLSA too strictly, the Authority finds that a strict application of the exemption is consistent with 5 C.F.R. § 551.202, in particular, with the principle in 5 C.F.R. § 551.202(b) that exemption criteria must be narrowly construed.

## V. Decision

The Agency's exceptions are denied.

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8. As the Agency does not provide any support for its claim that the Arbitrator's treatment of the EPS position as the same or similar to the Safety and Occupational Health Specialist position was "an obvious error of non-fact," Exceptions at 5 n.7, we deny the Agency's claim as a bare assertion. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (citations omitted).