66 FLRA No. 100

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FLORENCE, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1300
(Union)

0-AR-4753

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DECISION

March 1, 2012

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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 John F. Sass 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.

As relevant here, the Union filed a grievance claiming that the Agency violated the Fair Labor Standards Act (FLSA) when it paid overtime to employees in pay periods subsequent to the pay periods in which the overtime hours were actually worked. The Arbitrator found that the Agency violated the FLSA.

For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency issued a memorandum to employees working at the Agency's correctional institution in Florence, Colorado that changed how overtime hours were reported and paid. This dispute concerns the Union's claims that the memorandum's new overtime reporting and payment procedures prevent the Agency from timely paying overtime compensation to employees.

Before the Agency implemented the new overtime reporting and payment procedures, timekeepers reported to payroll the number of overtime hours worked based on a computer program known as "The Roster." Award at 3. Under the new overtime reporting and payment procedures, timekeepers can no longer submit overtime hours based on "The Roster." Instead, overtime hours cannot be reported to payroll until employees complete an official Overtime Authorization Form (Authorization Form) after working the assigned overtime hours. *Id.* The Authorization Form requires signatures from the employee working the overtime, the Captain, and the Warden or the Warden's designee. Although it generally takes about a week to obtain these signatures, it can take as long as a month. *Id.*

Once the Authorization Form is complete, timekeepers may submit the overtime hours to payroll. *Id.* at 3-4. As a result, overtime hours worked during the first week of employees' two-week pay periods are generally paid on that pay period's regular payday, but overtime hours worked during the second week of the pay period are generally not paid until the following pay period's regular payday. *Id.* at 4. If it takes longer than usual to obtain all of the signatures required on the Authorization Form, then payment of overtime can be further delayed. *Id.* at 13, 4-5.

As relevant here, the Union filed a grievance claiming that the Agency had failed "to pay overtime in a prompt manner" in violation of the FLSA and government-wide rules and regulations. *Id.* at 5. The parties could not resolve the grievance and submitted it to arbitration. The parties stipulated to the following issues: (1) "[D]oes the evidence in this case show that the Agency violated the [FLSA] . . . by paying overtime in pay periods subsequent to the periods in which the overtime hours were actually worked without having sufficient legal justification for doing so?"; (2) "If . . . the Agency did violate the [FLSA] . . . then what is the appropriate remedy?"[1] *Id.* at 1-2.

The Arbitrator noted that the FLSA does not explicitly provide a time limit within which employees are to receive their overtime compensation from employers. *Id.* at 13.

[1] The parties also stipulated to issues concerning the Agency's claim that the grievance was untimely and lacked specificity, and the Union's claim that the Agency violated the parties' agreement. Award at 1-2. The Arbitrator rejected all of these claims. *Id.* at 11-13; 15-16. As neither party challenges these findings, we do not address them further.

The Arbitrator determined, however, that the Department of Labor's (DOL's) regulation implementing the FLSA, 29 C.F.R. § 778.106[2] ("§ 778.106" or "DOL's regulation"), requires that overtime compensation earned in a particular pay period must generally be paid on that pay period's regular payday. *Id.* Citing § 778.106, the Arbitrator found that the Agency's delayed overtime payments violated the FLSA.[3] *Id.* at 13-14. The Arbitrator thus concluded that the Agency should pay employees according to the data in "The Roster" and not the data in the Authorization Forms because the information provided in "The Roster" is the most accurate and up-to-date data available regarding the overtime hours worked by employees. *Id.* In addition, the Arbitrator found that, contrary to the Agency's argument, official Agency policy only requires that overtime paperwork be completed and available for auditing purposes; not that an Authorization Form be completed before an employee is paid. *Id.* at 4, 15.

Having found an FLSA violation, the Arbitrator ordered the Agency to: (1) withdraw the memorandum implementing the new overtime payment procedure; (2) stop requiring that the Authorization Forms be fully completed before employees can be paid for overtime hours worked; (3) return to using the data provided in "The Roster" for purposes of submitting overtime hours to payroll; (4) pay liquidated damages to all bargaining unit employees affected by the award; and (5) pay the Union's reasonable attorney fees and costs. *Id.* at 16, 19.

[2] Section 778.106, "Time of payment," provides:

> There is no requirement in the [FLSA] that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the [FLSA] will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

29 C.F.R. § 778.106.

[3] The Arbitrator also noted that federal case law supports his finding that overtime compensation must be paid on the regular payday of the pay period in which it was earned because the law makes no distinction between when minimum wages and overtime compensation must be paid to employees. Award at 14 (citing *Beebe v. United States*, 640 F.2d 1283 (Ct. Cl. 1981); *Cook v. United States*, 855 F.2d 848 (Fed. Cir. 1988); and *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993)).

III. Positions of the Parties

A. Agency's Exceptions

The Agency excepts to the Arbitrator's award on several grounds. Initially, the Agency notes that the FLSA applies to both federal-sector and private-sector employees, and is implemented by two separate federal agencies – the Office of Personnel Management (OPM) and DOL. Exceptions at 4-5. The Agency claims that the Arbitrator erroneously applied § 778.106, which pertains to private-sector employees, rather than OPM's implementing regulation, 5 C.F.R. § 551.101 ("§ 551.101" or "OPM's regulation"), which applies to federal-sector employees.[4] *Id.* at 5. Specifically, the Agency contends that the Arbitrator improperly relied on DOL's regulation in concluding that the Agency violated the FLSA by not paying overtime compensation to bargaining unit employees on the regular payday of the pay period in which it was earned. *Id.* (citing Award at 19).

The Agency claims that it is in compliance with the FLSA and OPM's regulation because, in contrast to DOL's regulation, both the FLSA and OPM's regulation are silent as to the timeframe within which a federal-sector employer must pay overtime. *Id.* at 5, 7. The Agency argues that there is no dispute that it pays employees for the overtime hours that they have worked, although not always on the regular payday of the pay period in which the overtime was earned. *Id.* at 7.

The Agency further argues that, although § 551.101(c) provides that OPM's administration of the FLSA must be consistent with DOL's administration of the FLSA, that requirement only applies "to the extent practicable" and "to the extent that this consistency is required to maintain compliance with the terms of the [FLSA]." *Id.* (citing § 551.101(c)). The Agency claims that, even though DOL's regulation requires the payment of overtime on the regular payday of the pay period in which the overtime was earned, OPM's regulation does not have to "mirror" that requirement. *Id.* Therefore, the Agency argues, the award is contrary to law because it requires the Agency to meet the requirements of § 778.106, rather than the requirements of § 551.101,

[4] 5 C.F.R. § 551.501, "Overtime pay," is set forth in the appendix to this decision.

which does not contain the time-limit requirement.[5] *Id.* at 5.

Further, the Agency argues that the award is contrary to the doctrine of sovereign immunity. *Id.* at 7-9. The Agency concedes that the FLSA provides a valid waiver of sovereign immunity, but argues that the award is not based on a proper waiver of sovereign immunity because it is premised on a "faulty finding" of a violation of the FLSA. *Id.* at 8. According to the Agency, nothing in the FLSA or OPM's implementing regulation mandate that the Agency pay overtime compensation on the regular payday of the pay period in which it was earned. Therefore, the Agency argues, absent a valid waiver of sovereign immunity, the Arbitrator had no specific authority to make a monetary award to pay liquidated damages and attorney fees and costs. *Id.*

Finally, the Agency argues that the award is based on a nonfact. The Agency claims that, because the Arbitrator erroneously relied on DOL's implementing regulation in determining that overtime compensation must be paid on the regular payday of the pay period in which it is earned, a central fact underlying the award is erroneous, but for which, the Arbitrator would have reached a different result.

B. Union's Opposition

The Union argues that the Arbitrator's reliance on § 778.106 is not contrary to law and "was directly authorized by . . . § 551.501(a)." Opp'n at 9. According to the Union, OPM's position is that, where it has not established regulations regarding the administration of the FLSA, it is "to interpret the FLSA consistent with . . . DOL's regulations." *Id.* at 8 (citing OPM Decision F-1801-09-03 (February 20, 1997) (OPM Decision F-1801-09-03)); OPM Decision F-0810-12-02 and F-0850-12-01 (June 16, 1999)). Thus, the Union contends, the Arbitrator's reliance on DOL's regulation is directly authorized by OPM's regulation. As such, the Union claims, the Arbitrator's application of DOL's regulation requiring that overtime compensation be paid on the regular payday of the pay period in which it was earned is not contrary to law. *Id.* at 8 (citing § 778.106).

The Union also argues that the Arbitrator correctly cited federal law in support of his conclusion that overtime must be paid on the regular payday of the pay period in which it was earned.

The Union further claims that, as the Arbitrator's award is properly based on the FLSA, and as the FLSA provides a valid waiver of sovereign immunity, the award does not violate sovereign immunity. *Id.* at 12-13.

Finally, the Union argues that the Agency provides no support for its nonfact claim, and it should be denied as a bare assertion. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions 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.*

1. The Agency does not demonstrate that the Arbitrator erroneously applied DOL's regulation rather than OPM's regulation.

The Agency claims that, because the Arbitrator applied DOL's regulation rather than OPM's regulation, the award is contrary to law. Award at 5. For the reasons discussed below, we deny the Agency's exception.

OPM's regulation is silent as to the timeframe within which the government is required to make overtime payments to its employees for overtime hours worked. 5 C.F.R. § 551.501. However, the regulation does provide that OPM's administration of the FLSA must be consistent with DOL's, where practicable. Specifically, § 551.101(c) provides, in pertinent part:

> OPM's administration of the [FLSA] must comply with the terms of the [FLSA] but the law does not require OPM's regulations to mirror [DOL's] FLSA regulations. OPM's

[5] The Agency also claims that the Arbitrator erroneously relied on federal case law for the proposition that, because there is no distinction between minimum wages and overtime compensation under the law, the Agency must treat overtime pay like minimum wage pay, and pay employees at the end of the pay period in which the overtime was earned. Exceptions at 5 n.2 (citing Award at 14 (citations omitted)). But the Agency does not assert that the award is contrary to the cited case law. *Id.*

> administration of the [FLSA] must be consistent with [DOL's] administration of the [FLSA] only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the [FLSA].

Id.

When Congress amended the FLSA in 1974 to extend its coverage to certain federal employees, it indicated that OPM's authority must be exercised "in a manner that is consistent with [DOL's] implementation of the FLSA," and so as to ensure that "any employee entitled to overtime compensation under [the] FLSA receives it under the civil service rules." *AFGE v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987). Construing OPM's regulation as precluding the application of a timeframe within which employees must be paid for their overtime hours worked, as the Agency argues, would be inconsistent with DOL's implementation of the FLSA and therefore contrary to congressional intent and § 551.101(c). And, interpreting its own regulations, OPM's view is that, where it has not established regulations regarding the administration of the FLSA, it is "to interpret the FLSA consistent with the DOL's regulations." *See* OPM Decision F-1801-09-03 at 8 (where OPM has not established regulatory definitions, OPM applies DOL's regulations). As OPM's decision is consistent with the FLSA and the regulations discussed above, it carries persuasive weight, and we defer to it. *See AFGE, Local 2006*, 65 FLRA 465, 469 (2011) (Authority defers to OPM guidance, such as "opinion letters," to the extent that they have the power to persuade).

Consistent with congressional intent and § 551.101(c)'s requirements, in the absence of an applicable time limit in OPM's regulation, the Arbitrator directed the Agency to pay overtime compensation on the regular payday of the pay period in which it was earned, as required by DOL's regulation. *See* 29 C.F.R. § 778.106. The Agency does not argue that applying the timeframe for the payment of overtime in DOL's regulation would be inconsistent with the FLSA's requirements for federal-sector employees. Further, there is no indication that OPM intended its regulations to prohibit the application of a timeframe within which an agency must pay employees for overtime hours worked. And the Agency points to no provision in OPM's regulations precluding such a timeframe. Rather, the Agency merely claims that DOL's regulations are inapplicable in this case because OPM's regulations are not required to mirror them. Exceptions at 7.

In sum, the Agency has not demonstrated that applying the timeframe for the payment of overtime in DOL's regulation would be inconsistent with the FLSA's requirements for federal-sector employees. Accordingly, we deny the Agency's exception.[6]

> 2. The Agency does not demonstrate that the award violates the doctrine of sovereign immunity.

The Agency also argues that the award is contrary to the doctrine of sovereign immunity. Exceptions at 7-9.

The United States, as sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (citing *U.S. v. Testan*, 424 U.S. 392, 399 (1976)). Thus, there is no right to money damages in a suit against the United States without a waiver of sovereign immunity. *Id.* In order to waive sovereign immunity, Congress must unequivocally express its intention to do so. *Id.* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The government's consent to a particular remedy also must be unambiguous. *Id.* (citing *Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995)). "As such, an award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy." *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (then-Member Pope dissenting in part on another matter) (citation omitted).

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[6] We need not address the Agency's claim that the case law cited by the Arbitrator does not support the award. *See supra* note 5; Exceptions at 5 n.2. The Authority has consistently recognized that, when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *See, e.g., U.S. Dep't of Health & Human Servs., Food & Drug Admin., Pac. Region*, 55 FLRA 331, 336 (1999). In those circumstances, if the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the Arbitrator, then it is unnecessary to address exceptions to the other ground. *See, e.g., U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) (Member Cabaniss dissenting in part). The Arbitrator based his award on DOL's regulation, which is a separate and independent ground for his award. As the Agency has not established that the Arbitrator's reliance on DOL's regulation is deficient, we find that it is unnecessary to consider the Agency's challenge to the Arbitrator's citation to federal case law. *See U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011) (if excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds).

The Agency concedes that the FLSA provides a valid waiver of sovereign immunity. But the Agency argues that the award is premised on a "faulty finding" of a violation of the FLSA which, the Agency asserts, the Arbitrator erroneously based on § 778.106. Exceptions at 5, 8.

The Agency's claim that the award contravenes the doctrine of sovereign immunity is merely a restatement of its claim that the Arbitrator erroneously applied DOL's regulation, § 778.106, requiring that overtime compensation be paid on the regular payday of the pay period in which it was earned. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010). Accordingly, consistent with the finding that the Arbitrator's reliance on and application of the DOL regulation is not contrary to law, we deny the Agency's exception.

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). When the determination alleged to constitute a nonfact is based on an interpretation of law, that determination cannot be challenged as a nonfact. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37, 40 (2007).

The Agency contends that, because the Arbitrator erroneously relied on DOL's regulation in determining that it violated the FLSA, a central fact underlying the award is erroneous, but for which, the Arbitrator would have reached a different result.

The Agency's nonfact challenge does not provide a basis for finding the award deficient. The Arbitrator's application of DOL's regulation, providing that overtime pay must be paid to employees on the regular payday of the pay period in which it was earned, constitutes a legal conclusion, not a factual one. *See id.* Thus, the Agency's nonfact claim does not provide a basis for the finding the award deficient. *Id.* Accordingly, we deny the exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

§ 551.501 Overtime pay.

(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part--

(1) On the basis of periods of duty in excess of 8 hours in a day when the employee receives compensation for that duty under 5 U.S.C. 5545(c)(1) or (2) or 5545b;

(2) On the basis of hours of work in excess of 8 hours in a day that are not overtime hours of work under § 410.402 of this chapter, part 532 of this chapter and 5 U.S.C. 5544, or part 550 of this chapter;

(3) On the basis of hours of work in excess of 8 hours in a day for an employee covered by 5 U.S.C. 5544 for any hours in a standby or on-call status or while sleeping or eating;

(4) On the basis of hours of work in excess of 8 hours in a day for an individual who is not an employee, as defined in 5 U.S.C. 5541(2), for purposes of 5 U.S.C. 5542, 5543, and 5544;

(5) On the basis of hours of work in excess of 40 hours in a workweek for an employee engaged in fire protection or law enforcement activities when the employee is receiving compensation under 5 U.S.C. 5545(c)(1) or (2) or 5545b, or is not an employee (as defined in 5 U.S.C. 5541(2)) for the purposes of 5 U.S.C. 5542, 5543, and 5544;

(6) For hours of work that are not "overtime hours," as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedules;

> (7) For hours of work compensated by compensatory time off under § 551.531 of this part; and
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> (8) For fractional hours of work, except as provided in § 551.521 of this part.

5 C.F.R. § 551.501.