66 FLRA No. 5

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL IMMIGRATION
AND NATURALIZATION SERVICE COUNCIL
(Union)

0-AR-4468

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DECISION

August 25, 2011

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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 two awards of Arbitrator Samuel A. Vitaro 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 Arbitrator concluded that law enforcement officers (LEOs) receiving administratively uncontrollable overtime (AUO) also were entitled to additional time-and-a-half overtime under the Fair Labor Standards Act (FLSA) for work performed during their meal periods. In a subsequent award, the Arbitrator concluded that claimant # 311 (Claim 311) was entitled to 2,361 hours of overtime and that the Agency was required to pay travel and per diem expenses for a Union witness. For the reasons set forth below, we deny in part and grant in part the Agency's contrary to law exceptions, deny the Agency's essence exception, and modify the award consistent with this decision.

II. Background and Arbitrator's Awards

A. Background

This dispute began when the Union presented a grievance on behalf of Agency employees concerning their exemption status under the FLSA. Final Award at 2. Two groups of grievants were at issue: (1) those who were claiming to have been classified improperly as FLSA-exempt and (2) those who also claimed to be entitled to "suffer or permit" overtime. *Id.* The Agency agreed that many of the bargaining unit employees were classified incorrectly; as a result, the Agency changed the classification of those employees to non-exempt. *Id.* The Arbitrator then held evidentiary hearings on the claims concerning entitlement to "suffer or permit" overtime. The Arbitrator resolved the claims in a series of awards, finding that the majority of employees were entitled to "suffer or permit" overtime. *Id.* at 4.

While the parties were calculating the amount of overtime owed, the Agency argued to the Arbitrator that approximately 125 of the grievants whom the Arbitrator found were entitled to "suffer or permit" overtime were LEOs whom the Agency had designated as entitled to receive an annual AUO premium because they were required to work uncontrollable, irregular overtime. As a result, the Agency contended, these individuals were entitled to only the annual AUO pay and were not entitled to an hourly "suffer or permit" overtime under the FLSA. *Id.* at 4. Accordingly, the Arbitrator held another evidentiary hearing to determine the LEOs' entitlement to overtime. *Id.* Additionally, the payment computation as to Claim 311 was disputed at the hearing. *Id.* at 5.

B. 2007 Award

In 2007, the Arbitrator issued his decision concerning backpay for the lunch periods of the 125 LEOs receiving AUO (2007 Award). 2007 Award at 1-2. According to the Arbitrator, the issue before him was "whether the one-half hour lunch period . . . is properly considered as part of AUO hours . . . or whether that one-half hour each workday is treated [separately] under the FLSA and paid at time and one-half." *Id.* at 12.

The Arbitrator found that, under 5 U.S.C. § 5545(c)(2) (§ 5545(c)(2)), the premium payment for AUO covers only "irregular, unscheduled overtime" and expressly permits additional pay for regularly scheduled overtime.[1] *Id.* at 19. He concluded that the meal periods were not irregular or unscheduled, but, rather, were regularly scheduled; as a result, according to the

[1] The relevant statutory and contract provisions are set forth in the appendix to this decision.

Arbitrator, such periods were regularly scheduled overtime. *Id.* at 19-20. In so finding, the Arbitrator rejected the Agency's reliance on a 1992 Federal Personnel Manual Letter (FPM Letter 551-24) issued by the Office of Personnel Management (OPM), which provided that lunch periods were covered by AUO pay. *Id.* at 4-5. In rejecting this argument, the Arbitrator found that FPM Letter 551-24 was not a reasonable interpretation of the statute or consistent with the regulations. *Id.* 21-24. Therefore, the Arbitrator concluded that, as with other regularly scheduled overtime, the LEOs receiving AUO were entitled to time-and-a-half overtime compensation for their meal periods under the FLSA. *Id.* at 29.

The Arbitrator also resolved two other issues in his 2007 Award. First, the Arbitrator found that a Union witness was relevant to the arbitration hearing and that, as a result, pursuant to Article 48(k) of the parties' agreement, the Agency was required to pay his travel and per diem expenses. *Id.* at 27. Second, the Arbitrator declined to reevaluate Claim 311's entitlement to overtime and directed the parties to determine the number of hours of overtime to which Claim 311 was entitled. *Id.*

C. Final Award

After the parties could not agree on the number of hours to which Claim 311 was entitled, the Arbitrator issued a final award (Final Award). The Union argued that Claim 311 was entitled to 2,361 hours of overtime. Final Award at 7. The Agency responded that Claim 311 was entitled to only 2,061 hours of overtime because the grievant was not AUO-certified for 300 of the hours, and, therefore, must prove that he was "suffered or permitted" to work during those hours. *Id.* The Arbitrator determined that Claim 311 met his burden of showing that he was "suffered or permitted" to work during his lunch periods before he was AUO-certified and, therefore, was entitled to 2,361 hours of overtime. *Id.* at 8.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's 2007 Award is contrary to law because it grants time-and-a-half FLSA overtime to LEOs who are receiving AUO. Exceptions at 2. According to the Agency, granting FLSA overtime to LEOs earning AUO conflicts with 5 U.S.C. § 5542(a) (§ 5542(a)) and 5 C.F.R. § 551.512(b) (§ 551.512(b)). *Id.* at 3-4.

The Agency argues that the Arbitrator erred in finding that the LEOs were entitled to time-and-a-half overtime for their meal periods because they were regularly scheduled; rather, the Agency argues, any overtime work performed during meal periods was not scheduled in advance and was, thus, irregular. *Id.* at 4-5. According to the Agency, because the Arbitrator's 2007 Award grants LEOs receiving AUO pay time-and-a-half overtime for work time that is not regularly scheduled, it is contrary to § 5542(a). *Id.* at 5.

Additionally, the Agency argues that the 2007 Award is contrary to § 551.512(b), which provides "for the payment of AUO where 'intended.'" *Id.* at 5. According to the Agency, FPM Letter 551-24 explains that it is intended that meal periods are to be included within AUO, rather than being paid as regularly scheduled overtime. *Id.* at 5-6. Additionally, while the Agency acknowledges that FPM Letter 551-24 is no longer in effect, it contends that it is consistent with subsequent OPM guidance.[2] *Id.* at 6 (citing *Memorandum for Dirs. of Personnel*, CPM 96-19 (1996)). The Agency argues that, because OPM's interpretation of its own regulations must be given deference, the Arbitrator erred in finding that FPM Letter 551-24 was unreasonable. *Id.* at 8. Therefore, the Agency argues that the Arbitrator's 2007 Award granting time-and-a-half overtime to LEOs receiving AUO for their meal periods is inconsistent with OPM's guidance and contrary to law. *Id.* at 9.

The Agency also argues that the Arbitrator's 2007 Award finding that a Union witness' travel must be paid by the Agency fails to draw its essence from Article 48(k)(2) of the parties' agreement. *Id.* at 2. The Agency asserts that the record shows that the Union witness at issue was irrelevant because he did not discuss regular overtime or meal periods. *Id.* at 10. The Agency claims that the Arbitrator's determination that the Union witness was relevant was an implausible interpretation of Article 48(k)(2) and, therefore, fails to draw its essence from the parties' agreement. *Id.* at 10-11.

Finally, the Agency argues that the Arbitrator's award of 2,361 hours of overtime to Claim 311 is contrary to law. *Id.* at 2. The Agency argues that Claim 311 worked 300 of the claimed hours prior to his AUO certification. *Id.* at 11. According to the Agency,

[2] We note that the Agency filed a supplemental submission requesting that the Authority take official notice of recent OPM guidance that bears on the disputed issues. Agency's Supplemental Submission at 1. Because the OPM guidance relates to the disposition of the issues involved in this case, we take official notice of it. *See U.S. Dep't of Veterans Affairs, Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 811 n.5 (2011) (citing 5 C.F.R. § 2429.5).

because the hours did not qualify as AUO, they were eligible for overtime only if the employee was "suffered or permitted" to work. *Id.* The Agency argues that, because the Arbitrator made no finding that the supervisor knew or had reason to believe that "suffer or permit" work was being performed, his Final Award granting "suffer or permit" overtime for the extra 300 hours is contrary to law. *Id.* at 12-13.

B. Union's Opposition

The Union argues that the Agency's argument that work was not regularly performed during meal periods is disingenuous. Opp'n at 5. The Union claims that Title 5 overtime requires work to be authorized or approved in advance, but that FLSA overtime only requires work to be "suffered or permitted." *Id.* at 6-7. According to the Union, no law or regulation modifies the FLSA's requirement that overtime is paid at time and a half the employee's regular hourly rate. *Id.* at 8-9. Therefore, the Union asserts, the Arbitrator correctly awarded the employees overtime for their meal periods at that rate. *Id.* at 10.

The Union also argues that the overtime work performed during meal periods is regularly scheduled because it predictably occurred nearly every day. *Id.* at 11. The Union claims that, because the overtime worked during meals is regular, it should not be covered by AUO pay. *Id.* at 12. The Union contends that the Agency did not challenge the Union's evidence for essentially all the claimants who claimed to have worked during their meal periods. *Id.* at 12-13. The Union also argues that the Agency gives too much deference to FPM Letter 551-24 and that the Arbitrator was correct to disregard it. *Id.* at 13-14.

The Union also argues that the Arbitrator's decision regarding the relevance of its witness draws its essence from the parties' agreement. *Id.* at 16. The Union claims that, because the parties' agreement grants the Arbitrator the discretion to decide the relevance of witnesses and directs the Agency to pay travel and per diem if the Arbitrator determines that the witness is relevant, the Arbitrator's decision regarding this issue is not reviewable by the Authority. *Id.* at 16-17.

Finally, the Union argues that the Agency is arguing for the first time that Claim 311's supervisors did not know that he was performing "suffer or permit" overtime. *Id.* at 20. The Union asserts that it provided 131 claim forms supporting its claim that management was aware of "suffer or permit" overtime. *Id.* According to the Union, the Agency never objected to any of the materials supporting Claim 311's claim until it filed its exceptions. *Id.* at 24.

IV. Analysis and Conclusions

A. The 2007 Award is contrary to law; the Final Award is not contrary to law.

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.*

1. Relevant Statutory Background

Under the Federal Employees Pay Act (FEPA), an employee is entitled to overtime for all hours worked over eight hours in a day or forty hours in a week that are specifically ordered or approved. 5 U.S.C. § 5542(a). However, rather than paying an hourly overtime rate, an agency may provide an annual AUO premium to an employee who is required to work overtime hours that cannot be controlled administratively. 5 U.S.C. § 5545(c)(2); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., El Paso, Tex.*, 61 FLRA 741, 742 (2006). When an employee is receiving an AUO premium, AUO is the "sole compensation for irregular and occasional overtime work . . . ." 59 Fed. Reg. 66,149-01, 66,149 (1994). However, employees receiving AUO must still be paid overtime under Title 5 for all "regularly scheduled overtime," as well as all night, Sunday, and holiday pay. 5 U.S.C. § 5545(c)(2).

Regularly scheduled overtime work is defined as "overtime work that is part of an employee's regularly scheduled administrative workweek," which, in turn, "means the period within an administrative workweek, established in accordance with [5 C.F.R] § 610.111 [(§ 610.111)] of this chapter, within which the employee is regularly scheduled to work." 5 C.F.R. § 550.103. Section 610.111 provides that an agency "shall establish by a written agency policy statement" a basic workweek, as well as "the period of regular overtime work, if any, required of each employee."[3] 5 C.F.R. § 610.111(a)(1)-(2).

[3] We note that there is no finding or allegation that 5 C.F.R. § 610.111(b) applies here.

FLSA overtime, on the other hand, entitles employees to pay equal to one and a half times their regular rate for all hours over 40 in a week, but does not require hours to be specifically ordered and approved. 29 U.S.C. § 207(a). However, as relevant here, the FLSA provides for a different workweek for law enforcement officers employed by the Federal Government, in this case 42.75 hours.[4] 29 U.S.C. § 207(k); 5 C.F.R. § 551.541(a); *see also AFGE, Local 1815*, 56 FLRA 992, 994 (2000) (finding that the applicability of § 207(k) "is reflected in the overtime provisions of 5 C.F.R. § 551.501," and that FLSA overtime is governed by 5 C.F.R. § 551.541).

2. The 2007 Award is contrary to law.

The Agency argues that the Arbitrator's 2007 Award is contrary to § 5542(a) and § 551.512(b). According to the Agency, the award is contrary to § 5542(a) because it provided overtime pay for hours of work that are not regularly scheduled.[5] Exceptions at 5. Additionally, the Agency contends that the award is contrary to § 551.512(b) because irregular overtime is included within AUO. *Id.* at 9.

The Arbitrator found the LEOs' meal periods to be regularly scheduled overtime, relying on the fact that the meal periods themselves were neither irregular nor unscheduled. 2007 Award at 19-21. According to the Agency, while it is true that meal periods are regularly scheduled, the relevant question under the statute is whether *overtime* is regularly scheduled. Exceptions at 5. The Agency asserts that the meal periods at issue were not "prescheduled work time" or regularly scheduled overtime, but, rather, were periods when employees could decide that it was necessary to work. *Id.* at 4-5.

"[O]vertime that [is] added on to every work day of the year [is] 'irregular' if not ordered and directed according to law." *Bennett v. United States*, 4 Cl. Ct. 330, 343 n.39 (Cl. Ct.1984). Section 5545(c)(2) provides that employees receiving AUO pay may receive overtime pay for all "regularly scheduled overtime" work, but only if established in accordance with § 610.111. 5 U.S.C. § 5545(c)(2). The Agency did not schedule the overtime work during meal periods in advance in accordance with § 610.111, which, as stated above, requires the Agency to establish regularly scheduled overtime, in advance, in a written policy statement. 5 C.F.R. § 610.111(a)(1)-(2). As a result, the meal periods at issue here were not regularly scheduled overtime. *See* OPM Guidance on Applying FLSA Overtime Provisions to Law Enforcement Employees Receiving Administratively Uncontrollable Overtime Pay, ¶ 14, http://www.opm.gov/oca/pay/html/flsaovertime.htm noting that work performed by employees earning AUO during meal periods "[b]y definition" would be "irregular or occasional overtime work") (OPM Guidance). Therefore, we find that the Arbitrator's 2007 Award granting the LEOs time-and-a-half overtime is contrary to law. *See Immigration & Naturalization Serv., S. Reg'l Office, Dallas, Tex.*, 16 FLRA 1131, 1134 (1984) (citing *Burich v. United States*, 366 F.2d 984, 988-89 (Ct. Cl. 1966)) (finding work performed with high degree of frequency and regularity legally insufficient to be regularly scheduled overtime).

For the foregoing reasons, we grant this exception and modify the award. *See U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010) (holding that, "[w]here the Authority is able to modify an award to bring it into compliance with applicable law, it will do so"). In this regard, finding that the meal periods are not regularly scheduled overtime does not mean that the LEOs are not paid any FLSA overtime for those hours. *See* OPM Guidance at ¶ 18 (finding that FLSA non-exempt employees earning AUO are entitled to "[o]ne-half times the employee's hourly regular rate times all overtime hours worked"). The Arbitrator found, and the Agency does not dispute, that the LEOs receiving AUO are entitled to one-half times their regular hourly rate for all irregularly scheduled overtime hours, including meal periods. *See* 2007 Award at 26; Exceptions at 6. Although the Union is correct that the employees' total overtime pay must be equal to time and a half, Opp'n at 10, because the LEOs already are receiving AUO, the Arbitrator correctly determined that the proper calculation is for them to receive an additional one-half times their regularly hourly rate. *See* OPM Guidance at ¶ 19.

3. The Final Award is not contrary to law.

The Agency argues that the Final Award is contrary to law because the Arbitrator awarded 300 hours of overtime to Claim 311 before he was granted AUO status without finding that he was "suffered or permitted" to work. Exceptions at 11-12.

The Arbitrator found that, in the original hearing, "the Agency stated that it was accepting and not contesting [Claim 311's suffer or permit] claims." Final Award at 6. The Arbitrator's finding is a factual finding

[4] The Arbitrator, in his 2007 Award, applied the LEO exception provided in § 207(k). *See* 2007 Award at 10. Although the Union, in its opposition, argues that the Agency has not proven that § 207(k) applies, Opp'n at 4, the Union has not filed an exception on this issue and, thus, that issue is not before us. The parties do not dispute that, should § 207(k) apply, the relevant workweek is 42.75 hours.

[5] We note that it is undisputed that the meal periods at issue here are considered hours of work. *See* Exceptions at 3.

to which we defer. *See AFGE, Local 12*, 61 FLRA 507, 509 (noting that the arbitrator's finding that the party did not provide "necessary documentation" was a factual finding to which the Authority defers). On the basis of that factual finding, the Arbitrator concluded that "the Agency conceded liability" on this issue. 2007 Award at 27. The Arbitrator also determined that Claim 311 "is entitled to FLSA payments," *id.*, because Claim 311 "met his burden of proof as to the hours claimed," Final Award at 6.

The Agency subsequently challenged Claim 311's entitlement to "suffer or permit" overtime. Exceptions at 11-12. However, the Agency has not challenged, on nonfact grounds, the Arbitrator's factual findings that the Agency accepted Claim 311's claims and conceded liability. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 320, 321, 322 & n.2 (2010) (denying an exception after deferring to the arbitrator's finding that the grievant's supervisor admitted liability). Further, the Agency has provided no basis for finding that the Arbitrator erred in declining to revisit the conclusions that he had reached in the 2007 Award. *See* 2007 Award at 27; Final Award at 8. Accordingly, we find that the Final Award is not contrary to law and deny this exception. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 965 (2011) (denying a contrary-to-law exception after deferring to the arbitrator's factual conclusions regarding "suffer or permit" overtime).

B. The 2007 Award draws its essence from the parties' agreement.

The Agency argues that the Arbitrator's 2007 Award concluding that a witness' travel must be paid by the Agency fails to draw its essence from Article 48(k)(2) of the parties' agreement. Exceptions at 2. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

Article 48(k)(2) of the parties' agreement provides that, when the parties disagree about the relevance of a witness, "[i]f the arbitrator decides that the witness is relevant, the arbitrator will so state in the decision and the agency will pay travel and per diem." Opp'n at 16. In his 2007 Award, the Arbitrator reaffirmed his determination at the arbitration hearing that the Union witness was "relevant" and, therefore, interpreted the parties' agreement as requiring payment to the Union witness of travel and per diem expenses. 2007 Award at 27. The Agency has failed to establish that the award is implausible, irrational, or in manifest disregard of the parties' agreement. *See U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 53 FLRA 390, 398-99 (1997) (denying an essence exception where the arbitrator interpreted the agreement to require the agency to reimburse for travel and per diem expenses). Therefore, we find that the award draws its essence from the parties' agreement and deny this exception. *See NAGE, Local R4-27*, 60 FLRA 14, 16 (2004) (denying an essence exception where the arbitrator was expressly given discretion to exercise his judgment in the agreement).

V. Decision

The Agency's contrary to law exception with respect to the Final Award is denied and the Agency's essence exception is denied. The Agency's contrary to law exception with respect to the 2007 Award is granted and the award is modified consistent with this decision.

APPENDIX

5 U.S.C. § 5542 provides, in relevant part:

> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates: . . . .

5 U.S.C. § 5545 provides, in relevant part:

> . . . .
>
> (c) The head of an agency, with the approval of the Office of Personnel Management, may provide that-
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty . . . shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

29 U.S.C. § 207 provides, in relevant part:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
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> (1) Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> . . . .
>
> (k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of . . . any employee in law enforcement activities . . . if- . . . in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days . . . compensation at a rate not less than one and one-half times the regular rate at which he is employed.

5 C.F.R. § 551.411 provides, in relevant part:

> . . . .
>
> (c) Bona fide meal periods are not considered hours of work, except for on-duty meal periods for employees engaged in fire protection or law enforcement activities who receive compensation for overtime hours of work under 5 U.S.C. 5545(c)(1) or (2) or 5545(b).

5 C.F.R. § 551.512 provides, in relevant part:

> . . . .
>
> (b) An employee's "straight time rate of pay" is equal to the employee's rate of pay for his or her position (exclusive of any premiums, differentials, or cash awards or bonuses) except for an employee who is authorized annual premium pay under [§] 550.141 or [§] 550.151 of this chapter. For an employee who is authorized annual premium pay, straight time rate of pay is equal to basic pay plus annual premium pay divided by the hours for which the basic pay plus annual premium pay are intended.

5 C.F.R. § 551.541 provides, in relevant part:

> (a) An employee engaged in fire protection activities or law enforcement activities . . . who receives compensation for those activities under 5 U.S.C. 5545(c)(1) or (2) or 5545b . . . is subject to section 7(k) of the Act and this section. (See [§] 551.501(a)(1) and (5)). Such an employee shall be paid at a rate equal to one and one-half times the employee's hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act.
>
> (b) The tour of duty of an employee covered by paragraph (a) of this section shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in [§§] 551.411(c) and 551.432(b).

Article 48(k)(2) provides:

> Where the grievant or relevant witnesses are not within the commuting area of the hearing site, the Service will pay travel and per diem. Should there be a disagreement as to the relevance of a witness where travel and per diem is required, the Union will pay travel expenses and the issue will be presented to the arbitrator who will decide on the relevancy of the testimony. If the arbitrator decides that the witness is relevant, the arbitrator will so state in the decision and the agency will pay travel and per diem at a rate no greater than that authorized by government travel regulations.

Opp'n at 16.