

**67 FLRA No. 139**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2571  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
WACO REGIONAL OFFICE  
WACO, TEXAS  
(Agency)

0-AR-4888

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**DECISION**

August 28, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members  
(Member Pizzella concurring)

**I. Statement of the Case**

Arbitrator Thomas A. Cipolla awarded unpaid overtime compensation to certain Agency employees under the Fair Labor Standards Act (FLSA).<sup>1</sup> However, he denied liquidated damages because he found that the Agency did not willfully violate the FLSA. This case presents two substantive questions to determine whether the award is contrary to law.

The first question is whether the Arbitrator used the wrong standard when he denied the grievants liquidated damages. Because the Arbitrator's basis for denying liquidated damages is legally incorrect, the answer is yes.

The second question is whether the Authority should modify the award to include liquidated damages. Because the Arbitrator's undisputed finding that the Agency was negligent precludes the Agency, as a matter of law, from establishing the defense required to avoid liquidated damages under the FLSA – that the Agency acted in “good faith” and on a “reasonable basis” – the answer is yes.

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

The Union filed a grievance on behalf of certain employees claiming that the Agency had violated the parties’ agreement and the FLSA by “suffering and permitting” those employees to work overtime without compensation. The Union argued that the Agency failed to record the time the employees worked, and the Agency knew or should have known that employees worked, overtime because the Agency operated under a policy of “zero late cases,” which required employees to work more than eight hours per day or forty hours per week.<sup>2</sup>

When the parties did not resolve the grievance, they proceeded to arbitration. The Arbitrator framed the issue as: “Whether the Agency violated the [FLSA] by employees being suffered or permitted to work beyond their normal tour of duty without being properly compensated? If so, what is the remedy?”<sup>3</sup>

The Arbitrator found that the Agency violated the FLSA by permitting the employees to work overtime without compensation. Although he determined that the Agency “was negligent in ascertaining the hours worked by its [employees],” he found that the evidence did not demonstrate that the Agency “showed a reckless disregard for whether its conduct was prohibited under the FLSA.”<sup>4</sup> Thus, he found that the Agency did not “willfully violate[]” the FLSA, and he denied liquidated damages.<sup>5</sup>

The Union filed an exception to the award, and the Agency filed an opposition to the Union’s exception.

**III. Analysis and Conclusions**

The Union asserts that the Arbitrator’s denial of liquidated damages is contrary to law.<sup>6</sup> The Union argues that when an arbitrator finds a violation of the FLSA, liquidated damages are “mandated,”<sup>7</sup> unless the agency can establish that it acted in good faith and had reasonable grounds to believe that it was not violating the FLSA.<sup>8</sup> The Union claims that the Arbitrator made no such findings, and, therefore, liquidated damages are mandatory.<sup>9</sup> Relying on *AFGE, Local 1662 (Local 1662)*<sup>10</sup> and *Elwell v. University Hospitals Home Care Services*

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

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 16.

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

<sup>6</sup> Exception at 6.

<sup>7</sup> *Id.* (citing 29 U.S.C. § 216(b)).

<sup>8</sup> *Id.* at 6-7 (citing *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1282 (11th Cir. 2008); *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941-43 (8th Cir. 2008)).

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

<sup>10</sup> 66 FLRA 925, 927 (2012).

(*Elwell*),<sup>11</sup> the Union also argues that the Arbitrator's finding of negligence precludes a finding that the Agency acted in good faith.<sup>12</sup>

**A.** The Arbitrator used the wrong standard when he denied the grievants liquidated damages.

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.<sup>13</sup> 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.<sup>14</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings.<sup>15</sup>

Title 29, § 216(b) of the U.S. Code provides that, in addition to an employer's liability for unpaid overtime compensation, the employer is liable for liquidated damages in an amount equal to the unpaid overtime, unless the employer establishes a good-faith, reasonable-basis affirmative defense under 29 U.S.C. § 260.<sup>16</sup> In *Local 1662*, the Authority stated that:

Where an employer is liable for unpaid overtime under the FLSA, and the employer does not establish an affirmative defense, liquidated damages are *mandatory* . . . .

In order [to] establish a good-faith, reasonable-basis defense under § 260, the employer must demonstrate that: (1) the act or omission giving rise to the employee's FLSA action was in good faith (the good-faith requirement); and (2) the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA (the reasonable-basis requirement).

The "substantial burden" of satisfying these two requirements, "in effect, establishes a presumption that an employee who is improperly denied overtime [compensation] shall be awarded liquidated damages." . . . [T]o

<sup>11</sup> 276 F.3d 832, 841 n.5 (6th Cir. 2002).

<sup>12</sup> Exception at 7-8.

<sup>13</sup> 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)).

<sup>14</sup> U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala., 55 FLRA 37, 40 (1998).

<sup>15</sup> *Id.*

<sup>16</sup> 29 U.S.C. §§ 216(b), 260.

satisfy the good-faith requirement, an employer must "show[] that [it] subjectively acted with an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." Thus, an employer does not demonstrate good faith merely by showing that its violation of the FLSA was unintentional.<sup>17</sup>

The Arbitrator based his denial of liquidated damages on his finding that the Agency did not willfully violate the FLSA.<sup>18</sup> However, finding that an agency did not act willfully does not establish that it acted in good faith.<sup>19</sup> The willfulness standard pertains to determinations concerning the FLSA's statute of limitations,<sup>20</sup> an issue not involved in this case. By contrast, the good-faith, reasonable-basis standard pertains to determinations concerning whether an agency has established an affirmative defense to avoid payment of liquidated damages under the FLSA.<sup>21</sup> The burden of proof to establish willfulness falls on the employee; but the burden of proof to establish a good-faith, reasonable-basis affirmative defense falls on the employer.<sup>22</sup>

Thus, the Arbitrator's finding that the Agency did not willfully violate the FLSA does not provide a basis for concluding that the Agency established a good-faith, reasonable-basis affirmative defense to avoid liquidated damages under the FLSA.<sup>23</sup>

**B.** We modify the award to include liquidated damages.

When an agency fails to establish a good-faith, reasonable-basis affirmative defense under § 260, the FLSA mandates an award of liquidated damages to a grievant who prevails on an FLSA claim.<sup>24</sup> The Agency argues that the Authority must deny the Union's request

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<sup>17</sup> *Local 1662*, 66 FLRA at 927 (internal citations omitted).

<sup>18</sup> Award at 16.

<sup>19</sup> *Local 1662*, 66 FLRA at 927 (citing *Elwell*, 276 F.3d at 841 n.5).

<sup>20</sup> *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999) (*Herman*).

<sup>21</sup> *Local 1662*, 66 FLRA at 927.

<sup>22</sup> *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008).

<sup>23</sup> *Local 1662*, 66 FLRA at 927; see also U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind., 60 FLRA 298, 300 (2004) (DOJ) (citing *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 357 (5th Cir. 1990) (finding violation not willful does not preclude award of liquidated damages)).

<sup>24</sup> 29 U.S.C. § 216(b) (FLSA violator "shall be liable . . . in the amount of . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages").

that the Authority modify the award to include liquidated damages. The Agency gives two reasons: (1) the Authority should defer to the Arbitrator's finding that the Agency's actions were not willful; and (2) the Agency had no knowledge that its employees were working overtime.<sup>25</sup> However, the Agency does not claim that the Arbitrator found the required good-faith, reasonable-basis affirmative defense necessary for the Agency to avoid liquidated damages under the FLSA.<sup>26</sup>

The Agency's arguments do not support denying the Union's request that the award be modified to include liquidated damages. First, as stated above, the willfulness standard does not pertain to determinations concerning liquidated damages.<sup>27</sup>

Second, the Agency's claim that it had no knowledge that its employees were working overtime fails to demonstrate that the Agency acted in good faith.<sup>28</sup> The Arbitrator found that the Agency's failure to ascertain the hours worked by its employees was negligent.<sup>29</sup> But the Agency did not file exceptions and, thus, has not effectively disputed the Arbitrator's negligence finding.

This undisputed finding, that the Agency was "negligent,"<sup>30</sup> precludes finding that the Agency acted in good faith.<sup>31</sup> "An employer who acted negligently . . . in violating the FLSA would not be able to satisfy the objective standard of reasonableness required to demonstrate good faith."<sup>32</sup> Accordingly, because the Arbitrator's finding of negligence precludes the Agency from establishing a good-faith, reasonable-basis defense, we modify the award to include liquidated damages in an amount equal to the overtime compensation due the grievants.

#### IV. Decision

We grant the Union's contrary-to-law exception and modify the award to include liquidated damages.

<sup>25</sup> Opp'n at 5-7.

<sup>26</sup> Exception at 7.

<sup>27</sup> *Herman*, 183 F.3d at 474.

<sup>28</sup> See Local 1662, 66 FLRA at 927.

<sup>29</sup> Award at 16.

<sup>30</sup> Opp'n at 5-7.

<sup>31</sup> *Elwell*, 276 F.3d at 841 n.5 (employer's negligence in violating the FLSA precludes finding that employer established a § 260 affirmative defense).

<sup>32</sup> *Id.* (citing *DOL v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994) (noting that good faith is an objective standard)).

#### Member Pizzella, concurring:

I join my colleagues in granting the Union's contrary-to-law exception and modifying the Arbitrator's award to include liquidated damages against the Agency – the Department of Veterans Affairs, Waco Regional Office (VA Waco). But I do so reluctantly and for one reason.

Here, the Arbitrator found that VA Waco did not "willfully violate[] the [Fair Labor Standards Act] (FLSA)," but was nonetheless "*negligent*"<sup>1</sup> when it failed to "require" field examiners to submit even the most basic time records,<sup>2</sup> even though they worked from home "unsupervised"<sup>3</sup> and had "actively concealed their excessive hours of work."<sup>4</sup> In the end, when the field examiners filed their claims for overtime, the Arbitrator was left to rely on the personal "calendars" and "notebooks" of the field examiners in order to assess how much overtime was actually worked<sup>5</sup> because VA Waco had "no records of the times [the] field examiners *actually worked*."<sup>6</sup>

In other words, VA Waco totally dropped the ball. VA Waco was negligent.

Several courts have determined, in similar circumstances, that even though "negligence . . . by the employer is not sufficient to permit a finding of willfulness," "an employer who act[s] *negligently* . . . in violating the FLSA would not be able to satisfy the objective standard of reasonableness required to demonstrate good faith" in order to avoid an assessment of liquidated damages.<sup>7</sup> Under these circumstances, I agree that, as a matter of law, the award must be modified to include liquidated damages.

This is yet another example of a case that should never have made its way through the grievance process and been presented to the Authority for resolution. Not one aspect of this case "contributes to the effective conduct of [government] business."<sup>8</sup> The field examiners

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<sup>1</sup> Award at 16 (emphasis added).

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> The Arbitrator noted that the calendars and notebooks of several examiners were "equivocal at best and incomprehensible at worst." *Id.* at 17.

<sup>6</sup> *Id.* at 10 (emphasis added).

<sup>7</sup> *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002) (internal citations omitted) (emphasis added).

<sup>8</sup> *U.S. Dep't of VA, VA Med. Ctr., Martinsburg, W.Va.*, 67 FLRA 400, 405 (Dissenting Opinion of Member Pizzella) (citing *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (*CBP*) (Concurring Opinion of Member Pizzella)).

were given the latitude to work “unsupervised in their homes or in the field”,<sup>9</sup> the supervisors, who had recently worked as co-workers of the examiners, believed that their “work could be completed without working overtime”,<sup>10</sup> none of the examiners requested overtime before they filed the grievance, and the supervisors suspected that the examiners were “actively conceal[ing] their excessive hours of work”,<sup>11</sup> and, yet, the Agency maintained “no records of the times [the examiners] actually worked.”<sup>12</sup>

It is apparent to me that if the examiners had been more forthcoming with their supervisors about the number of hours they were working and had the supervisors required, and maintained, adequate documentation of the hours being worked, this entire matter could have been controlled and avoided the need for a grievance and arbitration altogether. Instead, taxpayers end up paying not only for the liquidated damages (i.e. a double penalty for the hours of overtime worked by the field examiners), but also for the “significant costs . . . used to process [the] grievance[]” including the official time used by Union officials during the grievance and arbitration, the work time used by VA Waco supervisors, labor-relations specialists, and attorneys to defend against the grievance and arbitration,<sup>13</sup> and the costs of an arbitrator, who failed to apply the proper legal standards to this case.

Thank you.

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<sup>9</sup> Award at 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *CBP*, 67 FLRA at 113 (Concurring Opinion of Member Pizzella).