

64 FLRA No. 179

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
FOREST SERVICE COUNCIL
(Union)

0-AR-4193

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DECISION

June 25, 2010

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 an exception to an award of S. Jesse Reuben, 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 exception.

The Arbitrator sustained a grievance concerning the calculation of certain overtime pay rates. For the reasons set forth below, we dismiss the Agency's exception.

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

The employees at issue in this case are Forest Service Law Enforcement Officers (LEOs). The Union filed a grievance concerning the calculation of LEOs' Administratively Uncontrollable Overtime (AUO) pay rates.

AUO pay is a premium that is paid to employees on an annual basis to compensate them for overtime or irregular hours worked. 5 C.F.R. § 550.151. The number of AUO hours worked by a LEO during a given quarter determines the rate at which the LEO

will earn AUO pay during the following quarter. *Opp'n* at 2 (citing 5 C.F.R. §§ 550.151 & 550.161(f)). When calculating AUO pay rates, the higher the number of AUO hours worked in one quarter, the lower the rate at which a LEO will earn AUO pay in the following quarter. *Id.*

LEOs detailed to assignments that are directly related to national emergencies declared by the President are entitled to receive AUO pay under 5 C.F.R. § 550.162(g). However, the period of time during which LEOs receive AUO pay while working on a national emergency pursuant to 5 C.F.R. § 550.162(g) is not to be included when computing the rate at which LEOs will earn AUO pay during the following quarter. 5 C.F.R. § 550.154(c); *see* Award at 3. Excluding such time from the AUO pay rate calculation allows the LEOs to earn AUO pay at a higher rate during the following quarter. *Opp'n* at 2.

In September 2005, the LEOs were temporarily assigned to areas affected by Hurricane Katrina to help maintain security and assist in the recovery effort. Award at 2. Although there was agreement that AUO pay earned during a national emergency should be excluded from the LEOs' quarterly AUO pay rate computation, *see* Award at 3, the Agency determined that the days LEOs spent on hurricane detail would be included in the computation. According to the Agency, this time was correctly included in the computation because the work was "inherently law enforcement[.]" Award at 2 (quoting an Agency "direction" dated June 18, 2002 from the Acting Director of Human Resources Management stipulating that the LEOs would "not be taken off [of] AUO" for work that is "inherently law enforcement").

The Union's grievance alleged that the Agency improperly included the time spent by the LEOs detailed to Hurricane Katrina-related activities in that calculation. The Union contended that, because the President declared Hurricane Katrina a "national emergency[.]" the days that the LEOs worked while on detail to the affected area should have been excluded from the calculation of their quarterly AUO pay rate. Award at 2. According to the Union, the time that the LEOs' spent on hurricane duty should have been excluded from the AUO pay rate calculation because regulations require such an exclusion for time spent working on national emergencies.

The Agency denied the grievance, claiming that 5 C.F.R. § 550.162(g) did not apply. The Agency argued that the regulation was intended to provide

LEOs with the opportunity to earn AUO pay in national emergencies concerning national defense, not natural disasters such as Hurricane Katrina. *Id.* In support, the Agency cited guidance received from the Office of Personnel Management (OPM) explaining that natural disasters such as hurricanes do not normally rise to the level of a national emergency. *Id.* at 3. The Agency also claimed that the President's national emergency declaration was issued solely to suspend certain minimum wage rates in the construction industry prescribed by 40 U.S.C. § 3147, and that the declaration had no bearing on LEOs' AUO pay. *Id.* When the grievance was not resolved, the Union invoked arbitration.

B. Arbitrator's Award

The Arbitrator stated the issue as follows:

Whether the Agency improperly failed to permit the reduction of days in the calculation of pay rates under the provisions in the Forest Service Handbook governing [AUO] during the recovery efforts from the effects of Hurricane Katrina?

Id. at 1.

Before the Arbitrator, the Union argued that Hurricane Katrina constituted a "national emergency" within the meaning of 5 C.F.R. § 550.162(g). Therefore, the Union contended, the LEOs' time spent on hurricane duty should have been excluded from the Agency's subsequent AUO pay rate calculations. *Id.* at 3. The Agency on the other hand contended that the LEOs' hurricane duty was properly included in the calculation because the President declared a "national emergency" solely within the meaning of 40 U.S.C. § 3147, which does not have any bearing on LEOs' AUO pay. *Id.* at 4.

Sustaining the grievance, the Arbitrator determined that the Agency should have excluded the days the LEOs were on hurricane duty from the calculation of the LEOs' subsequent AUO pay rates. In the Arbitrator's opinion, Hurricane Katrina constituted a national emergency within the meaning of 5 C.F.R. § 550.162(g). *Id.*

Addressing the Agency's argument, the Arbitrator noted that, although OPM's guidance indicated that the term "national emergency" as used in 5 C.F.R. § 550.162(g) does not usually apply to natural disasters, the guidance also indicated that a "particularly devastating disaster over a large [portion] of the country" could constitute a national

emergency. *Id.* Moreover, the Arbitrator concluded that the enormous loss of life and displacement of persons caused by Hurricane Katrina, coupled with the widespread response by the Federal Government to the disaster and the declaration that Hurricane Katrina was an "Incident of National Significance," demonstrated that the hurricane constituted a national emergency as contemplated by OPM and 5 C.F.R. § 550.162(g). Consequently, the Arbitrator found that the days that LEOs spent on hurricane duty should be excluded from the Agency's AUO pay rate calculation for subsequent quarters. *Id.*

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award is contrary to Title III of the National Emergencies Act (NEA), 50 U.S.C. § 1631. Section 1631 discusses the relationship between the President's declaration of a national emergency and the exercise of emergency powers or authorities "made available by statute." * Relying on § 1631, the Agency claims that the Arbitrator did not have the authority to decide which authorities were affected by the President's declaration of a national emergency. According to the Agency, the NEA reserves that power for the President. Exception at 3. The Agency contends that, under the NEA, the President must designate which authorities will apply in the case of a national emergency. Here, the Agency argues, the President declared a national emergency solely within the meaning of 40 U.S.C. § 3147. *Id.* at 2. Accordingly, in the Agency's view, the Arbitrator erred by "fail[ing] to consider the Title III requirements" when determining that the President's declaration of a national emergency triggered the regulatory provisions of 5 C.F.R. § 550.162(g). *Id.* at 3.

* 50 U.S.C. § 1631 provides:

§ 1631. Declaration of national emergency by Executive order; authority; publication in Federal Register, transmittal to Congress

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

B. Union's Opposition

The Union contends that the Agency's exception fails to demonstrate that the award is contrary to law. Opp'n at 5. The Union claims that there is no requirement that the President specifically authorize AUO pay under 5 C.F.R. § 550.162(g) when declaring a national emergency. Rather, the Union argues that 5 C.F.R. § 550.162(g) independently allows for AUO pay if the temporary assignment is directly related to a national emergency declared by the President. Opp'n at 5 (citing 5 C.F.R. § 550.162(g)).

The Union also takes issue with the Agency's claim that the Arbitrator does not have the authority to interpret the effect of the President's national emergency declaration. In the Union's view, if this were so, then no entity would ever have the authority to review the Agency's interpretation of the effect of the President's declaration on the LEO's AUO pay. Opp'n at 8. According to the Union, this would allow the Agency to pick and choose which rules to suspend or activate when the President's declaration of a national emergency does not list every single law, rule, and regulation affected by the declaration. *Id.*

IV. Analysis and Conclusion

For the following reasons, we dismiss the Agency's exception.

Raising an issue that it did not raise before the Arbitrator, the Agency argues that the award is contrary to the NEA because only the President has the authority to decide which powers or authorities are affected by a declaration of a national emergency. The Agency's argument is not properly before the Authority.

Section 2429.5 of the Authority's Regulations provides in pertinent part that "[t]he Authority will not consider . . . any issue which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. Authority precedent applying § 2429.5 makes clear that the Authority will not consider any issue that could have been, but was not, presented to an arbitrator. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178 (2009) (dismissing exceptions where evidence presented at hearing established that agency was aware that resolution of dispute entailed enforcement of a management right limitation but did not raise management right issue before arbitrator); *U.S. Dep't of the Air Force, Air Force Materiel*

Command, Robins Air Force Base, Ga., 59 FLRA 542, 544 (2003) (refusing to consider issue raised in agency's exception that union violated a provision of the Statute where arbitrator's award found agency had alleged union violated only the parties' collective bargaining agreement).

The issue before the Arbitrator was whether the Agency erred by failing to exclude the time spent by the LEOs on hurricane duty from the calculation of their future AUO pay rates. The record contains no evidence that the Agency disagreed with the Arbitrator's framing of the issue. In fact, at the arbitration, the Agency contended that it was not required to exclude the AUO in that calculation because Hurricane Katrina was a national emergency solely within the meaning of 40 U.S.C. § 3147, and not within the meaning of 5 C.F.R. § 550.162(g). Accordingly, the Arbitrator was required to determine whether the President's national emergency declaration triggered the national emergency AUO provision in 5 C.F.R. § 550.162(g).

Now, the Agency argues for the first time in its exception that the NEA deprived the Arbitrator of authority to determine the meaning and effect of the President's national emergency proclamation. However, that issue was not presented to the Arbitrator, and the Arbitrator addressed the issue that he framed. Accordingly, the Agency is prohibited from raising that objection in its exception, and we dismiss the exception pursuant to § 2429.5 of the Authority's Regulations.

V. Decision

The Agency's exception is dismissed.