65 FLRA No. 57

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4044
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
THREE RIVERS, TEXAS
(Agency)

0-AR-4667

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DECISION

November 24, 2010

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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 an exception to an award of Arbitrator Bruce Ponder filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator concluded that the Union failed to establish a prima facie case that the Agency violated the Fair Labor Standards Act (FLSA). For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievants work the day shift as Correctional Officers (COs) at the Federal Correctional Institution (FCI) at Three Rivers, Texas. In resolution of an unrelated dispute, the Union and the Agency agreed to a settlement regarding portal-to-portal pay. Award at 2. As part of the settlement, the day shift became a straight eight-hour shift, without a duty-free lunch period. *Id.* at 2-3. However, despite the settlement agreement, the Union and the Warden orally agreed that the COs would continue to work 8 ½ hour shifts and take thirty-minute duty-free lunch periods. *Id.* at 3.

When a new Warden replaced the previous Warden, he noticed that the settlement agreement required the COs to work an eight-hour shift. The new Warden told the local Union President of the need to implement the eight-hour shift. *Id.* The Union President convinced him to delay implementation for one quarter, and requested another delay in implementation the next quarter. *Id.* The Warden implemented the eight-hour shift the following quarter.

The Union then filed a grievance alleging that the Agency violated the FLSA because, for a period of several years, day-shift COs worked 8 ½ hour shifts without being provided the opportunity for a thirty-minute duty-free lunch period. Opp'n at 3. The grievance was not resolved and was submitted to arbitration. *Id.* The issue before the Arbitrator was "[w]hether the [A]gency violated the collective bargaining agreement by requiring dayshift employees to work during thirty-minute lunch periods at FCI Three Rivers."[1] Award at 2.

The Arbitrator stated that the Union must prove by a preponderance of the evidence that the employees have performed work for which they were improperly compensated. *Id.* at 22-23 (citing *Anderson v. Mount Clemens Pottery*, 328 U.S. 680, 686-88 (1946)). The Arbitrator recognized that, under the FLSA, "to employ" includes "to suffer or permit to work," and that the Union must show that the Agency had actual or constructive knowledge of the grievants' overtime work. *Id.* at 23 (citing 29 U.S.C. § 203(g), 5 C.F.R. § 551.104[2]).

1. As a preliminary matter, the Arbitrator found that the FLSA's two-year statute of limitations applies rather than the collective bargaining agreement's forty-day statute of limitations. Award at 21. Because no exceptions were filed to the Arbitrator's resolution of this issue, it is not before us.

2. Although the Arbitrator actually cites to 29 C.F.R. § 551.104, the Agency points out that this seems to be a typographical error, and 5 C.F.R. § 551.104 contains the definition of "suffered or permitted work." Opp'n at 4 n.2. Suffered or permitted work means "any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being

After summarizing the testimony and evidence presented, the Arbitrator concluded that if, in fact, COs were working through lunch, then the Union had not provided sufficient evidence to show that the Agency was aware of the alleged problem, and, accordingly, had failed to establish a prima facie case. *Id.* at 28-29. In reaching this conclusion, the Arbitrator considered the following evidence:

1) Several COs testified that they often worked without receiving a lunch break, although they did not complain to their supervisors or file any overtime requests, *id.* at 4-9;

2) Some of the COs at issue attended labor management relations meetings at which lunch breaks were discussed and never raised the issue, *id.* at 27-28;

3) Several Agency officials testified that they were not aware of a problem with COs not getting lunch relief, they saw COs eating lunch in the break room, and, if a problem arose, it was resolved quickly, *id.* at 10-18; and

4) The Warden testified that he changed the shift hours to reduce potential Agency liability, *id.* at 29.

Therefore, the Arbitrator denied the Union's grievance. *Id.* at 30.

III. Positions of the Parties

A. Union's Exception

The Union argues that the Arbitrator's conclusion that the Agency had not violated the FLSA is contrary to 5 C.F.R. § 551.104. Exception at 1. According to the Union, the Arbitrator correctly cited the definition of "suffer and permit," but incorrectly applied the definition to the facts at hand. *Id.* at 2. The Union claims that, in denying the grievance, the Arbitrator incorrectly found it necessary for the employees to complain about not getting lunch breaks. *Id.* The Union argues that it is not the employees' responsibility to complain; rather, "it just must be proved the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed." *Id.* at 3.

The Union contends that the evidence shows that the COs did not receive thirty-minute lunch breaks, that the Agency was "well aware" of the problem, and that the Agency had the opportunity to prevent the work from being performed. *Id.* at 17-18. The Union asserts that the Agency's system for providing lunch breaks "rarely, if ever, produced the kind of duty-free 30 minute lunch break required under the FLSA[.]" *Id.* at 5. The Union argues that, because the Warden was aware that lunch breaks were a point of contention throughout the Agency, he must have had reason to believe that it was a problem specifically at FCI Three Rivers. *Id.* at 11-12. The Union also asserts that supervisors were aware of the problem because one supervisor testified that he could not guarantee that COs always received their lunch relief. *Id.* at 14. According to the Union, because the testimony shows that COs were working through lunch and the Agency was aware of it, the Arbitrator misapplied the "suffer or permit" standard and the award is contrary to law. *Id.* at 18.

B. Agency's Opposition

The Agency argues that the Arbitrator's findings are not contrary to 5 C.F.R. § 551.104. Opp'n at 3-4. The Agency asserts that the Union's arguments are actually just a disagreement with the Arbitrator's underlying factual finding, to which the Authority must defer. *Id.* at 5. The Agency asserts that the Arbitrator properly found that, if employees were working during their lunch periods, then their supervisors were not aware of it. Thus, the supervisors did not "suffer[ ] or permit[ ]" the COs to work overtime. *Id.* at 6. Moreover, according to the Agency, the Arbitrator did not improperly rely on the fact that the COs never complained or informed their supervisors because this evidence demonstrated that the supervisors did not have knowledge of any overtime work, if, in fact, such work occurred. *Id.* at 3.

IV. The award is not contrary to law.

The Union contends that the Arbitrator's award is contrary to 5 C.F.R. § 551.104. 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.

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performed and has an opportunity to prevent the work from being performed." 5 C.F.R. § 551.104.

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.*

The FLSA defines "[e]mploy" as including "to suffer or permit to work." 29 U.S.C. § 203(g). As defined in 5 C.F.R. § 551.104, to suffer or permit to work means "any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed."

The Arbitrator's assessment of whether the Agency supervisor knew or had reason to believe that COs were performing overtime work is a factual finding, to which the Authority must defer in this case as it is not alleged to constitute a nonfact. *AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006) (*AFGE, Local 3614*); s*ee also Soc. Sec. Admin., Balt., Md.*, 63 FLRA 550, 552 (2009) (finding that a party's knowledge is a factual finding because "it is based on the arbitrator's evaluation of the evidence"). Thus, if the factual findings support the arbitrator's legal conclusion, the exceptions must be denied. *Id.* Additionally, "disagreement with an arbitrator's evaluation of the evidence and his determination of the weight to be accorded such evidence provides no basis for finding an award deficient." *AFGE, Local 3295*, 51 FLRA 27, 32 (1995).

The record shows that the Arbitrator evaluated whether the Agency supervisors knew or had reason to believe that COs may have worked during their lunch breaks. The Arbitrator weighed the conflicting testimony before him, acknowledged that it was a "mixed bag," but concluded that the Agency's testimony was "more credible." Award at 24, 29. Based on this evidence, the Arbitrator concluded that the Union did not meet its burden of establishing a prima facie case. *Id.* at 29.

Moreover, contrary to the Union's contention, the Arbitrator did not add a requirement that the grievants must complain in order to be eligible for overtime pay. Rather, the Arbitrator considered the absence of complaints to inform his decision of whether the Agency had actual or constructive knowledge of the alleged problem.

The Arbitrator's factual finding that supervisors were not aware of the alleged problem supports the legal conclusion that the supervisors did not suffer or permit the COs to work. *See AFGE, Local 3614*, 61 FLRA at 723. Therefore, we find that the award is not contrary to law, and we deny the exception. *See AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 594 (1993)) (finding the arbitrator's factual conclusion that the union had not presented evidence that employees worked overtime was not contrary to law).

V. Decision

The Union's exception is denied.