70 FLRA No. 8

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0922
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS
(Agency)

0-AR-5206

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DECISION

November 2, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator William L. McKee found that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to compensate certain employees who had performed overtime work during shift exchanges. The Arbitrator determined that the Agency knew that the employees were performing uncompensated work as of the date of an Agency memorandum issued on December 14, 2011. As a remedy, the Arbitrator directed the Agency to pay each affected employee fifteen minutes of backpay per shift, from the date of that memorandum "to the date of th[e a]ward."[2] There are two substantive questions before us.

The first question is whether the award is based on nonfacts. Because the alleged nonfacts relate to a factual matter that the parties disputed at arbitration, the answer is no.

The second question is whether the award is contrary to the FLSA because the Arbitrator erred in finding that the Agency did not know, or have reason to believe, that the employees were performing uncompensated work before December 14, 2011. Because we defer to the Arbitrator's assessment of that factual matter, the answer is no.

II. Background and Arbitrator's Award

The employees at issue are correctional officers (officers) assigned to "the [p]owerhouse post" (the powerhouse) at a federal medium-security prison.[3] The powerhouse controls the utilities for the prison, and the officers are responsible for, among other things, the operation and maintenance of the powerhouse and its machinery. Since May 2009, the powerhouse has been a twenty-four-hour operation; the officers work either eight-hour or twelve-hour shifts with no overlap between their shifts.

The Union filed a grievance alleging, in relevant part, that the Agency violated the FLSA by permitting the officers to work at least thirty minutes of "uncompensated time before and after their assigned shifts."[4] On December 14, 2011, shortly after the Union filed the grievance, the Agency issued a memorandum informing the officers that unauthorized overtime work was subject to discipline (powerhouse memorandum). The grievance was unresolved, and the parties submitted the matter to arbitration.

At arbitration, the parties stipulated to the following issues: "Did [the Agency] suffer or permit . . . [officers] to perform work before and/or after their scheduled shifts? If so, what is the remedy?"[5]

The Arbitrator stated that the "relevant inquiry" was whether the alleged overtime work, performed by the officers, was "'an integral and indispensable part of . . . [their] principal activities,'"[6] and "whether the Agency had actual or constructive knowledge" that the officers were performing such work.[7]

The Union argued that the officers conducted uncompensated "shift exchange[s],"[8] in which the outgoing and incoming officers exchanged equipment, discussed the status of projects, took inventory of tools, accounted for inmates, and inspected the powerhouse machinery. The Arbitrator agreed, and also found that some of the shift-exchange duties were "integral and indispensable to the[officers'] principal activities."[9]

[1] 29 U.S.C. §§ 201-219.
[2] Award at 36 (mislabeling the recovery period as *November* 14, 2011 to the date of the award); *see also* Exceptions Br., Ex. 6, Powerhouse Mem. (Powerhouse Mem.).
[3] Award at 2.
[4] *Id.* at 3 (quoting Exceptions Br., Ex. 2, Grievance).
[5] *Id.* at 1.
[6] *Id.* at 29 (alteration in original) (quoting *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008)).
[7] *Id.* (citing 29 C.F.R. § 785.11; *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 718 (2d Cir. 2001)).
[8] *Id.* at 12.
[9] *Id.* at 29.

With respect to whether the Agency knew, or should have known, that the officers were performing uncompensated work, the Union argued that the Agency had the requisite knowledge in May 2009, when the powerhouse became a twenty-four-hour operation. Since that time, the Union contended, there has been no overlap in officers' shifts, and, as a result, the officers could not perform the shift-exchange duties during regular hours. The Union also claimed that the Agency had actual knowledge that the officers were performing uncompensated work in October 2010 based on an email (2010 email) in which one of the officers informed management of his "tedious . . . pre[-] and post[-][shift] activities."[10]

The Arbitrator rejected the 2010 email as "relatively weak" evidence of the Agency's knowledge.[11] Specifically, the Arbitrator observed that the email was "hyperbolic,"[12] "unclear,"[13] and could not be "expected to [be] read . . . as a communication about [the officers] performing compensable work outside of their [regular] shift[s]."[14] Accordingly, the Arbitrator found that the 2010 email did not "create[] actual or constructive knowledge on the Agency's part."[15] Similarly, the Arbitrator did not find that the Agency had the requisite knowledge in May 2009. Instead, the Arbitrator – relying on the powerhouse memorandum[16] – found that December 14, 2011 was the "earliest date upon which there [was] unequivocal evidence of the Agency's knowledge."[17] In this regard, the Arbitrator observed that a memorandum "warning employees that they are not authorized to work overtime[,] and could be disciplined for doing so[,] is evidence that the Agency knew that those employees were working uncompensated overtime."[18]

As a remedy, the Arbitrator directed the Agency to pay each officer fifteen minutes of overtime per shift, "from [December] 14, 2011[] to the date of th[e a]ward."[19]

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

[10] Exceptions Br., Ex. 3, Union's Post-Hr'g Br. (Union's Post Hr'g Br.) at 32 (third alteration in original) (quoting Exceptions Br., Ex. 5, Email (2010 Email)).
[11] Award at 34.
[12] *Id.*
[13] *Id.* at 35.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 10.
[17] *Id.* at 35.
[18] *Id.*
[19] *Id.* at 36.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union contends that the award is based on nonfacts.[20] To establish that an award is deficient as based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[21] However, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration.[22]

The Union argues that the Arbitrator's finding – that the Agency did not know, or have reason to believe, that the officers were performing uncompensated work before December 14, 2011 – is based on nonfacts.[23] First, the Union challenges the Arbitrator's finding that the 2010 email did not put the Agency on notice.[24] According to the Union, the email "directly informed management that . . . officers were performing work beyond their shift hours."[25] Second, the Union challenges the Arbitrator's finding that the powerhouse memorandum was the first evidence of the Agency's knowledge.[26] In this regard, the Union contends that there was other evidence demonstrating that the Agency was aware, at an earlier time, that the officers were performing uncompensated work.[27]

The Authority has repeatedly stated, in the context of the FLSA, that an arbitrator's determination of whether a supervisor knew, or had reason to believe, that overtime work was being performed is a *factual* finding.[28] And, as stated above, the Authority will not find an award deficient on the basis of any factual matter that the parties disputed at arbitration.[29] Here, the Union concedes,[30] and the record demonstrates,[31] that the parties disputed, at arbitration, whether and when the Agency

[20] Exceptions Form at 8-9; Exceptions Br. at 7, 12, 14-15.
[21] *E.g.*, *NFFE, Local 858*, 66 FLRA 152, 153 (2011) (*Local 858*) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*)).
[22] *E.g.*, *id.* (citing *Local 1984*, 56 FLRA at 41).
[23] Exceptions Br. at 12, 14-15.
[24] *Id.* at 12 (citing Award at 34-35).
[25] *Id.* at 9.
[26] *Id.* at 7, 14-15.
[27] *Id.* at 14 (claiming that the Arbitrator "failed to rule on whether the Agency had actual knowledge based on [an] . . . all-staff memo issued on January 1, 2011").
[28] *E.g.*, *Local 858*, 66 FLRA at 154 (citing *AFGE, Local 4044*, 65 FLRA 264, 266 (2010) (*Local 4044*); *AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006)).
[29] *Id.* at 153 (citing *Local 1984*, 56 FLRA at 41).
[30] Exceptions Form at 9 (citing 2010 Email).
[31] *See* Union's Post Hr'g Br. at 30-37; Exceptions Br., Ex. 11, Agency's Reply Br. at 2-3, 7; Award at 15-17, 22-23.

knew, or had reason to believe, that the officers were working uncompensated overtime. Because the Union's nonfact exceptions challenge the Arbitrator's conclusion with regard to that factual matter, we deny those exceptions.[32]

B. The award is not contrary to law.

The Union contends that the award is contrary to the "FLSA and [its] interpretive regulations."[33] 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.[34] 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, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.[35]

Under the FLSA, an agency must compensate non-exempt employees for all hours of work in excess of forty hours in a workweek.[36] "Hours of work" includes, among other things, the time during which an employee is "suffered or permitted to work."[37] And work is "suffered or permitted" when, as relevant here, the employee's supervisor knows or has reason to believe that the work is being performed.[38]

The Union argues that the Arbitrator "misapplied the standard for management knowledge under the FLSA."[39] According to the Union, the Arbitrator failed to consider whether the Agency had constructive knowledge that the officers were performing uncompensated overtime work.[40] But, contrary to the Union's assertion, the record demonstrates that the Arbitrator did, in fact, evaluate whether the Agency had such knowledge. As the Union recognizes,[41] the Arbitrator cited the correct legal standard, stating that the "relevant inquiry is . . . whether the Agency had actual *or constructive* knowledge that the officers were extending their shifts to perform [overtime] work."[42] Moreover, after evaluating the 2010 email evidence, the Arbitrator specifically found that the email did not "create[] actual *or constructive* knowledge on the Agency's part."[43] Therefore, the Union's argument provides no basis for finding the award contrary to the FLSA.

The Union also claims that "[h]ad the Arbitrator applied the proper legal standard," he would have concluded that the Agency had *actual* knowledge based on the 2010 email,[44] or, alternatively, that the Agency had *constructive* knowledge in May 2009, when the Agency implemented the powerhouse as a twenty-four-hour operation.[45] However, as stated above, an arbitrator's "determination of whether a supervisor knows or has reason to believe that work is being performed is a factual finding."[46] Thus, we defer to the Arbitrator's assessment of whether the Agency knew, or had reason to know, that the officers were performing overtime work, unless the Union shows that the Arbitrator's findings are based on nonfact.[47]

[32] *See Local 858*, 66 FLRA at 153-54.
[33] Exceptions Form at 4 (citing 5 C.F.R. § 551.104; 29 C.F.R. § 785.11).
[34] *NFFE, Local 1804*, 66 FLRA 512, 514 (2012) (*Local 1804*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[35] *AFGE, Local 1395*, 67 FLRA 199, 199 (2014) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012)); *see Local 1804*, 66 FLRA at 514 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[36] 29 U.S.C. § 207(a)(1); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (citations omitted).
[37] 5 C.F.R. § 551.401(a)(2).
[38] *Id.* § 551.104; *see also Local 1804*, 66 FLRA 514-15 (citation omitted).
[39] Exceptions Br. at 1.
[40] *Id.* at 7-10.
[41] *Id.* at 1, 7, 8, 9.
[42] Award at 29 (emphasis added) (citing 29 C.F.R. § 785.11; *Kosakow*, 274 F.3d at 718).
[43] *Id.* at 35 (emphasis added).
[44] Exceptions Br. at 13.
[45] *Id.* at 10-11 (contending that "[i]t is a matter of common sense" that officers could not perform shift-exchange work during their regular hours because there is no overlap between shifts).
[46] *E.g.*, *Local 858*, 66 FLRA at 154 (citations omitted).
[47] *See Local 1804*, 66 FLRA at 515 (noting that "an arbitrator's assessment of whether supervisors knew, or had reason to know, that grievants were performing overtime work is a factual finding to which the Authority must defer absent a claim that it constitutes a nonfact" (citing *Local 4044*, 65 FLRA at 266 (noting that an "[a]rbitrator's assessment" of whether an agency supervisor knew or had reason to believe that employees were performing overtime work is a factual finding to which the Authority defers (citations omitted))).

As discussed above, the Arbitrator weighed the evidence before him and found that the 2011 powerhouse memorandum was the "earliest . . . evidence" of the Agency's knowledge.[48] Because the Union has not demonstrated that the Arbitrator's finding is based on nonfacts, we defer to the Arbitrator's assessment in this regard.[49] Accordingly, the Union's contentions provide no basis for finding the award contrary to law,[50] and we deny the Union's contrary-to-law exceptions.

IV. Decision

We deny the Union's exceptions.

[48] Award at 35.
[49] *See, e.g.*, *Local 1804*, 66 FLRA at 515.
[50] *See NTEU*, 63 FLRA 198, 201 (2009) ("[A]s the [a]rbitrator's finding . . . is a factual finding to which we defer, the [u]nion's claims of legal error provide no basis for finding the award contrary to law." (citation omitted)).