70 FLRA No. 140

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
BRYAN, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3978
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5241

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DECISION

July 13, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, we are called upon once again to determine whether certain activities which occur during a shift change – in this case, the exchange of information between officers going off shift and those coming on shift – constitute compensable principal activities.

In one award (the first award), Arbitrator Frederic R. Dichter found that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to pay overtime to certain correctional officers (relief officers) for the time that they spent engaging in information exchanges with officers whom they relieved from duty. The Arbitrator granted the relief officers five minutes of overtime pay per day and then, in a later award (the second award), granted liquidated damages and attorney fees.

The main question before us is whether the first award is contrary to Office of Personnel Management (OPM) regulations that implement the FLSA and the Portal-to-Portal Act (the Act)[2] in the federal sector. Because the information exchanges in which the officers engaged here are not principal activities and the officers did not engage in compensable activities for more than ten minutes per day, the remedies ordered by the Arbitrator are contrary to law.

II. Background and Arbitrator's Award

As relevant here, the parties disagree as to whether these information exchanges constitute principal activities for which the officers must be compensated. At arbitration, the parties stipulated to the following issue: "Did the [Agency] suffer or permit [b]argaining[-u]nit employees to perform work before and/or after their scheduled shifts without compensation in violation of the [FLSA] and the [p]arties['] [m]aster [a]greement? If so, what is the appropriate remedy?"[3]

In the first award, the Arbitrator found that the Agency required all relief and outgoing officers to exchange "vital" information, but that most shifts did not provide an overlap to accomplish this task.[4] These information exchanges included "what transpired during the preceding shift,"[5] and any "problems with particular inmates [that] the [relief] officer need[ed] to be alert[ed] to . . . so as not to be surprised or blindsided should another situation arise involving that inmate or inmates."[6]

According to the Arbitrator, these information exchanges were "principal" activities as that term was defined by the U.S. Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk* (*Integrity Staffing*).[7] Specifically, he noted that *Integrity Staffing* "defined a principal activity to include 'all activities which are [an] *integral and indispensable part of* the principal activities[,']" and he found that these information exchanges "fit[] within this definition."[8] The Arbitrator also determined 5 C.F.R. § 551.412(a)(1) – which requires that certain pre- and post-shift activities must last more than ten minutes per workday in order to be

[1] 29 U.S.C. §§ 201-219.
[2] *Id.* §§ 251-262.
[3] First Award at 1.
[4] *Id.* at 32, 34-35.
[5] *Id.* at 33.
[6] *Id.* at 32.
[7] 135 S. Ct. 513, 517 (2014).
[8] First Award at 34 (emphasis added).

compensable (the ten-minute rule)[9] – did not apply, and he awarded certain relief officers five minutes of overtime pay per shift.

In the second award, the Arbitrator granted liquidated damages and attorney fees.

The Agency filed separate exceptions to the first and second awards,[10] and the Union filed separate oppositions to the Agency's exceptions.[11]

We disagree with the Arbitrator.

III. Analysis and Conclusions

The Agency argues that the first award is contrary to the FLSA, as amended by the Act.[12] Specifically, the Agency claims that: (1) the Arbitrator failed to "justify his finding that the exchange of information is a 'principal activity' or one that the officers were employed to perform";[13] and (2) the Arbitrator's statement that the information exchange was "integral" means that the task was not a principal activity but a "preliminary activity."[14]

Under the FLSA, the Act, and implementing regulations, employees are entitled to compensation for time that they spend engaged in "principal activities,"[15] which are the activities that they are "employed to perform."[16] The question of whether an activity is a "principal activity" is a legal question that the Authority reviews de novo.[17]

It is well established that pre-shift "preparatory" activities are activities, in contrast to principal activities, that are "closely related . . . and indispensable to the performance of the principal activities."[18] In the private sector, courts have held that activities that are integral and indispensable to principal activities are *themselves* principal activities.[19] But OPM regulations that implement the FLSA and the Act in the federal sector clearly distinguish principal activities from preparatory activities.[20] In this regard, the regulations state, in pertinent part, that "a preparatory activity that an employee performs prior to the commencement of his or her principal activities . . . [is] not [a] principal activit[y]."[21] Thus, in the federal sector, a pre-shift activity that is "closely related" and "indispensable" to a principal activity is a preparatory activity – *not* a principal activity.[22] And, as such, preparatory activities are only compensable if the federal employee performs them for *more than ten minutes* per workday.[23]

In this case, the Arbitrator erroneously concluded that the information exchanges are "principal" activities.[24] As discussed above, the Supreme Court's holding in *Integrity Staffing* that "integral and indispensable" activities are themselves "principal" activities[25] does not apply in the federal sector. Consequently, the Arbitrator's application

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[9] Title 5, § 551.412(a)(1) of the Code of Federal Regulations provides, in pertinent part:

> If an agency reasonably determines that a *preparatory . . . activity* is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, *and that the total time spent in that activity is more than [ten] minutes per workday*, the agency shall credit all of the time spent in that activity, including the [ten] minutes, as hours of work.

(Emphasis added).

[10] In its opposition to the Agency's exceptions to the first award, the Union argues that those Agency exceptions should be dismissed because they are interlocutory – specifically, because, in the first award, the Arbitrator had not yet addressed whether the Agency was liable for liquidated damages. *See* Opp'n to First Award at 3. Because the second award resolved that issue, the Union's argument that the Agency's initial exceptions should be dismissed as interlocutory is moot. *See U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*DOJ*); *cf. U.S. Dep't of the Army, Army Info. Sys. Command, Savanna Army Depot*, 38 FLRA 1464, 1468 (1991) (finding that, because a deficiency in the initial award was later cured when the arbitrator issued a supplemental award, the union's exceptions to the initial award were moot).

[11] We consolidate the two cases for decision. *See, e.g., U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 772, 772 (2015) (citing *DOJ*, 67 FLRA at 19 n.1) (consolidating cases where they involved same parties and arose from same arbitration proceeding) .

[12] Exceptions Br. to First Award at 5-13.

[13] *Id.* at 8.

[14] *Id.* at 12.

[15] *U.S. DOJ, Fed. BOP, U.S. Penitentiary Atwater, Cal.*, 68 FLRA 857, 858 (2015) (*Atwater*).

[16] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 937 (2015) (*Lexington*) (quoting 5 C.F.R. § 550.112(a)).

[17] *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014).

[18] *Atwater*, 68 FLRA at 858 (quoting 5 C.F.R. § 550.112(b)(1)(i)). We note that, in determining whether an activity is "preparatory," the Authority has assessed whether the activity is "an integral and indispensable" part of the employee's principal activities. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 179 (2016) (citation omitted).

[19] *Integrity Staffing*, 135 S. Ct. at 517; *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33 (2005).

[20] *Atwater*, 68 FLRA at 858 (citing 5 C.F.R. § 550.112(b)).

[21] 5 C.F.R. § 550.112(b); *see Atwater*, 68 FLRA at 858.

[22] *Atwater*, 68 FLRA at 858.

[23] *Id.* at 859; *see also Lexington*, 68 FLRA at 939-40.

[24] First Award at 33.

[25] *Id.* at 34 (quoting *Integrity Staffing*, 135 S. Ct. at 517).

of that aspect of *Integrity Staffing* – and his resultant legal conclusion that the information exchanges are "principal" activities – are contrary to law.[26]

As such, the information exchanges were not principal activities. Even if they were preparatory activities, they fail to meet the ten-minute rule in 5 C.F.R. § 551.412 which requires the officers to participate in the exchanges for more than ten minutes per day in order to receive compensation under the FLSA. Accordingly, the first award is contrary to § 551.412, and we set it aside. As a result, there was no lawful basis for the Arbitrator to award liquidated damages or attorney fees in the second award, and we set aside that award as well.

IV. Decision

We set aside the first and second awards.

Member DuBester, dissenting:

Contrary to the majority, I would find that the relief officers' information exchange is a principal activity. The majority misinterprets the Arbitrator's findings, ignores Authority precedent, and errs in its view of Supreme Court precedent. Accordingly, I dissent.

The Arbitrator finds, correctly, that information exchanges are compensable *principal* activities. This conclusion is consistent with basic Fair Labor Standards Act (FLSA) requirements and Authority precedent.

The FLSA recognizes that compensable principal activities are those that employees are employed to perform. Although the FLSA does not define "principal activity,"[1] the Department of Labor (DOL), the agency charged with the FLSA's administration, promulgated an implementing regulation giving precisely this meaning to "principal" activities. Under this regulation, principal activities are those activities which employees are "employed to perform."[2]

Further, citing the FLSA's legislative history, the DOL's regulation provides that what constitutes principal activities is "to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed."[3] This regulatory definition of a "principal activity"[4] contrasts with the definition of a "preliminary activity," also discussed by the Arbitrator.[5] A "preliminary activity" is a pre-shift "activity that is not closely related to the performance of . . . principal activities."[6]

The merits award accords with these regulations, and is supported by the Arbitrator's factual findings and Authority precedent. After reviewing the record, the Arbitrator concludes that the information exchange is "a principal activity, not a preliminary one," because it is necessary to the officers' duty to ensure the safety and security of the facility.[7]

In reaching this conclusion, the Arbitrator relies on analogous Authority precedent in the *Coleman* case.[8]

[26] Moreover, private-sector court decisions addressing what types of activities employees are "employed to perform" further support a conclusion that the information exchanges here were not principal activities. *See, e.g.*, *Bonds v. GMS Mine Repair & Maint., Inc.*, No. 2:13–cv–1217, 2015 WL 5602607, at *10 (W.D. Pa. Sept. 23, 2015) (employer "did not employ [employees] to attend [pre-shift safety] meetings or otherwise conduct any pre-shift activities, but to perform underground labor related to its contracted mining operations – constructing (ventilation) walls, building track, masonry, spraying walls, gopher drilling, longwall set up/recovery, etc. – as well as the above-ground activities (such as readying parts and resupplying) which were actually necessary to conduct and complete that work"); *cf. Integrity Staffing*, 135 S. Ct. at 518 (employer "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers"); *Dinkel v. MedStar Health Inc.*, 99 F. Supp. 3d 37, 40 (D.D.C. 2015) (hospital employees were not employed to "launder or otherwise maintain their work clothing, but to perform various patient care activities and to perform support and administrative functions in the hospital").

[1] *See* 29 U.S.C. § 254(a).
[2] 29 C.F.R. § 790.8(a); *see also* 29 U.S.C. § 254(a)(1) (suggesting this meaning); *accord U.S. DOJ, Fed. BOP, U.S. Penitentiary Coleman II, Fla.*, 68 FLRA 52, 55 (2014) (Member Pizzella concurring and dissenting in part) (*Coleman*).
[3] 29 C.F.R. § 790.8(a).
[4] 5 C.F.R. § 550.112(a).
[5] Merits Award at 33-34.
[6] 5 C.F.R. § 550.112(b)(2).
[7] Merits Award at 33-34.
[8] *Coleman*, 68 FLRA at 55-56.

In *Coleman*, the Authority upheld an arbitrator's finding that correctional officers engaged in principal activities after entering a secure gate. The Authority relied on the arbitrator's unchallenged factual findings that the officers are employed to ensure "the protection and safety of the institution," and that after officers pass through the secure gate, they begin engaging in their principal activity because they "are in the immediate presence of inmates and have been called upon to . . . restrain those inmates."[9] Based on these findings, the Authority agreed with the arbitrator's conclusion that the officers' responsibility to maintain order within the secure area was a principal activity.[10]

Analogizing this case to *Coleman*, the Arbitrator finds, consistent with the FLSA's requirements, that the information exchange is "precisely the task for which [the officers] were hired": to "ensure the safety and security of the facility."[11] According to the Arbitrator, the information exchange includes "vital information that the [relief] officer needs in order to safely perform his duties of safety and security throughout the course of his scheduled shift."[12]

Regarding the information-exchange's "vital" nature, the Arbitrator determines that "[k]nowing flashpoints that might erupt during a shift is integral to [the facility's security],"[13] and that "[w]ithout performing this task, the safety and security of the prison, its inmates[,] and other employees could on any given day be compromised."[14] Moreover, the Arbitrator finds that this task occurrs at the beginning of each shift,[15] and undisputed testimony makes clear that the officers exchange information while at their assigned posts.[16]

The majority's decision ignores the FLSA's requirements, Authority precedent, and the Arbitrator's factual findings. Moreover, misinterpreting the awards, the majority's decision is based entirely on the premise that the Arbitrator finds the information exchanges "preparatory activities."[17] But this is not what the Arbitrator found. Instead, finding that officers are employed to ensure the safety and security of the prison, the Arbitrator further finds, explicitly and as discussed above, that information exchanges are *principal* activities, not preliminary or preparatory activities, because the exchanges are "*precisely* the task for which [the officers] were hired."[18] "Without performing this task," the Arbitrator concludes, "the safety and security of the prison, its inmates[,] and other employees could on any given day be compromised."[19] Consequently, because the premise for the majority's decision is faulty, the majority's main rationale, based on that premise, lacks a legal foundation.

In addition, the majority's assertion that the Arbitrator's merits award is inconsistent with the Office of Personnel Management (OPM) regulations, which concern "overtime work," is also faulty.[20] OPM's overtime regulations, like DOL's regulations, define "principal activities" as "the activities that an employee is employed to perform."[21] The Arbitrator's finding that the information exchange is "precisely the task for which [the officers] were hired"[22] satisfies that requirement.

I also do not agree with the majority that the Authority should ignore Supreme Court precedent.[23] The majority asserts that the Supreme Court's decision in *Integrity Staffing*,[24] interpreting the FLSA's requirements, does not apply when the Authority is interpreting the FLSA's requirements. The majority prefers to rely on what it views as conflicting OPM overtime regulations. I disagree. Where there is a conflict, Supreme Court precedent prevails.

And in any event, it is not necessary to read *Integrity Staffing* and OPM regulations as inconsistent. *Integrity Staffing* makes a distinction between "principal activities" and "preliminary" or "postliminary" activities.[25] OPM's regulations make a different distinction, between "principal activities" and "preparatory" or "concluding" activities.[26] And OPM's regulations are not inconsistent with *Integrity Staffing*'s holding, central to the Arbitrator's conclusions in this

[9] *Id.*
[10] *Id.* at 56.
[11] *Compare* Merits Award at 33 ("[g]uards are employed to ensure the safety and security of the facility") *with Coleman*, 68 FLRA at 53 ("employee's primary duty [is] . . . the protection and safety of the institution").
[12] Merits Award at 32. The Arbitrator finds that information exchanges are "vital" to officers because the exchanges provide the officers with information about "what transpired during the preceding shift," *Id.* at 33, and warn officers of any "problems with particular inmates [that] the [relief] officer needs to be alert[ed] to . . . so as not to be surprised or blindsided." *Id.* at 32.
[13] *Id.* at 33.
[14] *Id.* at 34.
[15] *Id.* at 33.
[16] Exceptions to Merits Award, Attach. C, Hr'g Tr. at 373, 633-34.
[17] Majority at 4.
[18] Merits Award at 33 (emphasis added).
[19] *Id.* at 34.
[20] Majority at 4 (citing 5 C.F.R. § 550.112(b)).
[21] 5 C.F.R. § 550.112(a).
[22] Merits Award at 33.
[23] *See* Majority at 3-4.
[24] 135 S. Ct. 513, 513 (2014).
[25] *Id.* at 517.
[26] 5 C.F.R. § 550.112(a) & (b).

case, that activities that are "integral" and "indispensable" to an employee's principal activity are themselves principal activities.[27]

For these reasons, I would deny the Agency's contrary-to-law exception. And, I would address and deny the Agency's remaining exceptions.

[27] *Integrity Staffing*, 135 S. Ct. at 517.