

70 FLRA No. 170

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5307

DECISION

September 27, 2018

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

I. Statement of the Case

In this case, the Authority reaffirms that employees covered by the Federal Employees Pay Act (FEPA)¹ are treated differently than employees who are covered by the Fair Labor Standards Act (FLSA).² Employees covered by the FEPA are FLSA-exempt and require prior written approval from their supervisor to qualify for overtime compensation.

The Agency operates a mental health clinic (the clinic). The Union filed a grievance alleging that the Agency violated the parties' agreement and law by failing to pay two of the clinic's licensed clinical social workers (CSWs) overtime.

Arbitrator Blanca E. Torres denied the grievance. She found that the CSWs are not entitled to overtime compensation under either the FLSA or the FEPA. The Arbitrator denied compensation under the FLSA because, as professional employees, the CSWs are exempt from coverage. And she denied compensation under the FEPA because the Agency had not approved their overtime in advance and, thus, the FEPA did not require the Agency to pay the CSWs overtime compensation.

¹ See 5 U.S.C. § 5542(a).

² See 29 U.S.C. § 207.

The Union filed contrary-to-law and essence exceptions. Because the award is consistent with the FLSA and the FEPA, we deny the Union's contrary-to-law exception. And because the Arbitrator interpreted the parties' agreement consistent with the FEPA's implementing regulations, we deny the Union's essence exception.

II. Background and Arbitrator's Award

The Agency's CSWs work eight-hour shifts, ending at 4:30 p.m. CSWs evaluate patients, document these assessments, and arrange for appropriate mental-health care. To complete a patient's intake, CSWs are often required to work past the end of their assigned shifts. When a patient arrives near the end of a CSW's shift, the CSW is required to work past 4:30 p.m. if that is necessary to provide needed care. For example, if a patient with an urgent mental-health issue is admitted, CSWs must complete documentation immediately for the clinician who takes over the patient's care.

The Agency requires that a supervisor give prior authorization for overtime work. The Agency also requires that such authorizations be approved by the Chief of Social Work. Without prior supervisory authorization, CSWs do not receive overtime pay when they submit patient assessment notes to their supervisors after their shifts end.³ CSWs have made "numerous" requests for overtime approval, which the Agency has denied.⁴

The Union filed a grievance alleging that, contrary to the FLSA and the parties' agreement, the Agency "knowingly 'suffered and permitted' [the CSWs] to work in excess of [eight] hours per day."⁵ The parties could not resolve the grievance and the Union invoked arbitration.

The Arbitrator found that CSWs are FLSA-exempt employees because they are "learned professionals."⁶ She concluded, therefore, that CSW overtime compensation is governed by the FEPA, which requires written, advance approval of overtime

³ Award at 7.

⁴ *Id.* at 10.

⁵ *Id.* at 2; see 5 C.F.R. § 551.401(a)(2) ("All time spent by an employee performing an activity for the benefit of an agency . . . is 'hours of work,'" including "[t]ime during which an employee is suffered or permitted to work.").

⁶ Award at 11-12 (citing 29 C.F.R. § 541.301(a)(1)-(3) ("To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.")).

work by an agency official.⁷ And, the Arbitrator further found that such approval was not given for these grievants, and that the FEPA does not impose any requirement for professional employees to be compensated at overtime rates for their overtime work. Consequently, the Arbitrator found no legal requirement to compensate the grievants for the overtime work they performed.⁸

Turning to the parties' agreement, the Arbitrator considered Article 21, which states that "[w]hen an employee works overtime, whether covered by the [FLSA] or exempt, such overtime will be paid in increments of [fifteen] minutes."⁹ Having found that the CSWs are covered by the FEPA, the Arbitrator interprets Article 21 in conjunction with the relevant FEPA implementing regulations, 5 C.F.R. §§ 550.111 and 550.112.¹⁰

The Arbitrator rejected the Union's argument that the plain language of Article 21 requires overtime compensation, whether or not an employee is FLSA exempt. She concluded that the FLSA-exempt employees referenced in Article 21 may earn overtime in fifteen minute increments, "but only" when overtime is officially ordered or approved by the delegated official in writing as required by § 550.111.¹¹ Finding that there was no evidence showing that the Chief of Social Services, the delegated official, authorized overtime in writing, the Arbitrator denied the grievance.¹²

On August 21, 2017, the Union filed exceptions to the award and the Agency filed an opposition to the Union's exceptions on September 19, 2017.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law.¹³ 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.¹⁴ 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.¹⁵

As the Arbitrator found, for purposes of overtime compensation, employees who are "exempt" from the FLSA are covered by the FEPA and its implementing regulations.¹⁶ Section 550.511 provides that that "[o]vertime work . . . may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated."¹⁷

Nonetheless, while the Union concedes the CSWs are FLSA-exempt, it argues, citing Authority case law,¹⁸ that the CSWs should not be denied overtime compensation merely because overtime hours were not previously authorized in writing.¹⁹ But, as the Arbitrator correctly determined, the cases upon which the Union relies do not support the Union's position.²⁰ Moreover, the Union does not identify any legal requirement for the Agency to pay overtime compensation to professional employees, like the grievants, for overtime work those employees perform.

Employees covered by the FEPA (FLSA-exempt) are treated differently than non-exempt employees when it comes to overtime.²¹ Overtime for FEPA employees requires prior written authorization. Consequently, although the supervisors here were aware

⁷ Award at 11; 5 U.S.C. § 5542(a) (overtime work "officially ordered or approved . . . shall be paid . . ."); see also 5 C.F.R. §§ 550.111, 550.112 (FEPA implementing regulations).

⁸ Award at 7, 9, 11, 18-20.

⁹ Exceptions, Ex. C, Master Agreement at 92; see also Award at 13.

¹⁰ Award at 13-14. Section 550.111 authorizes overtime pay "only" for overtime work that is "ordered or approved . . . in writing by an [authorized] officer or employee." Section 550.112 provides for the computation of overtime in fifteen minute increments – consistent with Article 21.

¹¹ Award at 15, 23.

¹² *Id.* at 23.

¹³ Exceptions at 3-5.

¹⁴ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollack, La.*, 68 FLRA 151, 152 (2014) (citations omitted).

¹⁵ *Id.*

¹⁶ *AFGE, AFL-CIO, Local 3614*, 60 FLRA 601, 603-04 (2005) (*AFGE*) (citing 5 U.S.C. § 5542).

¹⁷ 5 C.F.R. § 550.111(c) (emphasis added).

¹⁸ Exceptions at 5 (citing *U.S. Dep't of VA, Med. Ctr., West Palm Beach, Fla.*, 63 FLRA 544 (2009); *AFGE*, 60 FLRA at 601).

¹⁹ See *id.* Additionally, the Union cites an arbitrator's award which is not precedential, and also relies on Authority precedent concerning non-exempt FLSA employees. *Id.* at 4.

²⁰ See Award at 16-17. The Union also asserts that the Agency should not be able to argue that there was no advance authorization of overtime in writing because that argument was not raised in response to the grievance. Exceptions at 6. Because the issue was raised before the Arbitrator, the Agency is not precluded from raising it here. See Award at 4-5, 13.

²¹ *Id.* at 11.

that CSWs sometimes stayed beyond their shifts,²² there was no entitlement to overtime without prior written authorization.²³

Because the Arbitrator's legal conclusions are consistent with law, we deny the Union's contrary-to-law exception.²⁴

- B. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because Article 21 makes clear that employees must be paid overtime – whether or not they are FLSA-exempt, and imposes no “technical” written authorization requirement.²⁵

The Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement only when the appealing party establishes that the award is irrational, implausible, or in manifest disregard of the parties' agreement.²⁶

Contrary to the Union's argument, the Arbitrator's interpretation is not irrational, implausible, or in manifest disregard of the parties' agreement. Although Article 21 does not provide for any prerequisites for overtime for FLSA-exempt employees, the Arbitrator reasonably interpreted Article 21 to comport with FEPA regulations.²⁷ And in doing so, the Arbitrator concluded, also reasonably, that as FLSA-exempt employees, the CSWs may earn overtime in fifteen minute increments under the parties' agreement, “*but only*” when overtime is officially ordered or approved by the delegated official in writing, *as required by law and regulation*.²⁸

²² *Id.* at 7.

²³ Member DuBester agrees that the Agency has discretion, under applicable law, not to approve CSWs' overtime requests. He notes, however, that the Union introduced evidence showing that the grievants worked hundreds of hours of overtime without compensation at overtime rates. Award at 2-3 n.1, 7. And, virtually every request for approval of overtime pay was denied. *Id.* Against this background, it is understandable that the CSWs feel aggrieved, given the frequency that they must work overtime without overtime compensation.

²⁴ Although the Union did not request attorney fees from the Arbitrator, the Union also claims, without explanation, that the Arbitrator “ignore[d] the statutory scheme in place for awards of attorney fees.” Exceptions at 6. Apart from other considerations, because the Union does not support this contrary-to-law exception, we deny it. 5 C.F.R. § 2425.6(e)(1); *see, e.g., NAGE, Local R3-10 SEIU*, 69 FLRA 510, 510 (2016) (denying exception where party alleged arbitrator exceeded his authority but did not support argument).

²⁵ Exceptions at 5.

²⁶ *U.S. Small Bus. Admin.*, 70 FLRA 525, 526-28 (2018).

²⁷ Award at 15.

²⁸ *Id.* at 15, 23.

Accordingly, because the Union fails to show that the Arbitrator's interpretation of Article 21 is irrational, implausible, or in manifest disregard of the parties' agreement, we deny the Union's essence exception.

IV. Decision

We deny the Union's exceptions.