

71 FLRA No. 145

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR
TRAFFIC CONTROLLERS ASSOCIATION
(Union)

0-AR-5481

DECISION

May 20, 2020

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

I. Statement of the Case

Arbitrator Christopher E. Miles found that the Agency violated the parties’ collective-bargaining agreement and Fair Labor Standards Act (FLSA)¹ regulations by not properly calculating overtime hours for 144 air traffic controllers (the grievants) in August 2017. The questions before us are whether the arbitrator’s award: (1) is contrary to law, rule, or regulation; or (2) fails to draw its essence from the parties’ agreement. Because the award is contrary to FLSA regulations, we set aside the award.

II. Background and Arbitrator’s Award

From Friday, August 25 through Thursday, August 31, 2017, due to the effects of Hurricane Harvey, the grievants were held over on duty for as many as eighty-nine and one-half hours. A month later, the Union filed a grievance alleging that the Agency failed to calculate the grievants’ overtime pay properly during that period. The Agency denied the grievance, and the Union invoked arbitration.

The parties stipulated that the issue was “[w]hether the Agency violated the [parties’ agreement] or applicable law, rule[,] or regulation in how it

compensated the grievants for pay periods 19 and 20, 2017, immediately, during, and after Hurricane Harvey.”²

The Union contended that the grievants should be paid overtime for all hours that they were held over after their first scheduled shift because their shifts effectively never ended. In contrast, the Agency argued that the start of each administrative workday triggered a new period for grievants to earn overtime for any hours outside of their scheduled shifts. The parties stipulated that the grievants were paid overtime for all hours except the hours during their regularly scheduled shifts. Therefore, the Arbitrator concluded that the pertinent issue was whether the grievants were entitled to overtime during their scheduled shifts.

Ordinarily, the grievants are scheduled for eight-hour shifts on five consecutive workdays.³ Under the parties’ agreement, “[e]mployees are not eligible for overtime pay for work in excess of eight (8) hours in an administrative workday, except in cases where they have been called in before the beginning, or held over beyond the end, of their scheduled shift.”⁴ The parties’ agreement expressly incorporates the FLSA, stating that “[o]vertime pay computations for non-exempt bargaining unit employees must be made solely in accordance with [FLSA] regulations in 5 C.F.R. Part 551 and this Agreement[.]”⁵

The Arbitrator concluded that the Union’s grievance was governed by 5 C.F.R. § 551.501, which provides that “[a]n agency shall compensate an employee who is not exempt . . . for all hours of work in excess of [eight] in a day or [forty] in a workweek at a rate equal to one and one-half times the employee’s hourly regular rate of pay[.]”⁶ The Arbitrator found that the regulation’s “unambiguous language” required the Agency to pay employees at the overtime rate for any hours over eight hours in a twenty-four hour period *and* for all hours worked in excess of forty in a workweek.⁷

The Arbitrator further found that the workweek pertinent for pay purposes began at midnight on Sunday. Therefore, any grievant who worked more than forty cumulative hours – including straight time and overtime hours – in the workweek should have been paid overtime after the fortieth cumulative hour of work, regardless of whether the employee had already been

² Award at 2.

³ The Agency established a workweek for the grievants that consists of five consecutive days, with each workday consisting of an eight-hour shift. *Id.* at 7 (citing Art. 34 of the parties’ agreement).

⁴ *Id.* at 3 (citing Art. 38, § 7 of the parties’ agreement).

⁵ *Id.*

⁶ *Id.* at 10 (quoting 5 C.F.R. § 551.501).

⁷ *Id.* at 11 (citing 5 C.F.R. § 551.501).

¹ 29 U.S.C. §§ 201-219.

compensated at the overtime rate for some of those hours.⁸

On March 6, 2019, the Agency filed exceptions to the award, and on April 10, 2019, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award is contrary to law.

The Agency contends that the award is contrary to 5 C.F.R. Parts 550 and 551 because the Arbitrator's award directs the Agency to "double count[]" hours when determining an employee's overtime entitlement.⁹ 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.¹⁰ 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.¹¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.¹²

It is undisputed that the grievants' pay is governed by the Office of Personnel Management (OPM) regulations implementing the FLSA.¹³ Under these regulations, FLSA non-exempt employees are entitled to

overtime for hours worked in excess of eight in a day or forty in a workweek.¹⁴

Here, the Agency established a workweek consisting of five eight-hour days for the grievants,¹⁵ and paid the grievants overtime for all hours worked in excess of their scheduled shifts.¹⁶ In other words, the Agency paid the grievants overtime for all hours in excess of their eight-hour shifts each day and, for those grievants who worked on days after their scheduled forty-hour workweek had ended, the Agency paid them overtime for all hours worked on those days. The Arbitrator, however, directed the Agency to count hours that were already compensated as overtime in excess of eight in a day towards the forty-hour overtime threshold.¹⁷

The regulations implementing the FLSA for federal employees require agencies to consider part 550 of OPM's regulations when determining hours of work for overtime purposes.¹⁸ And under 5 C.F.R. § 550.111(a)(2), "[h]ours of work in excess of [eight] in a day are not included in computing hours of work in excess of [forty] hours in an administrative workweek."¹⁹ OPM has issued guidance interpreting these regulations as prohibiting "double-counting" – i.e., counting hours in excess of eight in a day that were paid as overtime toward hours in excess of the applicable overtime standard for the week (forty hours for FLSA non-exempt employees).²⁰

⁸ The Arbitrator explained his calculations through an example based on one of the grievants. The grievant was held over after his Sunday shift, then had regular shifts scheduled on Monday, August 28 and Tuesday, August 29. The Arbitrator found that the grievant was entitled to the straight time rate for his scheduled shifts on Monday and Tuesday, and the overtime rate for all hours worked outside of his scheduled shifts on those days. However, by 4:00 p.m. on August 30, five hours into his regular scheduled shift, the grievant had worked forty cumulative hours in the administrative workweek. Therefore, the Arbitrator found that the grievant was entitled to the overtime rate for all hours worked in the administrative workweek after 4:00 p.m. on August 30, including those hours worked during his scheduled shifts.

⁹ Exceptions Br. at 12, 18-19.

¹⁰ See, e.g., *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016).

¹¹ *Id.*

¹² *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

¹³ Article 38, Section 7 of the parties' agreement states that "[o]vertime pay computations for non-exempt bargaining unit employees must be made solely in accordance with the [FLSA] regulations in 5 CFR Part 551 and this Agreement." Award at 3; see also *id.* at 2 (noting parties' stipulation that "Article 38, Section 7 of the Agreement has to be read consistently with the FLSA Regulations").

¹⁴ 5 C.F.R. § 551.501; see, e.g., *Christofferson v. United States*, 64 Fed. Cl. 316, 321-22 (2005) (explaining that 5 C.F.R. § 551.501 harmonizes federal employee's overtime entitlements under Title 5 and the FLSA).

¹⁵ Exceptions, Attach. 3, Parties' Agreement at 5 ("A full-time employee's basic workday shall consist of eight (8) consecutive hours and the basic workweek shall consist of five (5) consecutive days[.]").

¹⁶ Award at 2.

¹⁷ *Id.* at 13-14.

¹⁸ 5 C.F.R. § 551.401(g) ("agencies shall credit hours of work under . . . part 550 of this chapter . . . that will not be compensated as hours of work in excess of [eight] hours in a day, as well as any additional hours of work under this part").

¹⁹ 5 C.F.R. § 550.111(a)(2).

²⁰ Exceptions, Attach. 6, Federal Personnel Manual (FPM) Letter 551-24 at 3 (Jan. 14, 1992).

The Authority has previously found that OPM's interpretation of the FLSA regulations is entitled to deference.²¹ Here, because the Arbitrator's conclusions and award are inconsistent with the relevant regulatory scheme and the guidance interpreting those regulations, we find that the award is contrary to law.

Accordingly, we grant the Agency's exception.²²

IV. Decision

We set aside the award as contrary to law.

Member Abbott, concurring:

This decision is based on well-established precedent, longstanding regulations, and clear Office of Personnel Management (OPM) guidance. Therefore, I wholeheartedly join the majority.

As such, this case might easily be described as one that is open-and-shut and one that should have been returned to the parties in a prompt manner. And, because the central dispute here concerns the appropriate amount of overtime pay the air traffic controllers are entitled to as a result of having to work long hours during Hurricane Harvey in August 2017, both parties have an interest in and a reasonable expectation of a prompt resolution of the dispute.

Lengthy delays in the issuing of Authority decisions do not "facilitate[] and encourage[] the amicable settlement[] of disputes"¹ or promote "an effective and efficient [g]overnment."² To this end, the Authority's first strategic goal set out in its Fiscal Year (FY) 2021 Congressional Budget Justification calls for parties to receive an answer to their exceptions to an arbitration award no later than 210 after the exceptions are filed with the Authority.³ From any measure, the single-focused issue in this case warranted a prompt decision. Therefore, I find it troubling that the majority's decision has lingered, and left the parties in litigation limbo, for as of 5/20/20, **438** days since the Agency filed its exceptions.

This should not have occurred.

²¹ E.g., *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 104 (2014) (finding that the Authority should defer to OPM guidance when it is based on a permissible construction of a statute that it is charged with administering); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Keyport, Wash.*, 55 FLRA 884, 887-88 (1999) (relying on a FPM Letter to interpret a government-wide regulation where OPM had not revoked the FPM Letter).

²² The Agency also argues that the award fails to draw its essence from the parties' agreement. Because we grant the Agency's contrary-to-law exception, we find it unnecessary to address its remaining arguments.

¹ 5 U.S.C. § 7101(a)(1)(C).

² 5 U.S.C. § 7101(b).

³ Federal Labor Relations Authority, FY 2021 Cong. Budget Justification at 21, Strategic Goal #1, Measure a. ("We will ensure . . . timely . . . determinations . . . and attempt to surpass . . . case-processing productivity goals . . . and timeliness measures that are meaningful to the parties" (arbitration exceptions within 210 days of the filing of exceptions)).