

73 FLRA No. 91

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MENDOTA, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1237
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5833

DECISION

March 9, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I Statement of the Case

Arbitrator Patrick Halter found the Agency violated the parties' collective-bargaining agreement, the Federal Service Labor-Management Relations Statute (the Statute), and the Fair Labor Standards Act (FLSA) by disapproving part of the grievant's official-time request and thereby causing the grievant to work more than his scheduled hours. As remedies, the Arbitrator awarded the grievant backpay with interest, liquidated damages, and arbitration costs.

The Agency filed exceptions to the award on essence and contrary-to-law grounds. For the following reasons, we dismiss the essence exception, and partially dismiss and partially deny the contrary-to-law exceptions.

II Background and Arbitrator's Award

The grievant works in the Agency's minimum-security facility and serves as the local union president. As relevant here, the grievant requested forty hours of official time from April 26-30, 2021, for representational activities.¹ The grievant's supervisor approved only eight hours.

On April 28, the Union filed a grievance alleging the Agency violated Articles 7 and 11 of the parties' agreement and governing law because the Agency reduced the official-time request "without just cause" based on anti-union animus.² The Union requested as remedies: (1) backpay with interest under the Back Pay Act³ (BPA);⁴ (2) compensation under the FLSA⁵ for time worked over the grievant's forty-hour workweek;⁶ (3) "liquidated damages in the [amount] equal to the amount of ordered back wages" under the FLSA;⁷ (4) fees and costs of the arbitration; and (5) "any and all available remedies including those deemed appropriate by the Arbitrator."⁸ The Union invoked arbitration.

The Arbitrator framed three issues: (1) whether the Agency violated the parties' agreement and §§ 7131(d) and 7116(a)(2) of the Statute "when it approved eight . . . hours of official time for [the] grievant"; (2) "[w]hether the Agency complied with the [parties' agreement and [f]ederal law(s) when it did not compensate [the] grievant for representational work" on April 26-27; and (3) "[w]hat is the appropriate remedy for any violation."⁹

The Arbitrator found that Article 7 incorporates § 7116 of the Statute and provides that the Agency will not restrain, interfere with, or coerce the Union in performing representational activities, and also provides that "Union representatives will be permitted to . . . perform and discharge their representational responsibilities" on paid duty time.¹⁰ He also determined that Article 11 requires the Agency to grant the grievant reasonable official time to perform representational activities, and that under that provision and § 7131(d) of the Statute, those activities are "paid duty time."¹¹

Upon finding that the Agency's approval of only eight hours was "not reasonable,"¹² the Arbitrator concluded the Agency's denial of the grievant's forty-hour request violated the parties' agreement and §§ 7116(a) and 7131(d) of the Statute.¹³ The Arbitrator also found the

¹ Unless otherwise noted, all dates hereafter refer to 2021.

² Award at 3 (quoting grievance narrative).

³ 5 U.S.C. § 5596.

⁴ Award at 10-11; Opp'n, Ex. A (Union Br.) at 18-20.

⁵ 29 U.S.C. § 203.

⁶ Award at 11-12; *see* Exceptions, Attach. C, Tr. (Tr.) at 11 (stating that the Union was seeking remedies under the FLSA); *see also* Union Br. at 21.

⁷ Union Br. at 23-25, 27.

⁸ Award at 4, 16, 20; *see also* Union Br. at 18-25; Tr. at 11.

⁹ Award at 16.

¹⁰ Exceptions, Attach. B, Parties' Master Agreement at 16; *see* Award at 16.

¹¹ Award at 17.

¹² *Id.* at 18.

¹³ *Id.* at 19.

Agency's violations "subjected [the] grievant to an unjustified or unwarranted personnel action which resulted in a withdrawal of compensation."¹⁴ On this point, the Arbitrator determined the Agency failed to compensate the grievant for two hours and ten minutes of work the grievant performed in addition to his paid forty-hour week, and that "[b]ut for the Agency's violations . . . the grievant would have performed representational activities on paid duty time."¹⁵

Consequently, the Arbitrator awarded the grievant backpay "at [a] straight[-]time rate of pay" plus interest for these additional hours.¹⁶ Additionally, because these hours "exceed[ed forty] hours during" the grievant's work week, the Arbitrator awarded liquidated damages, and the Union's fees and expenses, including arbitration costs, pursuant to the FLSA.¹⁷

On September 7, 2022, the Agency filed exceptions to the award, and on October 12, 2022, the Union filed an opposition to the Agency's exceptions.

III Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's exceptions.

The Agency argues the award is contrary to the FLSA because the Arbitrator found FLSA violations without conducting the proper analysis,¹⁸ and because the Arbitrator improperly awarded "both interest under the [BPA] and liquidated damages under the FLSA . . . as well as overtime pay" for the hours of work the grievant performed beyond the forty-hour workweek.¹⁹ The Agency also asserts the Arbitrator's award of "any relief" under the FLSA is contrary to law because there is no "evidence whatsoever that the grievant worked overtime."²⁰ Finally, the Agency argues that the Arbitrator's remedy under the FLSA requiring it to "pay for the Union's costs of the arbitration" fails to draw its essence from the agreement because Article 32 of the agreement requires the parties to share arbitration costs equally.²¹

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the

arbitrator.²² The record demonstrates that, at arbitration, the Union stated that "under law, be it the [BPA] and/or the [FLSA], [the grievant] was not properly compensated," and "should be awarded the payment that he's due, and reasonable attorney fees thereafter."²³ Additionally, in its July 5, 2022 post-hearing brief, the Union argued that the denial of official time violated the BPA and the grievant was therefore entitled to backpay with interest, and attorney fees and costs under that statute.²⁴ The Union *also* asserted that the Agency violated the FLSA by failing to pay the grievant for hours worked in excess of his regular forty-hour work week. In support of this argument, the Union set forth the applicable burdens of proof the Arbitrator should apply under the FLSA, as well as the facts that supported its argument. On this basis, the Union argued that, in addition to the BPA remedies, the grievant was entitled to backpay, liquidated damages, and costs under the FLSA.²⁵

Despite the foregoing, the Agency did not rebut the Union's arguments regarding its liability under the FLSA. Moreover, the Agency did not address the Union's requested FLSA remedies, either at arbitration or in its July 1, 2022 post-hearing brief.²⁶ In fact, the Agency did not mention the FLSA at all. Additionally, although the Agency's post-hearing brief was filed before the Union's, more than a month elapsed before the Arbitrator issued the award on August 8, 2022, and there is no evidence that the Agency attempted to raise to the Arbitrator the arguments it now raises before the Authority.²⁷ Because the Agency could have raised its

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 20.

¹⁸ *See* Exceptions Br. at 5-6.

¹⁹ *Id.* at 10-11.

²⁰ *Id.* at 11.

²¹ *See id.* at 12 n.3.

²² 5 C.F.R. §§ 2425.4(c), 2429.5; *Bremerton Metal Trades Council*, 73 FLRA 212, 213 (2022) (*Bremerton*); *see* Opp'n at 4-5.

²³ *See* Tr. at 11.

²⁴ Union Br. at 18-20; *see also id.* at 26-27.

²⁵ *Id.* at 21-25; *see also id.* at 27.

²⁶ *See* Exceptions, Attach. A, Agency Closing Br. at 2-7.

²⁷ *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011) (*USDA*) (concluding that agency failed to present argument to arbitrator, even where union raised the issue in post-hearing brief filed after agency's brief, because "nearly a month elapsed before the [a]rbitrator issued her award" after the union filed its brief).

FLSA arguments to the Arbitrator, but failed to do so, we dismiss these exceptions.²⁸

IV. Analysis and Conclusions: The Agency has not demonstrated that the award is contrary to law.

The Agency asserts that the award is contrary to § 7131(d) of the Statute and Authority case law because the Arbitrator awarded overtime as a remedy, whereas the grievant is only entitled to “straight-time rates” as compensation for wrongfully denied official time.²⁹ Contrary to the Agency’s assertion, the Arbitrator awarded the grievant backpay at a “straight[-]time rate of pay,” with interest.³⁰ This remedy is consistent with Authority precedent applying § 7131(d).³¹ Additionally, because the Agency failed to raise to the Arbitrator its arguments concerning the additional remedies under the FLSA, we do not consider them.³² Therefore, the Agency has not demonstrated that the award is contrary to law, and we deny this exception.

V. Decision

We partially dismiss and partially deny the Agency’s exceptions.

²⁸ *AFGE, Loc. 2338*, 73 FLRA 229, 230 (2022) (citing *U.S. DOL*, 67 FLRA 287, 288-89 (2014)) (dismissing contrary-to-law exceptions where a party could have raised arguments before the arbitrator but failed to do so); *U.S. Dep’t of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 48 (2022) (citing *NATCA*, 72 FLRA 299, 300 (2021)) (same); *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 (2020) (dismissing exception alleging that award was contrary to FLSA where union failed to raise any FLSA arguments to arbitrator); *U.S. Dep’t of Com., Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 67 FLRA 356, 357 (2014) (dismissing exception where “the [a]rbitrator granted the very relief that the [u]nion requested in its brief, and there is no indication that the [a]gency opposed the [u]nion’s remedial request before the [a]rbitrator, despite having an opportunity to do so”); *USDA*, 65 FLRA at 484 n.4; *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (dismissing exception that award was contrary to FLSA regulation where agency failed to present that argument to the arbitrator), *recons. denied*, 65 FLRA 76 (2010); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 64 FLRA 810, 811-12 (2010) (dismissing agency’s argument that arbitrator failed to make “the requisite findings” to support damages award under the FLSA where agency did not present that issue to the arbitrator), *recons. denied*, 65 FLRA 256 (2010).

²⁹ See Exceptions Br. at 9-10 (citing *U.S. Dep’t of Transp., FAA, Sw. Region, Fort Worth, Tex.*, 59 FLRA 530, 532 (2003) (*FAA*)).

³⁰ Award at 19-20.

³¹ *FAA*, 59 FLRA at 532 (“[T]he Authority has held that ‘where official time authorized by the provisions of a collective[-]bargaining agreement is wrongfully denied and the representational functions are performed on nonduty time, [§] 7131(d) entitles the aggrieved employee to be paid at the appropriate straight-time rates for the amount of time that should have been official time.’” (quoting *U.S. DOD, Def. Cont. Audit Agency, Ne. Region, Lexington, Mass.*, 47 FLRA 1314, 1322 (1993))); see also *U.S. Dep’t of HHS, SSA, N.Y. Region*, 52 FLRA 328, 330 (1996) (same).

³² See *Bremerton*, 73 FLRA at 213.