**73 FLRA No. 144**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2053, COUNCIL 243
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION SOUTHEAST
(Agency)

0-AR-5886

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DECISION

December 6, 2023

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

## I. Statement of the Case

Arbitrator Paul Gordon issued an award dismissing, as untimely, a Union grievance alleging the Agency failed to pay employees overtime under the Fair Labor Standards Act (FLSA).[1] The Union filed exceptions alleging the award is contrary to law and public policy. Because arbitrators may lawfully enforce contractual time limits for filing grievances that are shorter than the FLSA's filing periods, we deny the exceptions.

## II. Background and Arbitrator's Award

The Agency implemented a compressed work schedule – effective the pay period starting September 16, 2018 – of twelve hours on, twelve hours off, "with 3/2, 2/3 alternating work days."[2] Beginning with that implementation, the Agency did not pay employees on the compressed schedule any overtime pay for hours worked in excess of eight hours per day or forty hours per week.

On May 27, 2022, the Union filed a grievance challenging the Agency's failure to pay those employees overtime. The grievance went to arbitration, where the Arbitrator framed the issue as: "Whether the . . . grievance . . . was filed timely so as to be arbitrable in compliance with the Master Agreement?"[3]

The Arbitrator noted Article 32, Section 4(B) of the parties' agreement states that "grievances must be presented within fourteen (14) calendar days after the incident occurs or the grievant became aware of the incident."[4] The Arbitrator found that the Union and affected employees were aware of the nonpayment of overtime beginning in September 2018, and that the fourteen-day time limit for filing a grievance began at that time.

The Arbitrator also found Article 32's time limit does not contain any exception for alleged continuing violations. The Arbitrator determined the parties knew how to bargain exceptions to that time limit, as they agreed in Article 32 to exclude several items, including certain types of statutory complaints, from that limit. The Arbitrator further determined that the parties did not include any exceptions to that time limit for FLSA claims.

Additionally, the Arbitrator rejected a Union claim that the FLSA statute of limitations, set forth in 29 U.S.C. § 255(a) (§ 255(a)), is incorporated into the parties' agreement and supersedes Article 32's time limit. Citing Authority precedent,[5] the Arbitrator found that applying the contractual time limit was "not a waiver contrary to [c]ongressional command[] and [did] not preclude effective vindication of any statutory rights."[6] In that regard, the Arbitrator stated, "There may be other forums for the Union to seek redress for the wage claims, but the [agreement] limits the time period for filing a *grievance*" to fourteen days.[7] Because the Union did not file its grievance within fourteen days of when the grieved incident occurred, or when the Union or employees became aware of that incident, the Arbitrator dismissed the grievance as untimely.

[1] 29 U.S.C. §§ 201-219.
[2] Award at 10.
[3] *Id.* at 2.
[4] *Id.* at 7.
[5] *See id.* at 21 (citing *AFGE, Loc. 3882*, 59 FLRA 469 (2003); *AFGE, Loc. 916*, 47 FLRA 165 (1993)).
[6] *Id.*
[7] *Id.* at 20-21 (emphasis added).

On April 26, 2023, the Union filed exceptions to the award, and on May 31, 2023, the Agency filed an opposition.[8]

## III. Analysis and Conclusions

The Union argues the award is contrary to law because the Arbitrator failed to apply the time limits in § 255(a).[9] According to the Union, § 255(a) "is a substantive right" that the parties' agreement does not "clearly and unmistakably waive," as Article 2, Section 1 of the parties' agreement allegedly requires.[10] For support, the Union cites various court decisions.[11]

An arbitrator's determination regarding the timeliness of a grievance is a procedural-arbitrability determination.[12] In order for a procedural-arbitrability determination to be found contrary to law, the appealing party must establish the determination conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception 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] In conducting that assessment, the Authority defers to the arbitrator's factual findings unless the excepting party demonstrates the award is based on a nonfact.[16]

The Authority has held that, where a collective-bargaining agreement contains time limits for filing grievances that are shorter than § 255(a)'s filing periods, it is not contrary to the FLSA for an arbitrator to rely on those contractual limits to dismiss grievances as untimely.[17] Contrary to the Union's claim, the Authority has held that "nothing in the express language of § 255(a) suggests that the time limit contained in [that] provision is a *substantive* right" that must be clearly and unmistakably waived.[18] Further, none of the cited court decisions hold that arbitrators may not enforce contractual time limits that are shorter than § 255(a)'s filing periods.[19] Accordingly, the Union has not demonstrated the award is contrary to § 255(a), and we deny the contrary-to-law exception.

The Union also argues the award is contrary to public policy.[20] However, the Union's public-policy exception repeats the same arguments from its contrary-to-law exception. As we deny the contrary-to-law exception, we likewise deny the public-policy exception.[21]

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[8] The Authority's Office of Case Intake and Publication issued a deficiency order to the Union, directing it to: serve the Agency with a complete copy of its exceptions, including a copy of the Arbitrator's award; and respond to the deficiency order by June 20, 2023. The Union did not respond to the order until June 26, but asks the Authority to consider its untimely response because it did not receive the Authority's order until June 26 – the same day it responded. Union's Resp. to Deficiency Order at 1. The tracking information associated with the Authority's order supports the Union's claim that it did not receive the order until June 26. In these circumstances, we find it appropriate to grant the Union's request to consider its untimely response, and we consider that response and the exceptions. *See, e.g.*, *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 4 n.1, *recons. denied*, 61 FLRA 393 (2005) (where party did not timely receive deficiency order, Authority waived expired time limit and allowed filing); *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals, Region II, N.Y.C., N.Y.*, 43 FLRA 1353, 1353 n.* (1992) (same).

[9] Exceptions at 4.

[10] *Id.* at 6. Article 2, Section 1 of the parties' agreement provides, in pertinent part: "Any lawful waivers of the rights given to the [employer] or the [union] by the [statute] must be clearly and unmistakably set forth in this [agreement] and understood to be waived by both the [union] and the [employer]." Award at 3.

[11] Exceptions at 6-7 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238-39 (2013) (*American Express*); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (*Green Tree*); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (*Barrentine*); *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 578 (1942) (*Overnight Motor*); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008)).

[12] *NLRB Pro. Ass'n*, 71 FLRA 737, 738 (2020) ("Put simply, this case – which involves an arbitrator's determination regarding the timeliness of a grievance – concerns only procedural arbitrability."), *pet. for rev. denied sub nom. NLRB Pro. Ass'n v. FLRA*, 856 F. App'x 316 (D.C. Cir. 2021).

[13] *Id.* at 739.

[14] *NTEU*, 72 FLRA 182, 186 (2021).

[15] *Id.*

[16] *Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 (2021).

[17] *See, e.g.*, *IFPTE, Loc. 386*, 66 FLRA 26, 30 (2011) (*IFPTE*); *Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841, 845 (1993).

[18] *IFPTE*, 66 FLRA at 30 (emphasis added).

[19] *See American Express*, 570 U.S. at 238-39 (finding Federal Arbitration Act does not permit courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of federal-law claims); *Green Tree*, 531 U.S. at 90 (stating that, "[i]n determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue"); *Barrentine*, 450 U.S. at 745 (holding that *substantive* FLSA rights are not waivable by collective-bargaining agreements); *Overnight Motor*, 316 U.S. at 579-81 (finding employment contract could not waive substantive FLSA provisions regarding wage rates); *Chao*, 514 F.3d at 285 (discussing general purposes underlying the FLSA's overtime provisions).

[20] Exceptions at 9.

[21] *AFGE, Loc. 1441*, 73 FLRA 36, 38 (2023) (denying public-policy exception that was based on same arguments denied in contrary-to-law exception).

## IV. Decision

We deny the Union's exceptions.

**Chairman Grundmann, concurring:**

I concur with the decision to deny the exceptions. The result is correct based on the Arbitrator's interpretation of the language of the collective-bargaining agreement, even if the result is harsh. I write separately to note two things.

First, as the decision acknowledges,[1] the Arbitrator stated, "There may be other forums for the Union to seek redress for the wage claims."[2] Nothing in our decision today should be construed as holding to the contrary.

Second, in finding the grievance untimely, the Arbitrator cited several Authority decisions, including *U.S. DOJ, Federal BOP, Federal Correctional Complex, Terre Haute, Indiana*;[3] *U.S. Department of VA, John J. Pershing VA Medical Center*;[4] *U.S. DOD Education Activity*;[5] and *U.S. Department of the Treasury, IRS*.[6] I was not a Member when the Authority issued those decisions and, thus, I did not participate in those cases. I am open to revisiting the relevant parts of those decisions in a future, appropriate case.[7] However, the Union's exceptions do not challenge the Arbitrator's reliance on those decisions or require us to resolve whether they were rightly decided. As such, I need not address that question in this case.

Therefore, I concur.

[1] Decision at 2.
[2] Award at 20.
[3] 72 FLRA 711 (2022) (Chairman DuBester dissenting).
[4] 71 FLRA 947 (2020) (Member DuBester dissenting).
[5] 70 FLRA 937 (2018) (Member DuBester dissenting).
[6] 70 FLRA 806 (2018) (Member DuBester dissenting) (*IRS*).
[7] I note that in *U.S. Department of the Army, Army Material Command, Army Security Assistance Command, Redstone Arsenal, Alabama*, 73 FLRA 356, 356 (2022) (*Redstone*), the Authority reversed *IRS* to the extent *IRS*'s determinations regarding interlocutory review conflicted with *Redstone*.