

65 FLRA No. 126

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

and

SOCIAL SECURITY ADMINISTRATION
REDDING DISTRICT OFFICE
REDDING, CALIFORNIA
(Agency)

0-AR-4617

DECISION

March 9, 2011

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Thomas Angelo filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator determined that the Agency did not violate the law or the parties' National Agreement (Agreement) when it denied "suffer or permit" overtime to employees on alternative work schedules (AWSs).

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award**A. Background**

The Union represents service and claims representatives at the Agency's Redding, California office. Award at 2-3. The Agreement provides for an AWS that allows employees to vary their arrival and departure times within the work day. *Id.* at 7.

The Redding office opens at 7:00 a.m. Work is not authorized to begin before that time. *Id.* at 5-6. The start time for AWS employees is either the time recorded on their time cards or 7:00 a.m., whichever is later. Overtime and credit hours are recorded on an Agency form. *Id.* at 4.

The Agreement recognizes two kinds of overtime, regular and irregular. *Id.* at 5. Regular overtime is planned and approved by management in advance. Irregular overtime is unplanned and is permitted at the Redding office only when a service call lasts beyond an employee's scheduled clock-out time. *Id.*

Some AWS employees became concerned that they were not being compensated for time they worked before 7:00 a.m., the authorized starting time. The employees became concerned because that time was not being recorded on the Agency overtime form as irregular overtime. The Union filed a grievance on their behalf seeking irregular overtime compensation. *Id.* at 2, 6. When the parties could not resolve the grievance, it was submitted to arbitration.

B. Arbitrator's Award

As relevant here, the parties stipulated to the following issue for resolution by the Arbitrator:

Whether the [Agency] . . . denied compensation to employees for work performed beyond their tour of duty, and thereby violated the Agreement and/or the [Fair Labor Standards Act (FLSA)]. If so, what should the remedy be?

Id. at 3.

The Arbitrator first determined that all of the employees affected by the grievance were on AWSs. *Id.* at 7. In resolving the grievance, the Arbitrator considered the FLSA, its implementing regulation, 5 C.F.R. § 551.501(a)(6), and the Federal Employee Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. §§ 6120-6133 (the Act). *Id.* at 8-9.¹ Because the Union sought irregular overtime compensation for AWS employees for overtime work that was not ordered in advance by management, the Arbitrator construed the Union's argument to be based on the "suffer or permit" provisions of the

1. Pertinent provisions of these laws and regulations, as well as pertinent contract provisions, are set forth in the appendix to this decision.

FLSA, which provide for overtime compensation for such work.² *Id.* at 7, 9.

Applying the FLSA's "suffer or permit" overtime regulations, the Arbitrator determined that the FLSA allows AWS employees to earn overtime only if management orders the overtime in advance and the hours worked do not consist of credit hours. *Id.* at 7-8. The Arbitrator therefore concluded that AWS employees are not entitled to "suffer or permit" overtime because, by definition, it is not ordered in advance by management. Thus, the Arbitrator denied the grievance. *Id.* at 10. The Arbitrator found that the Office of Personnel Management's (OPM's) Handbook on Alternative Work Schedules (AWS Handbook) supported his decision. The AWS Handbook specifically states that "[e]mployees on flexible work schedules may not earn overtime pay as a result of including 'suffered or permitted' hours (under the FLSA) as hours of work." *Id.* at 8 (quoting AWS Handbook).

In the Arbitrator's view, the Union's position that AWS employees are entitled to "suffer or permit" overtime presumes that all employees are covered by the "suffer or permit" provisions of the FLSA regardless of whether they are on a flexible work schedule. *Id.* at 9. According to the Arbitrator, this position overlooks federal laws mandating that AWS employees are not entitled to any "suffer or permit" overtime. *Id.* Because AWS employees are not entitled to "suffer or permit" overtime, the Arbitrator concluded that it was unnecessary for him to determine whether management knew or should have known that AWS employees were starting work before 7:00 a.m. *Id.*

The Arbitrator did not determine whether the Agency denied AWS employees compensation under the Agreement for other "legitimate" overtime because he found that the Union failed to present sufficient evidence to prove this claim. *Id.* at 2.

2. The FLSA provides the federal minimum standards for wages and overtime. 29 U.S.C. §§ 201-219. 5 C.F.R. Part 551 sets forth the regulations implementing the FLSA in the federal sector. "Suffer or permit" overtime is overtime work performed for the benefit of an agency, whether requested or not, provided that management knows or has reason to know the work is being performed and does not prevent it. 5 C.F.R. §§ 551.104 & 401(a)(2).

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law and fails to draw its essence from the Agreement. Exceptions at 3. In support of its contrary to law claim, the Union argues that AWS employees are entitled to "suffer or permit" overtime because the regulations implementing the FLSA allow employees to be compensated for both regular and irregular overtime, including "suffer or permit" overtime. *Id.* at 4-6. Specifically, the Union argues that 5 C.F.R. § 551.401(a)(2) provides that all time spent by an employee performing work for the benefit of an agency under the direction and control of that agency constitutes hours of work. *Id.* at 4-5. According to the Union, such time includes "suffer or permit" overtime hours. *Id.* at 5. The Union reasons that, because "suffer or permit" hours constitute hours of work, AWS employees must be compensated for that time.

The Union claims that AWS employees are entitled to "suffer or permit" overtime under 5 C.F.R. § 551.501(c) because it is unscheduled overtime for which an employee must be paid.³ The Union asserts that this regulation defines "irregular" overtime as overtime work that is not scheduled in advance of an employee's workweek. *Id.* Therefore, the Union argues, the Arbitrator erred in denying "suffer or permit" overtime to AWS employees. *Id.* at 5-6.

The Union further claims that the AWS Handbook does not support the Arbitrator's award. Specifically, the Union argues that the AWS Handbook, which states that "suffer or permit" overtime is not available to AWS employees, "is of little legal import" because it is only guidance and therefore not persuasive. *Id.* at 5. The Union further contends that, "contrary to [the Arbitrator's] assertions, the 'suffer or permit' or irregular overtime is authorized" by the regulations, not prohibited by the Act or the AWS Handbook, and is allowed by the Agency's Personnel Policy Manual. Therefore, the Union argues, the Arbitrator's decision that AWS employees are not permitted to work such irregular overtime is contrary to law. *Id.* at 6.

3. 5 CFR § 551.501 provides for overtime pay. Subpart (c) states: "In this subpart, 'irregular or occasional overtime work' is work that is not scheduled in advance of the employee's workweek."

Finally, the Union contends that the award fails to draw its essence from the Agreement because it is in conflict with the Agreement's general overtime provisions. *Id.* at 7-8. The Union cites the general overtime provisions of the Agreement, which provide compensation for both regular and irregular overtime.⁴ *Id.* Therefore, the Union claims, the overtime provisions of the Agreement establish AWS employees' right to earn irregular overtime, including "suffer or permit" overtime. *Id.* at 7-9. In the Union's view, the award, which denies "suffer or permit" overtime, categorically denies all irregular overtime to AWS employees. Consequently, the Union argues, the award reflects a manifest disregard of the Agreement and is also unfounded, irrational, and not a plausible interpretation of the Agreement. *Id.* at 8-9.

B. Agency's Opposition

As a threshold matter, the Agency disputes the date the award was served on the Union and claims that the Union's exceptions were filed one day late. Opp'n at 2-3.

In regard to the merits, the Agency argues that the award is not contrary to law because it properly denies AWS employees both "suffer or permit" and irregular overtime. *Id.* at 3-4. The Agency contends that the Arbitrator correctly determined that "suffer or permit" overtime is not authorized for AWS employees because it is not overtime that is ordered in advance by management as required by 5 U.S.C. § 6121(6). *Id.* at 4-6. In the Agency's view, the Union's claim for overtime compensation is based on credit hours for which the law does not permit compensation.⁵ *Id.* at 5. The Agency contends that the legislative history of the Act demonstrates

4. Article 10, Section 3, General Overtime Provisions, provides in pertinent part:

C. When an employee, whether covered by the Fair Labor Standards Act or exempt, works regular overtime, such overtime will be scheduled and paid in increments of 15 minutes. When an employee, whether covered by the Fair Labor Standards Act or exempt, works irregular overtime, such overtime will be paid in increments of 15 minutes . . .

Exceptions, Attach., Ex. 2 at 56.

5. AWS employees are not compensated for credit hours unless they opt out of a flexible work program. See 5 U.S.C. §§ 6123(b) & 6126(b).

Congress' intent to avoid the exact claim that is made here: a demand to be compensated for credit hours, which are accrued at the employee's election, by claiming entitlement to "suffer or permit" overtime even though it was not ordered in advance. *Id.* at 6-8.

Furthermore, the Agency contends that the Arbitrator was correct in giving the AWS Handbook persuasive weight when interpreting the Act's application to overtime because the Authority has done so in the past. *Id.* at 9 (citations omitted). Therefore, the Agency argues, the AWS Handbook, which states that AWS employees are not entitled to "suffer or permit" overtime, is persuasive authority that supports the award. *Id.* at 9-10. The Agency further notes that the Agency's Personnel Policy Manual also confirms the validity of the award because it states that employees on flexible work schedules cannot earn "suffer or permit" overtime. *Id.* at 6-7. Based on the foregoing, the Agency concludes that the Union has not shown that the Arbitrator's award is contrary to law.

The Agency also argues that the Union has not established that the award fails to draw its essence from the Agreement. *Id.* at 10-11. The Agency contends that the Union misinterprets the award. *Id.* at 10. Specifically, the Agency asserts that, while the Arbitrator determined that AWS employees are not entitled to "suffer or permit" overtime, he did not make a determination as to whether they are entitled to irregular overtime because the Union failed to provide evidence supporting this claim. *Id.* at 10-11. Therefore, the Agency argues, the Union fails to show that the award does not draw its essence from the Agreement.

IV. Preliminary Issue

The Agency disputes the date the award was served on the Union and claims that the Union's exceptions are untimely. *Id.* at 2-3.

Section 7122(b) of the Statute requires that exceptions be filed within thirty days from the date of service of the award. 5 U.S.C. § 7122(b). Section 2429.22 of the Authority's Regulations provides that five days be added if the award is served by mail or commercial delivery. 5 C.F.R. § 2429.22. The Regulations also provide that the date of filing exceptions by mail is the postmark date. 5 C.F.R. § 2429.21(b).

The Union submitted evidence establishing that it was served with the award by mail on December 29, 2009. Exceptions, Attach., Ex. 1.

Therefore, adding five days as provided by 5 C.F.R. § 2429.22, the Union was required to file its exceptions by February 1, 2010.⁶ The record indicates that the exceptions were postmarked January 29, 2010. Accordingly, the Union's exceptions were timely filed. *See U.S. Dep't of Veterans Affairs, San Diego Healthcare Sys., San Diego, Cal.*, 65 FLRA 45, 47 (2010).

V. Analysis and Conclusions

A. The award is not contrary to law.

The Union contends that the award is contrary to law because the Arbitrator misapplied the law concerning "suffer or permit" overtime under the FLSA. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv.*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Arbitrator found that the Union's claim to irregular overtime was based on the "suffer or permit" provisions of the FLSA. "Suffer or permit" is overtime work performed for the benefit of an agency that management has not ordered in advance, but which management knows or has reason to know is being performed, and which management does not prevent. 5 C.F.R. §§ 551.104 & 401(a)(2). The regulations implementing the FLSA provide for overtime pay but exclude such pay "[f]or hours of work that are not 'overtime hours,' as defined in 5 U.S.C. § 6121, for employees under flexible . . . work schedules[.]" 5 C.F.R. § 551.501(a)(6). Overtime hours for employees on flexible work schedules, as defined in § 6121, are "all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but [do] not

include credit hours." 5 U.S.C. § 6121(6).⁷ "In other words, an employee covered by the FLSA who is on a flexible work schedule may not receive overtime unless ordered in advance" by management. *AFGE, Local 2006*, 65 FLRA 465, 469 (2011). Furthermore, the AWS Handbook, which the Authority finds has persuasive weight on this issue, states that employees on flexible work schedules may not earn "suffer or permit" overtime. *Id.* (finding AWS Handbook persuasive and consistent with statutory and regulatory provisions precluding "suffer or permit" overtime for AWS employees).

The Arbitrator's legal conclusions are consistent with these principles. The Arbitrator found that all of the employees subject to the grievance are AWS employees. The Arbitrator then determined that AWS employees are only entitled to overtime if it is ordered in advance by management. The Arbitrator also found that "suffer or permit" overtime under the FLSA is overtime not ordered in advance. Therefore, the Arbitrator concluded that AWS employees are precluded from receiving "suffer or permit" overtime. Accordingly, the Union's contrary to law contentions do not provide a basis for finding the award deficient.

For the reasons set forth above, we deny the Union's exception that the award is contrary to law.

B. The award does not fail to draw its essence from the Agreement.

Relying on the general overtime provisions in the Agreement, the Union argues that the award fails to draw its essence from the Agreement. When reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent

6. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including §§ 2429.21 and 2429.22, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here.

7. Credit hours are hours that are "in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday[.]" 5 U.S.C. § 6121(4).

a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See, e.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). This standard and the private sector cases from which it is derived make clear that an arbitrator's award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement. *See id.* at 575-76. The courts defer to the arbitrator's interpretation of the collective bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union claims that the award fails to draw its essence from the Agreement by categorically denying all irregular overtime to AWS employees. However, the Arbitrator did not make such a categorical determination. To the contrary, the Arbitrator considered whether AWS employees are entitled to "legitimate" irregular overtime under the Agreement, and found that "the Union failed to present enough evidence that would allow for a conclusion to be drawn that the Agency denied legitimate overtime payments" to any employee, including AWS employees. Award at 2. Therefore, the Union fails to show that the award does not draw its essence from the Agreement on this basis.

The Union also claims that the award fails to draw its essence from the Agreement because the award is inconsistent with Article 10. The Union contends, in this regard, that Article 10 provides compensation for regular and irregular overtime, including "suffer or permit" overtime.

The Union's reliance on Article 10 is misplaced. Article 10 provides, in pertinent part: "When an employee . . . works irregular overtime, such overtime will be paid in increments of 15 minutes . . ." Exceptions, Attach., Ex. 2 at 56. As this wording reflects, Article 10 does not establish any entitlement for AWS employees to earn "suffer or permit" overtime. The Arbitrator found that "the Agreement . . . contains some abstract provisions regarding the counting of incremental time with respect to irregular overtime[.]" Award at 2. As such, the Arbitrator's conclusion is not inconsistent with Article 10 because the article only addresses how employees will be paid for overtime they have earned. Consequently, the Union's claim does not provide any basis for finding that the Arbitrator's interpretation of the Agreement is unfounded, irrational, implausible, or in manifest disregard of the Agreement.

For the reasons set forth above, we deny the Union's exception that the award fails to draw its essence from the Agreement.

VI. Decision

The Union's exceptions are denied.

APPENDIX

Article 10 of the Agreement provides, in pertinent part:

Section 3- General Overtime Provisions

....

C. When an employee, whether covered by the Fair Labor Standards Act or exempt, works regular overtime, such overtime will be scheduled and paid in increments of 15 minutes. When an employee, whether covered by the Fair Labor Standards Act or exempt, works irregular overtime, such overtime will be paid in increments of 15 minutes. . . .

Exceptions, Attach., Ex. 2 at 56.

The Federal Employee Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. §§ 6120-6133 provides, in pertinent part:

5 U.S.C. § 6121 Definitions

For purposes of this subchapter—

....

(4) “credit hours” means any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee’s basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday;

....

(6) “overtime hours”, when used with respect to flexible schedule programs under sections 6122 through 6126 of the title, means all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but does not include credit hours;

5 U.S.C. § 6123

....

(b) Notwithstanding the provisions of law referred to in subsection (a)(1) of this section, an employee shall not be entitled to

be compensated for credit hours worked except to the extent authorized under section 6126 of this title or to the extent such employee is allowed to have such hours taken into account with respect to the employee’s basic work requirement.

5 U.S.C. § 6126

....

(b) Any employee who is on a flexible schedule program under section 6122 of this title and who is no longer subject to such a program shall be paid at such employee’s then current rate of basic pay

5 C.F.R. Part 551- Pay Administration Under the Fair Labor Standards Act provides, in pertinent part:

5 C.F.R. § 551.104 Definitions.

....

Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

5 C.F.R. § 551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is “hours of work.” Such time includes:

....

(2) Time during which an employee is suffered or permitted to work;

5 C.F.R. § 551.501 Overtime pay.

(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee’s hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part --

....

(6) For hours of work that are not "overtime hours," as defined in 5 U.S.C. § 6121, for employees under flexible or compressed work schedules[.]

....

(c) In this subpart, "irregular or occasional overtime work" is work that is not scheduled in advance of the employee's workweek.