64 FLRA No. 202

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
WASHINGTON, D.C.
(Agency)

and

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

0-AR-4427

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DECISION

July 30, 2010

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

I. Statement of the Case

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

The Arbitrator granted, in part, a grievance alleging that the Agency violated federal regulations when it failed to pay overtime pay and per diem reimbursements to employees who assisted the Agency in responding to Hurricanes Rita and Katrina. As a remedy, the Arbitrator ordered backpay and attorney fees. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In anticipation of Hurricanes Katrina and Rita, the Agency sent a number of employees from other facilities to assist prison facilities in Texas and Louisiana with evacuating inmates. Award at 4. For Hurricane Katrina, bus crews -- employees trained to move prisoners safely -- were sent to assist the State of Louisiana. *Id.* The bus crews initially worked out of the Elaine Hunt State Correctional Facility (Elaine Hunt or Elaine Hunt Facility) in Baton Rouge, Louisiana. *Id.* After about eight days, the bus crews were relocated to Oakdale Federal Prison. *Id.* at 5. At the end of this assignment, they returned to their home base. *Id.*

A few weeks later, because of Hurricane Rita, six bus crews were dispatched to Bastrop, Texas. *Id.* When the hurricane hit in Beaumont, Texas, the bus crews made runs to Beaumont, delivering food and, on return, evacuating prisoners. *Id.* After about a week, the bus crews moved to the Federal Correctional Facility in Beaumont, Texas (Beaumont or Beaumont Facility). *Id.* At that location, the training center where employees were being housed was filled; as a result, the bus crews slept on the buses for several days. *Id.*

Special Operational Response Teams (SORT) -- specially-trained volunteer teams used in emergencies of all kinds -- also were sent to the Beaumont Facility to support local staff. *Id.* at 4, 6-8. A SORT team of eight employees, which had been assigned to Beaumont shortly after the hurricane hit, stayed for approximately twelve days. *Id.* at 6. This team slept on the floor of the training center, using sleeping bags. *Id.* at 7. Other SORT teams experienced similar conditions.

The Union filed a grievance alleging that the Agency failed to pay the employees properly. The grievance was not resolved and was submitted to arbitration. The parties stipulated to the following issues:

> 1. Did the Agency fail to pay employees who were on temporary duty status [(TDY)] during Hurricanes Rita and Katrina in accordance with applicable laws, rules, and regulations?[1]

1. The parties stipulated that the relevant regulations included 5 C.F.R. § 551.432. *See* Award at 2. The relevant text of this regulation provides:

> (a) Except as provided in paragraph (b) of this section, *bona fide* sleep time that fulfills the following conditions shall not be considered hours of work if:
>
> (1) The work shift is *24 hours or more*;
>
> (2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and
>
> (3) There are at least 5 hours available for such time during the sleep period.

5 C.F.R. § 551.432.

2. Did the Agency fail to properly pay per diem rates to such employees?

3. If either of the above questions is answered in the affirmative, what is the appropriate remedy?

Id. at 1.

The Arbitrator determined that 5 C.F.R. § 551.432 applied to SORT teams that were on 16-hour shifts. *Id.* at 13. The Arbitrator considered testimony concerning the 16-hour shifts and found that, "[d]efining the work shift as separate 16-hour days with supposedly . . . free time off in between, rather than as one continuous long shift or as 24-hour shifts[,] which include eight hours of presumed sleep time, appears to be an arbitrary distinction without a practical difference." *Id.* The Arbitrator noted that this did not "automatically" mean that these employees were in "work status for 24 hours of every day" that they were at Beaumont because the situation was not the same for the entire time. *Id.* at 14. The Arbitrator found that, for a period of time after their arrival, the SORT team employees were presented with "so much noise and such inadequate living conditions" that they had "less than five continuous hours of sleep a night." *Id.* The Arbitrator thus found, based on credited testimony, that SORT team employees are entitled to pay for 24 hours for each day that they "were scheduled for what the Agency characterized as a '16 hour shift' between the onset of the hurricane and the end of such a shift which began at any time on the following Thursday." *Id.* at 15.

The Arbitrator also found that bus crews that were assigned to 16 hour shifts at Beaumont were covered by 5 C.F.R. § 551.432. *Id.* The Arbitrator found that, during the first four days that the bus crews were there, they slept on buses and were given "what appear[ed]" to be 16-hour shifts "with possibly longer hours in practice[.]" *Id.* The Arbitrator concluded that "any bus crew which was given a 16[-]hour shift at Beaumont is entitled to the same presumption of less than five hours' sleep during the first four days after they arrived at Beaumont[.]" *Id.*

The Arbitrator also found that bus crews assigned to Elaine Hunt and similar facilities were entitled to full per diem because the Agency had not established that it had provided them with meals during such time. *Id.* at 16. As to Beaumont, the Arbitrator determined that, because the Agency had made some food available, SORT team and bus crew employees assigned there were entitled to "repayment for any meals which [they] actually purchased as a result of finding insufficient food available on-site" and that those who purchased food from a local store also were entitled to reimbursement. *Id.* (citing § 301-11.17 and 11.18 of the Federal Travel Regulations (FTRs)).[2]

The Arbitrator then addressed the Union's request for attorney fees. As an initial matter, the Arbitrator noted that the Agency did not argue against either the request itself or the calculation of the amount. *Id.* The Arbitrator then found that the Union had "prevailed on the merits of th[e] matter to a substantial degree, that the legal reasons supplied in support of the request . . . appear sufficient on their face, and that both the actual amounts and the methods of calculation appear reasonable under the circumstances." *Id.* The Arbitrator, thus, awarded the Union attorney fees in the amount of $16,956.42.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to 5 C.F.R. § 551.432. Exceptions at 4. The Agency asserts that 5 C.F.R. § 551.432 applies if the "work shift is 24 hours or more"; therefore, if an employee is on a 16-hour shift, the "plain language" of 5 C.F.R. § 551.432 indicates that it would not apply. *Id.* at 6.

2. The pertinent text of § 301-11.17 and 11.18 of the FTRs, which the parties stipulated were relevant, provides as follows:

> 301-11.17: If my agency authorizes per diem reimbursement, will it reduce my [Meals and Incidental Expenses (M & IE)] allowance for a meal(s) provided by a common carrier or for a complimentary meal(s) provided by a hotel/motel?
>
> Answer: No. A meal provided by a common carrier or a complimentary meal provided by a hotel/motel does not affect your per diem.
>
> 301-11.18: What M & IE rate will I receive if a meal(s) is furnished at nominal or no cost by the Government . . . ?
>
> Answer: Your M & IE rate must be adjusted for a meal(s) furnished to you (and except as provided in 301-11.17) . . . . If you pay for a meal that has been previously deducted, your agency will reimburse you up to the deduction amount . . . .

Award at 2 & 4.

The Agency contends that the Arbitrator specifically found that employees on the "SORT Team at . . . Beaumont [were] on 16 hour shifts." *Id.* The Agency claims that the Arbitrator erroneously determined that, because the shifts occurred over a number of days, they were "continuous in nature" and the regulation applied. *Id.* The Agency asserts that the Arbitrator "misinterprets the plain meaning of 5 C.F.R. § 551.432" because it is "intended to apply to shifts of 24 hours or more" and that the employees at issue "were on 16 hour shifts and not required to be in a continual state of readiness." *Id.* at 6-7.

The Agency also disagrees with the Arbitrator's award of "full per diem" to any employee who was on one of the temporary duty assignments. *Id.* at 7 n.3. The Agency asserts that all employees were given per diem, less the amount required by the FTRs for meals provided by the Agency. *Id.* The Agency contends that because "some employees did not like the meals, or chose to go to local convenience stores to purchase food, does not render the award appropriate." *Id.* According to the Agency, under 5 U.S.C. § 5702, the employees are not entitled to full per diem when they were provided meals by the Agency. *Id.*

The Agency contends that the attorney fee award is contrary to law because it is both "premature" and "inappropriate." *Id.* at 8 (citing the Back Pay Act and 5 U.S.C. § 7701(g)). The Agency asserts that the award is premature because the Arbitrator did not request any briefs on the matter and awarded attorney fees at the "same time he made a decision on the merits." *Id.* The Agency contends that only the Union addressed the issue of attorney fees. Further, according to the Agency, because the Union raised this issue in its post-hearing brief, the Agency had had "no opportunity to respond" to the Union's request. *Id.* The Agency also asserts that the Arbitrator did not "specifically articulate any of the reasons" that the award is appropriate under 5 U.S.C. § 7701(g), and argues further that the award should be denied because it is not in the interest of justice. *Id.* at 9. The Agency claims that "[i]t did not know, nor should it have known, that it would not be the prevailing party[.]" *Id.*

B. Union's Opposition

The Union asserts that the award is not contrary to 5 C.F.R. § 551.432. Opp'n at 2. Additionally, referring to its post-hearing brief, the Union contends that the Agency has not demonstrated that the award of per diem is contrary to 5 U.S.C. § 5702. *Id.*

The Union next asserts that the Agency's claim that the Arbitrator "did not request any briefs" concerning attorney fees is "false." *Id.* at 2. According to the Union, at the hearing in this case, the Arbitrator "specifically noted the Union had requested" attorney fees; that he stated that he was not "familiar with the Back Pay Act[] provisions" regarding attorney fees; and that he requested the parties to brief this issue in their post-hearing briefs. *Id.* at 3. The Union asserts that the Agency did not comply with this request. Further, the Union contends that "nothing prevented the Agency from responding" to the Union's Post-Hearing Brief. *Id.* The Union asserts that the post-hearing briefs "were submitted on or about July 11, 2008," and the award was not issued until September 6, 2008. *Id.* at 2 n.2. The Union argues that the Agency had "plenty of time to respond" to the Union's brief. *Id.* The Union also asserts that the attorney fee award should be upheld because the Arbitrator was persuaded by the reasoning in its brief. *Id.* at 3.

IV. Analysis and Conclusions: The award is not contrary to law.

We review questions of law and government-wide regulations raised by exceptions to an arbitrator's award *de novo*. *See U.S. Dep't of the Army, Evans Army Cmty. Hosp., Fort Carson, Colo.*, 58 FLRA 244, 245 (2002). In applying a standard of *de novo* review, we determine whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that determination, we defer to the arbitrator's underlying findings of fact. *See id.* The Agency contends that the award is contrary to 5 C.F.R. § 551.432, 5 U.S.C. § 5702, the Back Pay Act, and 5 U.S.C. § 7701(g).

A. 5 C.F.R. §§ 551.432

Section 551.432 establishes the criteria for determining whether sleep time constitutes hours of work for which an employee will be compensated. *See AFGE, AFL-CIO, Local 2354*, 30 FLRA 1130, 1140 (1988). Sleep time is not "considered hours of work" if: (1) the work shift is 24 hours or more; (2) during such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and (3) there are at least 5 hours available for such time during the sleep period. 5 C.F.R. § 551.432(a).

The Agency argues that, because the Arbitrator found that SORT team employees were on 16-hour shifts, the award does not satisfy 5 C.F.R. § 551.432's requirement that a work shift be

"24 hours or more." Exceptions at 6 (citing to Award at 13).

The Agency misconstrues the award. The Arbitrator's conclusion that 5 C.F.R. § 551.432 applies to SORT teams and bus crews assigned to the Beaumont Facility is based on specific findings of fact that the employees were on 24-hour work shifts. In this regard, although the Arbitrator referred to 16-hour shifts, the Arbitrator rejected the Agency's "belie[f] that . . . 16 hour shifts constituted discrete events, not one continuous shift with sleep time in between work periods." Award at 13. The Arbitrator found that "[d]efining the work shift as separate 16 hour days . . . rather than as one continuous long shift or as 24-hour shifts" was an "arbitrary distinction without a practical difference." *Id.* The Arbitrator found that, for a certain period, SORT team employees "are entitled to pay for 24 hours for each day for which they were scheduled for what the Agency characterized as a 16 hour shift . . . ." *Id.* at 15. These findings demonstrate that the Arbitrator determined that the disputed employees were on 24-hour shifts. The Arbitrator's findings also establish that, during the specified time, these employees experienced so much noise and such inadequate living conditions that they had "less than five" hours of continuous sleep a night. *Id.* at 14. The Arbitrator found that, in these circumstances, the requirements of 5 C.F.R. § 551.432 were satisfied. *Id*. The Arbitrator also found that bus crews assigned to the Beaumont Facility for certain days experienced conditions similar to the SORT teams, thereby also satisfying the requirements of 5 C.F.R. § 551.432. *Id*. at 15.

Based on the Arbitrator's specific factual findings, which are not disputed and to which the Authority defers, the Arbitrator's conclusion that SORT team and bus crew employees assigned to the Beaumont Facility were on 24-hour shifts and entitled to compensation is consistent with 5 C.F.R. § 551.432. Accordingly, we find that the award is not contrary to 5 C.F.R. § 551.432.

B. 5 U.S.C. § 5702

The payment of employee travel expenses is governed by provisions of the Travel Expenses Act (TEA), 5 U.S.C. § 5701and the FTRs. *See U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780 (2010). The Agency only cited § 5702 of the TEA, which concerns per diem with respect to employees traveling on official business, and did not specifically cite any provision under this section or the FTRs. *See* Exceptions at 7 n.3. Section 5702 (a)(1) provides that when an employee is "traveling on official business away from the employee's designated post of duty," he or she is entitled to a per diem allowance, reimbursement for "the actual and necessary expenses of official travel[,]" or a combination of both. 5 U.S.C. § 5702 (a)(1).

The Agency disagrees with the portion of the award that requires it to pay "full per diem" to employees, asserting that, under 5 U.S.C. § 5702, the employees are not entitled to full per diem "when [they] were actually provided meals by the Agency[.]" *Id.* at 7 n.3. In resolving the per diem issue, the Arbitrator applied § 301-11.17 & 11.18 of the FTRs that concern TDY travel allowances, which the parties stipulated were "relevant" in this case. Award at 2 & 4. The Arbitrator found that bus crews who worked out of Elaine Hunt, Oakdale, and similar facilities were entitled to full per diem because the evidence established that the Agency did not provide these employees with meals during their assignment. *See id.* at 16. With respect to SORT teams and bus crews assigned to the Beaumont Facility, the Arbitrator found that, because some food had been provided by the Agency, these employees were entitled to payment only for food they actually purchased as a result of finding, at times, that "insufficient food [was] available on-site." *Id.* at 16. These findings, which are not disputed and to which the Authority defers, show that, in the first situation, meals were not provided and, in the second situation, meals were insufficient. Thus, contrary to the Agency's claim, we find nothing, nor has the Agency identified anything, in 5 U.S.C. § 5702 or the relevant FTRs that establish the Arbitrator's award is inconsistent with 5 U.S.C. § 5702.

Accordingly, we find that the award is not contrary to 5 U.S.C. § 5702.

C. The Back Pay Act and 5 U.S.C. § 7701(g)

The Back Pay Act expressly provides that an employee affected by an unjustified or unwarranted personnel action is entitled, on correction of the personnel action, to receive "reasonable attorney fees related to the personnel action[.]" 5 U.S.C. § 5596(b)(1)(A)(ii). Regulations implementing this portion of the Act require that, to be awarded attorney fees by an arbitrator, the grievant or the grievant's representative must present a request for fees to the arbitrator, who must provide the employing agency with an opportunity to respond. *See* 5 C.F.R. § 550.807(a)-(b).

The Agency contends that the attorney fee award is contrary to law because it is "premature" and "inappropriate." Exceptions at 8 (citing the Back Pay Act and 5 U.S.C. § 7701(g)). The Agency asserts that the award is premature because the Arbitrator awarded attorney fees at the "same time he made a decision on the merits" and that it had "no opportunity to respond" to the appropriateness of the Union's request. *Id.*

The Agency has not demonstrated that the award of attorney fees was premature. The Authority has held that it is not premature to request attorney fees as part of an arbitrator's award on the merits of a grievance. *See Health Care Fin. Admin., Dep't of HHS*, 35 FLRA 274, 289-90 (1990) (*HHS*) (citing *Phila. Naval Shipyard*, 32 FLRA 417, 420 (1988) ("While such requests [for attorney fees] may be submitted during the course of an arbitration proceeding, nothing . . . requires that a request for attorney fees be made before an award is final and binding.")). Further, the Authority has determined that arbitrators may rule on requests for attorney fees simultaneous to rendering a decision on the merits of a grievance. *See id*. at 290 (citations omitted).

Moreover, the Agency has not demonstrated that it had "no opportunity to respond" to the Union's attorney fee request. Exceptions at 8. In its Post-Hearing Brief to the Arbitrator, the Union requested that it be awarded attorney fees in accordance with law. *See* Union Opp'n, Attach. A at 1 & 13-18. Also, the Union's Post-Hearing Brief and Petition for Attorney Fees included documentation that certified the Agency had been served with the Union's request. *See* Opp'n, Attach. A at 19. Further, the parties' post-hearing briefs were submitted on July 11, 2008, and the award was not issued until September 6, 2008, almost two months after the fee request was filed with the Arbitrator and served on the Agency. *See* Award at 17; Exceptions, Attach. B at 8; Opp'n, Attach. at 19. The record thus demonstrates that the Agency had an opportunity to respond to the attorney fee request. The Agency does not assert, and the record does not show, that it made any attempt during this period to address the attorney fee issue before the Arbitrator. *See, e.g., U.S. Dep't of HHS, SSA*, 48 FLRA 1040, 1044 (1993) (finding agency had opportunity to respond to attorney fee request, consistent with 5 C.F.R. § 550.807(b), where award was not issued until approximately two months after the fee request was filed with the arbitrator and served on the agency).

Further, as the Agency could have, but failed to, raise any arguments challenging the Union's request -- which included a requested fee amount and legal reasons supporting the request -- the Agency is precluded from raising such issues before the Authority. Section 2429.5 of the Authority's Regulations provides that the Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5. As found above, the Agency had an opportunity to respond to the request for attorney fees but did not "argue against" it. Award at 16. We also note that, although the parties' post-hearing briefs were submitted simultaneously, the Agency does not argue that either the Arbitrator or the parties' collective bargaining agreement precluded the Agency from responding to the Union's post-hearing brief. Accordingly, we find that the exception claiming the award is contrary to the Back Pay Act and § 7701(g) is barred from our consideration by § 2429.5. *See, e.g., U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 87, 91 (2002) (agency precluded under § 2429.5 from raising objections to award of attorney fees with respect to certain matters that agency did not raise before arbitrator).

V. Decision

The Agency's exceptions are denied.