**65 FLRA No. 54**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL
OF EEOC LOCALS NO. 216
(Union)

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
(Agency)

0-AR-4581

_____

DECISION

November 15, 2010

_____

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 Steven M. Wolf filed by the Union under § 7122 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.[1]

In his original award (original award), the Arbitrator found that the Agency violated the Fair Labor Standards Act (FLSA) and further found, in a clarification award (clarification award), that affected employees were entitled to liquidated damages equal to the amount of overtime compensation owed minus compensatory time already used. For the reasons discussed below, we deny the Union's exceptions.

## II. Background and Arbitrator's Award

The Union filed a grievance alleging, as relevant here, that the Agency violated 29 U.S.C. §§ 207 and 216(b) by effectively requiring employees to request compensatory time off in lieu of overtime compensation.[2] *See* Original Award at 1-2, 77. The Arbitrator framed the issue before him as: "[W]hether the Agency . . . violated the FLSA by . . . [creating] suffered or permitted overtime [by] . . . wrongly . . . granting . . . compensatory time instead of . . . overtime." *Id.* at 76-77. The Arbitrator sustained the grievance and, as relevant here, determined that the Agency owed any affected employees overtime compensation and liquidated damages. *See id.* at 77, 79. The Arbitrator directed the parties to attempt to determine which employees were owed overtime, and how much overtime each employee was owed.[3] *See id.* at 79.

After engaging in settlement discussions, the parties asked the Arbitrator to clarify how liquidated damages would be calculated. *See* Exceptions, Attach. 3 at 1-2 (Union Letter); Exceptions, Attach. 4 (Memo) at 1-4. In the clarification award -- the award at issue here -- the Arbitrator ruled, in pertinent part, that "liquidated damages shall be calculated after, not before, deduction of the monetary value of compensatory time granted and taken by eligible employees." Clarification Award at 1.

## III. Positions of the Parties

### A. Union's Exceptions

The Union asserts that the Arbitrator's "calculation of liquidated damages is contrary to the law" because the Arbitrator deducted compensatory time already paid from overtime compensation owed before determining the amount of liquidated damages. Exceptions at 4-5. (citing *U.S. Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543 (2001) (*Naval Sea Sys.*)). According to the Union, the Arbitrator thereby reduced liquidated damages which, the Union argues, "may only be reduced upon a showing of good faith by the employer[.]" *Id.* at 3

1. As discussed further below, the parties also submitted additional filings in connection with an Authority show-cause order.

2. 29 U.S.C. § 207(a) states, in pertinent part, that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." As relevant here, 29 U.S.C. § 216(b) states that an employer who violates § 207 of the FLSA shall be liable to affected employees "in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."

3. Neither party filed exceptions to the original award. *See* Exceptions at 2; Opp'n at 1-2.

(citing 29 U.S.C. §§ 216(b) and 260;[4] *U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 286 (2000) (*Indian Head*)). *See also id.* at 4-5 (citing *U.S. Dep't of Commerce, NOAA, Office of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, Va.*, 57 FLRA 559, 564 (2001) (*NOAA*)).

Additionally, the Union argues that the clarification award is contrary to law because the Arbitrator deducted unused compensatory time from the backpay award. *See* Exceptions at 5 (citing *SSA, Memphis, Tenn.*, 59 FLRA 564, 567 (2004) (*SSA*)).

B. Agency's Opposition

The Agency contends that the Union's exceptions are interlocutory because the Arbitrator did not "completely resolve all issues submitted for arbitration" including "the identification of the aggrieved individuals and the amounts of damages to which each is entitled[.]" Opp'n at 4 (citing *U.S. Dep't of Veterans Affairs, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 174-75 (2005) (*Veterans*); *Navy Pub. Works Ctr., San Diego, Cal.*, 27 FLRA 407, 408 (1987) (*Public Works*)). On the merits, the Agency alleges that the Arbitrator correctly calculated liquidated damages, as compensatory time already used does not constitute "unpaid" overtime under 29 U.S.C. § 216(b). Opp'n at 5. Further, the Agency asserts that the Arbitrator's calculation of liquidated damages is consistent with how Federal courts have calculated liquidated damages in similar contexts. *See id.* at 6-7 (citing *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1330 (7th Cir. 1987) (*Coston*), *cert. denied*, 485 U.S. 1007 (1988), *vacated on other grounds*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988); *Lupien v. City of Marlborough*, 387 F.3d 83, 89-90 (1st Cir. 2004) (*Lupien*)). Finally, the Agency asserts that the award does not grant credit for unused compensatory time, as the Union claims. *See* Opp'n at 7.

## IV. Analysis and Conclusions

A. Preliminary matter: The Union's exceptions are not interlocutory.

The Authority issued an order to show cause, directing the Union to show cause why the Authority should not dismiss the exceptions as interlocutory. *See* Order to Show Cause at 1-3. In its response, the Union asserts that the Arbitrator resolved all of the issues before him, as he "determined the remedy to be applied" in the original award, Response at 2, and his ruling in the clarification award as to how liquidated damages will be calculated constitutes a final award. *Id.* at 3. In the alternative, the Union claims that the Authority should consider the exceptions because "exceptional circumstances exist" that will materially advance the dispute in a way that would "assure the correct application of the law" and the "claims of individuals[.]" *Id.* at 3-4.

In a reply to the Union's response,[5] the Agency counters that "neither the [original award] nor the [clarification award] completely resolved all issues submitted for arbitration" because the Arbitrator had not resolved "the identification of aggrieved individuals or the amount of damages . . . to which they might be entitled." Reply at 4 (citing *U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 925-26 (2002) (*HHS*)). Further, the Agency contends that the clarification award is "not a . . . clarification[]" because the Union did not adhere to the requirements for requesting a clarification under the parties' agreement. *See id.* Therefore, the Agency claims, "the [clarification award] cannot be treated as a clarification which can be the subject of an exception." *Id.* Finally, the Agency argues that the Union's exceptions do not present a plausible jurisdictional defect that would warrant review of an interlocutory appeal. *See id.* at 5.

Section 2429.11 of the Authority's Regulations provides, in pertinent part, that "the Authority . . . ordinarily will not consider interlocutory appeals." Accordingly, the Authority will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Transp., FAA, Wash., D.C.*, 60 FLRA 333, 334 (2004). Exceptions to an award are not interlocutory where an arbitrator has retained jurisdiction solely to assist the parties in the

4. As relevant here, 29 U.S.C. § 260 states that under the FLSA, if the employer "shows . . . that the act or omission giving rise to [the FLSA] action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of t[he FLSA,]" then a court may "award no liquidated damages or award any amount thereof not to exceed the amount specified in" 29 U.S.C. § 216.

5. The order to show cause permitted the Agency to reply to any Union response. Order to Show Cause at 3.

implementation of awarded remedies, including the specific amount of monetary relief awarded. *See, e.g., U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009) (*IRS*); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007). In addition, the Authority has held that an award holding an agency liable for unpaid overtime was final, and that exceptions to it were not interlocutory, even though the award did not identify, among other things, which employees were affected by the agency's actions. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (*ADX*).

Contrary to the Agency's claim, the original award completely resolved the issue submitted to arbitration -- whether the Agency violated the FLSA by failing to pay employees overtime compensation -- by finding that the Agency violated the FLSA and therefore owed affected employees overtime compensation and liquidated damages. *See* Original Award at 77, 79-80. Further, the fact that the Arbitrator did not identify the specific employees to whom overtime compensation was owed and did not determine the amount of overtime compensation owed, does not render the original award non-final for the purposes of determining whether the Union's exceptions are interlocutory. *See ADX*, 64 FLRA at 1170. Moreover, the clarification award, to which the exceptions here pertain, did not leave any submitted issues unresolved. Additionally, the decisions cited by the Agency do not demonstrate that either award is not final. In this regard, nothing in *Veterans*, 61 FLRA at 174-75, indicates that either the original award or the clarification award failed to completely resolve all of the issues submitted to arbitration. Moreover, unlike the situation here, the award in *Public Works*, 27 FLRA at 408, did not provide any type of remedy. Further, whereas the award in *HHS*, 57 FLRA at 926, entitled "Phase One Interim Award[,]" indicated, by its name, that the award was not final, neither the original award nor the clarification award in this case contains such indication. With regard to the Agency's claim that the Union did not adhere to the requirements of the parties' agreement in requesting a clarification of the award, the Agency does not provide any basis for finding the clarification award is not a final award to which the Union may file exceptions.

For the foregoing reasons, we find that the Union's exceptions are not interlocutory, and we consider them.[6]

B. The clarification award is not contrary to law.

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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dept's of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making this assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The FLSA provides that when an employer has not shown that it acted in good faith, the employer shall be liable for "*unpaid* overtime compensation . . . and . . . an additional equal amount [of] liquidated damages." 29 U.S.C. § 216(b) (emphasis added). Consistent with this wording, Federal courts have awarded or upheld awards of liquidated damages equal to *unpaid* overtime compensation, that is, overtime compensation minus compensatory time already paid. *See, e.g., D'Camera v. District of Columbia*, 722 F.Supp. 799, 803-04 (D.D.C. 1989) (*D'Camera*); *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 74, 76-77 (1st Cir. 1998) (*Roman*). *Cf. Coston*, 831 F.2d 1329-30 ("the amount of actual harm done the plaintiff must be determined prior to doubling the damage award as required to establish liquidated damages" such that "amounts earned in mitigation of the backpay compensatory award must be deducted prior to doubling" when determining damages under the Age Discrimination Employment Act, which incorporates the remedial scheme of the FLSA).

Consistent with the above precedent, the Arbitrator determined that liquidated damages should equal the actual harm to affected employees, i.e., the overtime compensation owed minus compensatory time already used. Moreover, the decisions cited by the Union are inapposite because they do not address

6. As we have found that the Union's exceptions are not interlocutory, it is not necessary to determine whether they present a plausible jurisdictional defect that would warrant review of an interlocutory appeal.

how liquidated damages should be calculated. *See Indian Head*, 56 FLRA at 286 (liquidated damages warranted where agency did not act in good faith under the FLSA); *NOAA*, 57 FLRA at 564 (agency acted in good faith under the FLSA); *Naval Sea Sys*, 57 FLRA at 545-48 (upholding award of backpay). As such, the Union has not demonstrated that the Arbitrator's calculation of liquidated damages is contrary to law. Therefore, we deny this exception.

Finally, the Union contends that the award improperly "provid[es] a credit for compensatory time granted" rather than compensatory time used. Exceptions at 5. Contrary to the Union's assertion, the award deducts "compensatory time *granted and taken* by eligible employees." Clarification Award at 1 (emphasis added). Thus, the award is not contrary to *SSA*, 59 FLRA at 567, where the Authority held that an award of overtime pay must be reduced to the extent that employees have already used compensatory time. *See* Exceptions at 5.

For the foregoing reasons, we deny the Union's exceptions.

## V. Decision

The Union's exceptions are denied.