65 FLRA No. 73

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4602

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DECISION

December 17, 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

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn 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 concluded, among other things, that the Agency improperly designated the Auditors, encompassing positions at grades 9 through 13, (hereinafter Auditors) as exempt under the Fair Labor Standards Act (FLSA) and ordered the Agency to pay liquidated damages. Opinion and Interim Award at 45, 50; Opinion and Third Interim Award at 27. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency employs roughly 300 Auditors nationwide who work in the Office of International Trade, Office of Regulatory Audit. Opinion and Interim Award at 5. The Union filed a grievance on behalf of these Auditors, asserting that the Agency had improperly classified them as FLSA exempt.[1] *Id.* at 1. After the Agency failed to respond to the Union's grievance, the Union invoked arbitration. *Id.* at 2. The parties stipulated to the following issue: "[w]hether the [Agency] improperly exempted employees covered by the grievance from the overtime provisions of the [FLSA?] . . . . If [so], what shall be the remedy?" *Id.* at 3.

In his opinion and interim award, the Arbitrator found that the Agency improperly designated the Auditors as FLSA exempt. *Id.* at 45, 50. The Arbitrator first examined whether the Auditors met the professional exemption.[2] *Id.* at 39-44. The Arbitrator determined that the Auditor position satisfied the primary duty test of this exemption. *See Id.* at 38, 40.

However, the Arbitrator found that the Agency failed to establish that the Auditor position satisfied the discretion and independent judgment test. *Id.* at 41-44. The Arbitrator determined that the Auditors do not exercise discretion and independent judgment because their work is constrained by the Focused Assessment Program (FA Program) policy and the Regulatory Audit Division Manual (RAD Manual), which "describe, in exacting, exhaustive detail the work to be performed by [the] Auditors." *Id.* at 41. According to the Arbitrator, testimony demonstrated that the Auditors consider the FA Program policy and the RAD Manual to be the "Bible" of their work and that "the purpose of the FA Program policy and the RAD Manual is to create uniform procedures for the conduct of the audits and to minimize the exercise of discretion by individual auditors." *Id.* Similarly, the Arbitrator noted that the Auditors must adhere to Government Accountability Office Generally Accepted Government Auditing Standards (GAGAS)

1. The Union also filed its grievance on behalf of Field Analysis Specialists, Chemists, Textile Analysts, and Information Technology Specialists. Opinion and Interim Award at 1. In addition to addressing the FLSA exemption status of the Auditors in his opinion and interim award, the Arbitrator addressed whether grade 14 Auditors and Field Analysis Specialists are FLSA exempt. *Id.* at 45-50. The Arbitrator also issued an opinion and second interim award which "resolved the [p]arties' dispute concerning the FLSA status of the bargaining unit employees in the Chemist (GS-1320), Textile Analyst (GS-1384) and Information Technology Specialist (GS-2210) [positions]." Opinion and Third Interim Award at 1-2. Because the Agency did not except to the Arbitrator's findings regarding the FLSA exemption status of these positions, they are not before us.

2. An employee is considered FLSA exempt under the professional exemption if the agency can establish that the primary duty, discretion and independent judgment, intellectual and varied work, and 80-percent tests are met. 5 C.F.R. § 551.207. The relevant provisions of 5 C.F.R. § 551.207 are set forth in the appendix to this decision.

and Agency policies when conducting audits. *Id.* Also, the Arbitrator determined that the Auditors' work is subject to extensive supervisory review and heavily edited by management officials. *Id.* at 41-42. The Arbitrator decided that the Auditors are not professional employees; rather, they are line or production employees because they follow policy instead of executing policy, and carry out the Agency's mission and day-to-day functions. *Id.* at 42, 43. Finally, relying upon 29 C.F.R. § 541.203(j), a Department of Labor (DOL) regulation involving the administrative exemption, the Arbitrator determined that, because the Auditors' work is similar to the duties performed by inspectors and investigators who are FLSA nonexempt, the Auditors' work fails to satisfy the professional exemption. *Id.* at 43-44.

Also, the Arbitrator found that the Agency failed to demonstrate that the Auditors were exempt from the FLSA under the administrative exemption.[3] *Id.* at 44-45. The Arbitrator noted that the administrative exemption contains the same discretion and independent judgment test as the professional exemption. *Id.* The Arbitrator determined that, because the Auditors rely heavily on the FA Program policy, the RAD Manual, and GAGAS requirements, they lack sufficient discretion and independent judgment. *Id.* at 45. Moreover, the Arbitrator noted that the Auditors do not satisfy the administrative exemption because, based on the record, "their work is essentially comparable to that of ordinary inspectors, as described in 5 CFR § 551.206(n)[,] who are FLSA [n]onexempt."[4] *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law because the Arbitrator improperly relied on non-controlling and obsolete DOL regulations. Exceptions at 6-8. The Agency claims that the Arbitrator's statement that "'[i]t is well-established that, in the event of [a] perceived conflict between DOL and [Office of Personnel Management (OPM)] guidance, DOL regulations govern'" is an incorrect statement of the law. *Id.* at 6 (quoting Opinion and Interim Award at 36); *see also id.* at 7. According to the Agency, the Arbitrator should have relied solely on OPM regulations to determine whether the Auditors are FLSA exempt because "OPM was given [the] responsibility . . . [of] administering the provisions of the FLSA with respect to the federal workforce." *Id.* at 7 (citations omitted). Moreover, the Agency claims that, even assuming the Arbitrator properly relied on DOL regulations in determining whether the Auditors are FLSA exempt, the DOL regulations that the Arbitrator cited in his award are obsolete. *Id.* (citing 69 Fed. Reg. 22,122-01 (Apr. 23, 2004)).

Also, the Agency claims that the award is contrary to law because the Arbitrator improperly relied on a "new" version of the OPM regulations. *Id.* at 8-9. The Agency asserts that the new OPM regulations are not applicable because "the Agency's decision to classify its Auditors as exempt from the FLSA . . . was made pursuant to an earlier version of the regulations (i.e., the 2006 version)." *Id.* at 8. According to the Agency, the Arbitrator should not have applied the new OPM regulations because OPM included a preamble "stating that these new regulations have 'no retroactive effects.'" *Id.* (citing 72 Fed. Reg. 52,753, 52,761 (Sept. 17, 2007)). Moreover, the Agency claims that, although the 2006 and the new OPM regulations are similar, the amendments modified the professional exemption's primary duty test by including additional requirements that did not exist in the 2006 regulations. *Id.* at 8-9.

The Agency asserts that the award is contrary to law because the Arbitrator applied the incorrect legal standard in assessing the professional exemption's primary duty test. *Id.* at 9-13. The Agency claims that the Arbitrator improperly "appli[ed] the primary duty test for the *administrative* exemption to conclude that the Agency's Auditors fail the primary duty test for the *professional* exemption." *Id.* at 10 (emphasis in original); *see also id.* at 12.

Finally, the Agency claims that the award is contrary to law because the Arbitrator failed to apply certain OPM and DOL regulations when analyzing the discretion and independent judgment test. *Id.* at 13-16. The Agency asserts that the Arbitrator

3. An employee is considered FLSA exempt under the administrative exemption if the agency can establish that the primary duty, nonmanual work, discretion and independent judgment, and 80-percent tests are met. 5 C.F.R. § 551.206. The relevant provisions of 5 C.F.R. § 551.206 are set forth in the appendix.

4. The Arbitrator also issued an opinion and third interim award in which the arbitrator ordered the agency to pay liquidated damages and determined that a three year statute of limitations period applied. Opinion and Third Interim Award at 26-27. Because the Agency does not except to the Arbitrator's findings in his opinion and third interim award, this opinion is not before us.

should have applied certain OPM regulations explaining that "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." *Id.* at 15 (citing 5 C.F.R. § 551.104). Also, the Agency claims that the Arbitrator should have relied upon certain DOL regulations indicating that "'[t]he use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial[,] or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption . . . .'" *Id.* at 15-16 (quoting 29 C.F.R. § 541.704). Finally, the Agency asserts that, instead of comparing the Auditors with inspectors, the Arbitrator should have taken into account the similarities between the Auditors and accountants, who are FLSA exempt.[5] *Id.* at 16.

B. Union's Opposition

The Union argues that the Arbitrator's conclusion that the Agency failed to demonstrate that the Auditors were FLSA exempt under either the professional exemption or the administration exemption was not contrary to law. Opp'n at 8-22.

The Union contends that the award is not contrary to law because the Arbitrator properly applied both the OPM and DOL regulations and did not rely on obsolete DOL regulations. *Id.* at 22-25. According to the Union, "the Authority has roundly rejected the argument that DOL regulations play no role in the analysis of the exemption status of federal employees." *Id.* at 22. Also, the Union argues that the Agency mischaracterizes the Arbitrator's reliance on the DOL regulations; the Union notes that the Arbitrator did not entirely disregard the OPM regulations as claimed by the Agency and never perceived a conflict between the OPM and DOL regulations. *Id.* at 24. Moreover, the Union contends that, "[w]hile the [a]ward does cite to pre-2004 DOL regulations, the provisions cited by the Arbitrator remain in effect." *Id.* at 25. According to the Union, because "[n]one of the propositions established in the 2004 regulations cited in the [a]ward were eliminated (or even substantially changed) in later revisions[,] . . . the Agency has not identified a single regulatory provision that is obsolete." *Id.* at 26.

Also, the Union argues that the award is not contrary to law even though the Arbitrator incorrectly applied the "new" version of the OPM regulations. *Id.* at 11 n.3, 26-28. The Union contends that, contrary to the Agency's interpretation of the award, "the Arbitrator did not [add] any additional requirements [to the primary duty test] and [found] *for the Agency* with respect to the primary duty test of the professional exemption." *Id.* at 27 (citing Opinion and Interim Award at 40) (emphasis in original). According to the Union, in stating that "there are more *tests* than just the positive education requirement[,]" the Arbitrator simply meant that, in addition to satisfying the primary duty test, the Agency must also demonstrate that an employee exercises discretion and independent judgment. *Id.* at 28 (citing Opinion and Interim Award at 40) (emphasis in original). Finally, the Union cites precedent indicating that, "even if an arbitrator uses the wrong legal analysis, the Authority [will] not disturb the conclusion if the correct result was reached." *Id.* at 27 n.7 (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 433 (2001)) (*Marine Operations Ctr.*).

The Union contends that the Arbitrator did not mistakenly apply the administrative exemption's primary duty test when determining whether the Auditors qualified for the professional exemption. *Id.* at 29-30. The Union argues that "the Arbitrator concluded both that the Auditors meet the primary duty test for the professional exemption because [employees must be educated in order to perform the work] and that the Auditors do not meet the primary duty test for the administrative exemption because they perform mission work." *See id.* at 30 (citing Opinion and Interim Award at 40, 42-43).

Finally, the Union argues that the Arbitrator properly found that the Auditors lack sufficient discretion and independent judgment to satisfy the professional and administrative exemptions. *Id.* at 30-32. The Union contends that "[t]he Arbitrator properly analyzed many factors, including the constraints placed on [the] Auditors by those documents, the routine nature of their work, and their lack of authority" before concluding that the Auditors lacked sufficient discretion and independent judgment. *Id.* at 31. Also, the Union argues that "[t]he Arbitrator did not conclude that *any* supervisory review would be sufficient to defeat a claim that [the] Auditors do not exercise discretion and independent judgment[;] [r]ather, . . . it was the extent of that review that defeated the claim." *Id.*

5. The Agency notes that the Arbitrator's comparison of the Auditors with ordinary inspectors was based solely on the new version of the OPM regulations. Exceptions at 14 (citing 5 C.F.R. § 551.206(n)). According to the Agency, the 2006 OPM regulations never mention the exemption status of the inspectors. *Id.*

(emphasis in original). According to the Union, it is irrelevant that some of the Auditors are Certified Public Accountants because a position's exemption status is dependent upon the actual duties performed. *Id.* at 32. Lastly, the Union argues that the Agency's claim that the Arbitrator should have compared the Auditors with accountants merely challenges the Arbitrator's factual findings and, ultimately, does not provide a sufficient basis for finding that the award is contrary to law. *Id.* at 31-32.

IV. Analysis and Conclusions

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., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The award is not contrary to law despite the fact that the Arbitrator relied on an outdated version of the DOL regulations.

The Agency asserts that the Arbitrator should have relied solely on OPM regulations in order to determine whether the Auditors are FLSA exempt and that the Arbitrator's statement – that the DOL regulations govern if a conflict exists between DOL and OPM regulations – is an incorrect statement of the law. Exceptions at 6-7. Moreover, the Agency claims that, even assuming the Arbitrator properly relied on DOL regulations in determining whether the Auditors were FLSA exempt, the DOL regulations that the Arbitrator cited in his award are obsolete. *Id.* at 7-8 (citations omitted).

The Agency's exception fails to establish that the award is deficient. Under Authority precedent, it is well established that an arbitrator may consider both OPM and DOL regulations when reviewing an employee's FLSA exemption status. *See NTEU*, 53 FLRA 1469, 1479-80 (1998) (applying both DOL and OPM regulations in order to determine whether the award exempting GG-11 level examiners from the FLSA was contrary to law). Moreover, the Authority has found that, although OPM regulations presumptively control, the DOL regulations are useful to arbitrators when interpreting the FLSA. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 46 FLRA 1063, 1072 (1992) (quoting *Adam v. United States*, 26 Cl. Ct. 782, 786 (1992) (*IRS, Wash. D.C.*) (finding that, "in construing [the OPM] regulations, the court is not barred, but[,] rather[,] encouraged to consider the DOL's regulations and other interpretations of the statute"). Here, although the Arbitrator improperly stated that DOL regulations control in the event of a conflict between the DOL regulations and the OPM regulations, the award is not deficient because the Arbitrator did not disregard the OPM regulations when making his determination that the Auditors are not FLSA exempt. Opinion and Interim Award at 36; *see IRS, Wash., D.C.*, 46 FLRA at 1072 (requiring arbitrators to consider OPM regulations when reviewing the FLSA exemption status of a federal employee). The Arbitrator discussed both the professional and administrative exemptions under the OPM and DOL regulations. Opinion and Interim Award at 33-36. Indeed, the Arbitrator cited almost exclusively to OPM regulations when he analyzed whether the professional and administrative exemption tests were met. *Id.* at 39-45. Thus, the Arbitrator's reliance on both DOL and OPM regulations does not render the award deficient.

Also, the Authority has found that an arbitrator's reliance on an outdated version of a statute does not render the award deficient unless the party excepting to the award can demonstrate that the award is inconsistent with the applicable version of the statute. *See U.S. Dep't of Def., Nat'l Guard Bureau Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934, 936 (2002) (*Nat'l Guard*). Here, the Arbitrator cited to outdated DOL regulations involving the administrative and professional exemptions. Award at 34-35. However, although the Agency claims that significant updates were made to the DOL regulations, it does not cite to a single change in the 2004 version of the DOL regulations that would cause an inconsistency between the award and those regulations. Exceptions at 7 (citing 69 Fed. Reg. 22,122-01 (Apr. 23, 2004)) (failing to discuss how the DOL regulations changed and how the award is contrary to the 2004 version of the DOL regulations). Moreover, by failing to provide supporting arguments or authority, the Agency's contention constitutes nothing more than a bare assertion. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (determining that, if a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare assertion). Consequently, the

Agency has failed to establish that the award is deficient. *See Nat'l Guard*, 57 FLRA at 936 (denying the agency's exception because, although the arbitrator relied on an outdated version of 32 U.S.C. § 709 in his award, the agency failed to prove that the award was inconsistent with 32 U.S.C. § 709 and that the arbitrator's reliance on an outdated version of that provision rendered the award deficient).

Accordingly, we deny the Agency's exception.

B. The Arbitrator's conclusion that the Auditors lack discretion and independent judgment is not contrary to law.

The Agency claims that the award is contrary to law because the Arbitrator wrongfully found that the Auditors lacked discretion and independent judgment. Exceptions at 13-16. The Agency asserts that the Arbitrator should have applied certain OPM regulations demonstrating that "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." *Id.* at 15 (citing 5 C.F.R. § 551.104). Also, the Agency claims that the Arbitrator should have relied upon certain DOL regulations stating that "'[t]he use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption . . . .'" *Id.* at 15-16 (quoting 29 C.F.R. § 541.704). Finally, the Agency asserts that, instead of only comparing the Auditors with inspectors, the Arbitrator should have taken into account the similarities between the Auditors and accountants who are FLSA exempt. *Id.* at 16.

Under OPM's implementing regulations, "[t]he designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee." *U.S. Dep't of the Navy, Naval Explosive Ordnance Disposal Tech. Div., Indian Head, Md.*, 57 FLRA 280, 286 (2001) (quoting 5 C.F.R. § 551.202(h)(i)) (*U.S. Dep't of the Navy Indian Head II*). Moreover, it is the employer's burden to prove that employees are exempt. *Id.* (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974)). Exemptions are construed narrowly against the employer who seeks to assert the exemptions. *Id.* (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

As an initial matter, the Agency asserts, and the Union concedes, that the Arbitrator improperly relied on the new version of the OPM regulations. Exceptions at 8-9; Opp'n at 11 n.3. We find that the Arbitrator erred by applying the new OPM regulations in his award because the grievance was presented and the Agency's decision to classify the Auditors as FLSA exempt occurred in 2006. The new OPM regulations became effective on October 17, 2007, and amendments to these regulations included changes to the administrative and professional exemptions. *See* 5 C.F.R. §§ 551.206, 551.208. For instance, new requirements were added to the professional exemption's primary duty test, and the 80-percent test was eliminated from both the administrative and professional exemptions. *See id.* However, there is no indication that the amendments were intended to be applied retroactively; in fact, OPM noted in its summary of the new OPM regulations that "[t]he regulations . . . [have] no retroactive effects[.]" 72 Fed. Reg. 52,753, 52,761 (Sept. 17, 2007); *see U.S. Dep't of the Interior, Bureau of Mines, Pittsburgh Research Ctr.*, 53 FLRA 34, 38 n.1 (1997) (*Bureau of Mines*) (determining that the Authority should apply the pre-amended version of the Training Act in existence at the time of the events giving rise to the grievance because there was no indication in the legislative history of the amendments that they were intended to be applied retroactively). Consequently, in reviewing the Agency's remaining exceptions, we apply the 2006 version of the OPM regulations. *See Bureau of Mines*, 53 FLRA at 38 n.1 (applying the pre-amended version of the statute in order to determine whether the award was contrary to law).

Under the 2006 version of the OPM regulations, an employee is considered FLSA exempt under the professional exemption if the agency can establish that the primary duty, intellectual and varied work, discretion and independent judgment, and 80-percent tests are met. 5 C.F.R. § 551.207. An employee is exempted from the FLSA under the administrative exemption if the agency can establish that the primary duty, nonmanual work, discretion and independent judgment, and 80-percent tests are met. 5 C.F.R. § 551.206; *see Marine Operations Ctr.*, 57 FLRA at 434 (determining that, under 5 C.F.R. § 551.206, an employee must meet all of the criteria to be exempted from FLSA overtime based on the administrative exemption). As noted by the parties, the discretion and independent judgment test is the same under both exemptions. Exceptions at 13; Opp'n at 21. In order to meet the test, an "employee [must] frequently [exercise] discretion and independent judgment, under only general

supervision, in performing the normal day-to-day work." 5 C.F.R. §§ 551.206(c), 551.207(c).

Based on the Arbitrator's factual findings, his legal conclusion that the Auditors do not exercise discretion and independent judgment is not contrary to law. In his award, the Arbitrator evaluated the credibility of the evidence and testimony presented to him and considered the duties actually performed by the Auditors before concluding that the Auditors lack discretion and independent judgment. Opinion and Interim Award at 41-45; *see U.S. Dep't of the Navy Indian Head II*, 57 FLRA at 286 (indicating that an arbitrator must consider the duties actually performed by the grievant in determining whether that grievant is FLSA exempt). The Arbitrator found that, because the Auditors rely heavily on the FA Program policy, the RAD Manual, and GAGAS requirements, they lack sufficient discretion and independent judgment. Opinion and Interim Award at 41, 45; *see U.S. DHS, Bureau of Customs & Border Prot.*, 61 FLRA 485, 493 (2006) (*DHS*) (finding that it is not sufficient that employees exercise some discretion in the performance of their duties in order for them to qualify as professional employees). According to the Arbitrator, testimony demonstrated that the Auditors consider the FA Program policy and the RAD manual to be the "Bible" of their work and that "the purpose of the FA Program policy and the RAD Manual is to create uniform procedures for the conduct of the audits and to minimize the exercise of discretion by individual auditors." Opinion and Interim Award at 41; *see DHS*, 61 FLRA at 493 (determining that, although there were many decisions that Agricultural Specialists had to make in applying the manuals and performing their work, it was clear that the determinations that required judgment and extensive educational background, the hallmark of professional employees, were made by employees other than the Agriculture Specialist).

Although the Agency cites certain DOL regulations suggesting that employees may exercise discretion and independent judgment even if they rely upon manuals and guidelines in performing their duties, those regulations also state that "exemptions are not available . . . for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances."[6] 29 C.F.R. § 541.704. Moreover, in concluding that the Auditors do not exercise sufficient discretion and independent judgment, the Arbitrator not only took into account the Auditors' reliance on the FA Program Policy, the RAD manual, and GAGAS requirements, but also considered other relevant factors. Opinion and Interim Award at 41-42.

For instance, the Arbitrator determined that the Auditors do not exercise discretion and independent judgment because their work is subject to extensive supervisory review and heavily edited by management officials. Opinion and Interim Award at 41-42. Although the Agency implies that, under the award, an employee cannot be subject to any supervisory review in order for the discretion and independent judgment to be met, the Arbitrator simply found that, in this case, the Auditors' work is subject to considerable supervisory review. Exceptions at 15; Opinion and Interim Award at 41-42. Finally, the Arbitrator compared the duties of the Auditors with those of ordinary investigators and determined that, like investigators, the Auditors lack discretion and independent judgment.[7] *See U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA

6. 29 C.F.R. § 541.704 provides as follows:

> The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

7. Although the Agency asserts that the Arbitrator relied solely on the inspector and investigator example contained in the new OPM regulations when he compared the duties of Auditors with those of inspectors, its assertion is without merit. Exceptions at 14 (citing 5 C.F.R. § 551.206(n)). In his award, the Arbitrator also cited an applicable DOL regulation, namely 29 C.F.R § 541.203(j), which notes that inspectors and investigators are not FLSA exempt because they do not exercise discretion and independent judgment. Opinion and Interim Award at 43-44. As noted previously, it is well established that an arbitrator may consider DOL regulations when reviewing an employee's FLSA exemption status. *See NTEU*, 53 FLRA at 1479-80.

280, 285 (2000) (citing *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999)) (finding that an arbitrator's determination regarding whether an employee's duties satisfy the requirements of an exemption may be based on a comparison of the employee's duties at issue with the duties of other employees whose exempt status has been determined) (*U.S. Dep't of the Navy, Indian Head I*).

To the extent that the Agency contends that the award is deficient because the Arbitrator failed to compare the Auditors' duties with those of accountants and failed to credit certain testimony, its contentions are without merit. Exceptions at 13-16. The Arbitrator's assessment of the weight to be accorded evidence and testimony is a factual finding, to which the Authority must defer in this case as it is not alleged to constitute a nonfact. *See AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006). Moreover, because the Agency's arguments challenge the Arbitrator's evaluation of evidence and testimony and determination of the weight to be accorded such evidence and testimony, it has not established that the award is contrary to law. *See, e.g., AFGE, Local 4044*, 65 FLRA 264, 266 (2010) (finding that disagreement with an arbitrator's evaluation of the evidence and his determination of the weight to be accorded such evidence provides no basis for finding an award deficient); *SSA, Highland Park, Mich.*, 65 FLRA 141, 141 (2010). Consequently, based on the Arbitrator's factual findings, his conclusion – that the Agency failed to demonstrate that the Auditors are FLSA nonexempt because they lack sufficient discretion and independent judgment – is not contrary to law.[8]

Accordingly, we deny the Agency's exception.

V. Decision

The Agency's exceptions are denied.

8. As noted above, under both the professional and administrative exemptions, an employee must meet all of the criteria to be exempted from the FLSA. *See* 5 C.F.R. §§ 551.206, 551.207. Moreover, as also noted above, an employee must exercise discretion and independent judgment under both the professional and administrative exemptions. Exceptions at 13; Opp'n at 21. The Arbitrator's factual findings, to which we defer, demonstrate that the Agency has failed to prove that Auditors exercise discretion and independent judgment in accordance with 5 C.F.R. §§ 551.206 and 551.207. Opinion and Interim Award at 41-45. Consequently, it is not necessary to address the Agency's exception with respect to the primary duty test.

APPENDIX

5 C.F.R. § 551.206 Administrative exemption criteria.

An administrative employee is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four of the following criteria:

(a) Primary duty test. The primary duty test is met if the employee's work –

(1) Significantly affects the formulation or execution of management programs or policies; or

(2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a management official.

(b) Nonmanual work test. The employee performs office or other predominantly nonmanual work which is –

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) Discretion and independent judgment test. The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) 80-percent test. In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

5 C.F.R. § 551.207 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) Primary duty test. The primary duty test is met if the employee's work consists of –

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field . . . .

(b) Intellectual and varied work test. The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

(c) Discretion and independent judgment test. The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) 80-percent test. In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.