66 FLRA No. 171

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1662
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
RAYMOND W. BLISS ARMY HEALTH CENTER
FORT HUACHUCA, ARIZONA
(Agency)

0-AR-4845

_____

DECISION

August 29, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

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

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement (Agreement) and the Fair Labor Standards Act (FLSA) by suffering or permitting the grievant to work overtime without compensation. He directed the Agency to compensate the grievant for unpaid overtime, but he denied the Union liquidated damages and attorney fees. For the reasons that follow, we modify the award to include liquidated damages, and we remand the award in part to the parties to permit the Union to petition the Arbitrator for reasonable attorney fees and costs, absent settlement.

II. Background and Arbitrator's Award

Although the grievant regularly arrived to work fifteen minutes before the scheduled start of his shift, the Agency did not compensate him for those fifteen-minute periods (the uncompensated time). Award at 6. The Union filed a grievance alleging that the Agency owed the grievant overtime compensation and liquidated damages for the uncompensated time. *Id.* at 6-7.

When the grievance was unresolved, the parties proceeded to arbitration, and the Arbitrator framed the issues as follows:

> Did the Agency violate [A]rticle[] 32 or 33 of the [Agreement[1]] and/or the [FLSA[2]] if it indeed required, or suffered or permitted, [the grievant] to report to duty [fifteen] minutes prior to his assigned start time . . . each day . . .?
>
> If so, what shall be the appropriate remedy?

Id. at 11.

The Arbitrator found that the grievant's former supervisor (former supervisor) told the grievant to arrive "early before the official start of [his] shifts." *Id.* at 32. In addition, the Arbitrator found that – although the evidence did not establish that the grievant's current supervisor (current supervisor) instructed the grievant to continue reporting early, *id.* at 36 – the current supervisor "was aware of the early start[-]time practice" and did not terminate it, *see id.* at 37-38. As such, the Arbitrator found that the Agency "'suffered or permitted' the grievant . . . to report to work early." *Id.* at 37. Because there was no dispute that the grievant "perform[ed his] job duties . . . when he reported . . . early [for work]," *id.* at 34, the Arbitrator sustained the grievance, *id.* at 39, and directed the Agency to provide the grievant with the amount of overtime pay or compensatory time off due to him for the uncompensated time, *id.* at 38. Regarding the Union's request for liquidated damages, the Arbitrator stated that the FLSA provides for recovery of "unpaid wages and overtime compensation, plus an equal amount in liquidated damages, in the *discretion* of the *trial*

[1] Article 32 of the Agreement states, in relevant part, "Employees working in excess of eighty (80) hours a pay period will be given a choice of compensatory time or overtime pay. Compensatory time will not be mandatory, except as provided by" the FLSA. Award at 9-10 (quoting Art. 32, § 4.3). Article 33 of the Agreement states, in pertinent part, "Overtime will be compensated in accordance with the [FLSA]. . . . An employee shall neither be compelled nor permitted to work overtime without being compensated by either compensatory time off or paid overtime." *Id.* at 10 (quoting Art. 33, § 4).

[2] The provision of the FLSA at issue here states, in pertinent part, that "no employer shall employ any of [its] employees . . . for a workweek longer than forty hours unless such employee receives compensation for [the] employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1).

judge." *Id.* (citing 29 U.S.C. § 216(b)).[3] However, the Arbitrator stated that he would not award liquidated damages or attorney fees "since the decision is pursuant to arbitration under the [Agreement]." *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that "the portion of the [award] that denied liquidated damages and attorney fees [is] contrary to law." Exceptions at 2. Although the Union acknowledges that an employer may avoid liability for liquidated damages by establishing the affirmative defense that it acted in good faith and had reasonable grounds for believing that it was not violating the FLSA, *id.* at 8 (citing 29 U.S.C. § 260),[4] the Union asserts that the Agency did not establish such a defense here, *id.* Without an affirmative defense, the Union contends that § 216(b) mandates an award of liquidated damages in this case, *id.* at 7, and the Union requests modification of the award to provide such damages, *id.* at 9. Moreover, the Union argues that the Arbitrator denied attorney fees before the Union even requested them. *Id.* at 6. As the Union contends that the FLSA mandates an award of attorney fees and costs to it as the prevailing party, *id.* at 6-7, the Union requests that: (1) the Authority modify the award to grant attorney fees and costs; and (2) "remand the matter to the Arbitrator solely for determining the reasonableness of the fees and costs incurred," *id.* at 7.

B. Agency's Opposition

The Agency asserts that although the Arbitrator did "not make a specific reference to" 29 U.S.C. § 260, "he clearly considered the[] factors" for the § 260 affirmative defense against liquidated damages and found that the Agency established such a defense. Opp'n at 2. The Agency asserts that the Arbitrator made the following findings, which, according to the Agency, satisfy the requirements of § 260: (1) the former supervisor's instruction to the grievant to arrive at work early "was not done with any ill intent"; (2) the continuation of the early-arrival practice "was again not done with ill intent but" was "merely unwittingly allowed" by the grievant's current supervisor; and (3) as soon as an Agency official above the grievant's current supervisor learned of the early arrivals, that official "put an immediate stop to this practice." *Id.* at 3.

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.*

When reviewing exceptions to awards involving claims under the FLSA in particular, the Authority has held that arbitrators must resolve those claims in accordance with the FLSA's substantive provisions. *See U.S. Dep't of the Navy, Naval Explosive Ordnance Disposal Tech. Div., Indian Head, Md.*, 57 FLRA 280, 284-85 (2001) (Chairman Cabaniss dissenting as to application). Specifically, the Authority has found that the FLSA provisions concerning liquidated damages and attorney fees and costs are substantive provisions, with which arbitration awards must be consistent. *See AFGE, Local 446*, 58 FLRA 361, 362 (2003) (*Local 446*) (arbitrator must award attorney fees under § 216(b) to prevailing party in FLSA grievance); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 46 FLRA 1063, 1072-73 (1992) (*IRS*) (liquidated damages under § 216(b) properly awarded at arbitration). Moreover, the Authority has held that arbitrators may not deny parties the benefit of the substantive provisions of § 216(b) on the basis that the dispute was decided at arbitration, rather than in court. *Local 446*, 58 FLRA at 362. *See also U.S. Dep't of the Navy, U.S. Naval Academy, Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009).

A. The award's denial of liquidated damages is contrary to law.

The Union contends that § 216(b) required the Arbitrator to award liquidated damages in this case. Exceptions at 7. As mentioned *supra* note 3, § 216(b) states that, in addition to an employer's liability for unpaid overtime compensation, the employer is liable for liquidated damages in an amount equal to the unpaid

[3] As relevant here, § 216 states that if an employer violates 29 U.S.C. § 207, *see supra* note 2, the employer "shall be liable" to affected employees "in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages," as well as liable for a "reasonable attorney's fee . . . and costs of the action." 29 U.S.C. § 216(b).

[4] As relevant here, § 260 states that if the employer "shows to the satisfaction of the court that the act or omission giving rise to [the employee's FLSA] action was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation" of the FLSA, then the "court may . . . award no liquidated damages or award any amount thereof not to exceed the amount specified in" 29 U.S.C. § 216, *see supra* note 3. 29 U.S.C. § 260.

overtime, unless the employer qualifies for the good-faith, reasonable-basis defense under 29 U.S.C. § 260. *See AFGE, Local 987*, 66 FLRA 143, 146 (2011) (*Local 987*) (citing *NTEU*, 53 FLRA 1469, 1482 (1998)). In other words, where an employer is liable for unpaid overtime under the FLSA, and the employer does not establish an affirmative defense, liquidated damages are *mandatory*. *Id.* at 146-47; *accord Brock v. Wilamowsky*, 833 F.2d 11, 20 (2d Cir. 1987) ("The [FLSA] does not authorize the court to decline to award liquidated damages . . . unless the employer has established its good-faith, reasonable-basis defense.").

In order establish a good-faith, reasonable-basis defense under § 260, the employer must demonstrate that: (1) the act or omission giving rise to the employee's FLSA action was in good faith (the good-faith requirement); and (2) the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA (the reasonable-basis requirement). 29 U.S.C. § 260; *Local 987*, 66 FLRA at 146. The "substantial burden" of satisfying these two requirements, "in effect, establishes a presumption that an employee who is improperly denied overtime [compensation] shall be awarded liquidated damages." *NTEU*, 53 FLRA at 1481 (internal quotation marks omitted). As relevant here, to satisfy the good-faith requirement, an employer must "show[] that [it] subjectively acted with an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." *Id.* (and sources cited therein). Thus, an employer does not demonstrate good faith merely by showing that its violation of the FLSA was unintentional. *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71-72 (2d Cir. 1997) (*Reich*). *Cf. Elwell v. Univ. Hosp. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002) (employer's negligence in violating FLSA precludes finding that employer established a § 260 affirmative defense).[5]

The Arbitrator refused to award liquidated damages because, unlike a trial judge, he made his "decision . . . pursuant to arbitration under the [Agreement]." Award at 38. However, as stated earlier, § 216(b) not only provides arbitrators the same authority as judges to award liquidated damages, *see Local 446*, 58 FLRA at 362, but in the absence of a § 260 affirmative defense, it mandates awarding such damages to a grievant prevailing on a FLSA claim, *see Local 987*, 66 FLRA at 146-47; *IRS*, 46 FLRA at 1072-73. Thus, we find that the Arbitrator's grounds for refusing to award liquidated damages are contrary to law.

As for whether the Agency established a § 260 good-faith, reasonable-basis defense against liquidated damages, the Agency identifies three arbitral findings to demonstrate that it did. *See* Opp'n at 2-3. First, the Agency notes that the former supervisor did not act with ill will. *Id.* at 3 (citing Award at 37). Yet the absence of intent to violate the FLSA does not satisfy the good-faith requirement. *Reich*, 121 F.3d at 71-72 ("ignorance of . . . prevailing law" insufficient to demonstrate good faith). Second, the Agency argues that the current supervisor "merely unwittingly allowed" a violation of the FLSA. Opp'n at 3 (citing Award at 36). But because the current supervisor "was aware of the early start[-]time practice" and did not act to terminate it, *see* Award at 37-38, the Agency has not established that the current supervisor demonstrated "an honest intention to ascertain what the [FLSA] requires and to act in accordance with it." *NTEU*, 53 FLRA at 1481; *accord Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 150-51 (2d Cir. 2008) (finding of good faith precluded where employer did not take "active steps" to ascertain FLSA requirements and act affirmatively to comply). Third, the Agency cites the Arbitrator's finding that the official above the current supervisor immediately stopped the early start-time practice once he learned of it. Opp'n at 3 (citing Award at 37-38). Nevertheless, that does not establish good faith with respect to the Agency's FLSA noncompliance *prior to* that official's action. Thus, we find that the Agency failed to satisfy the good-faith requirement of § 260,[6] and that, as a result, it has not established an affirmative defense against liquidated damages.

Under these circumstances, the FLSA mandates an award of liquidated damages to the grievant. 29 U.S.C. § 216(b) (FLSA violator "*shall be liable* . . . in the amount of . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages" (emphasis added)). The Union requests that the Authority modify the award to include liquidated damages, Exceptions at 9, and its request is consistent with Authority precedent, *see NTEU*, 53 FLRA at 1481-84 (after reviewing bases on which agency alleged good faith and reasonable basis, Authority set aside arbitrator's determination that agency established § 260 defense and modified award to include liquidated damages). Therefore, we modify the award to include such damages in an amount equal to the overtime compensation due the grievant.

[5] As discussed below, the good-faith requirement provides a sufficient basis for resolving the exceptions. Thus, we do not explore the reasonable-basis requirement in detail here.

[6] An employer must satisfy both of the requirements of § 260 to establish a defense against liquidated damages, and as we have found that the Agency has not demonstrated that it satisfied the good-faith requirement, it is unnecessary to address whether the Agency satisfied the reasonable-basis requirement. *See Local 987*, 66 FLRA at 147 n.8.

B. The award's denial of attorney fees is contrary to law.

A party that prevails on a FLSA claim is entitled to reasonable attorney fees and costs. 29 U.S.C. § 216(b) ("The court in such action *shall* . . . *allow* a reasonable attorney's fee . . . and costs of the action." (emphasis added)); *IFPTE, Local 529*, 57 FLRA 784, 786 (2002). As the result of the Union's grievance, the Arbitrator granted the grievant the overtime compensation due to him under the FLSA, and there are no exceptions to that portion of the award. Under such circumstances, the Union is correct that the FLSA entitles it to an award of fees and costs. Exceptions at 6-7 (citing § 216(b)); *see Local 987*, 66 FLRA at 148. In fact, the Agency does not contest that entitlement. However, the Union states that it never had the opportunity to request attorney fees or costs before the Arbitrator denied them. Exceptions at 6. Consequently, we set aside the Arbitrator's denial of attorney fees as contrary to law, and remand that portion of the award to the parties to permit the Union to petition the Arbitrator to award "a reasonable attorney's fee . . . and costs," absent settlement. 29 U.S.C. § 216(b).

V. Decision

The award is modified to include liquidated damages and is remanded in part to the parties to permit the Union to petition the Arbitrator for reasonable attorney fees and costs, absent settlement.