**66 FLRA No. 28**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA
(Agency)

0-AR-4724

_____

DECISION

September 21, 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 Craig L. Williams 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 denied a grievance requesting that the Agency pay damages to the grievant under the Fair Labor Standards Act (FLSA). For the reasons that follow, we modify the award, in part, and remand the award to the parties, in part, for resubmission to the Arbitrator, absent settlement.

## II. Background and Arbitrator's Award

The grievant earned compensatory time (comp time) for overtime work, and, when he did not use his comp time within the prescribed time limits, the Agency "liquidated" the "aged comp time" – i.e., converted the comp time that he had not used into a cash payment. *See* Award at 3; *see also* 5 C.F.R. § 551.531(d), (g).[1] The Union filed a grievance alleging that the Agency violated the FLSA and a memorandum of agreement between the parties (MOA) by liquidating the grievant's aged comp time at a rate that underpaid him.[2] Award at 1-3. When the grievance was unresolved, the parties proceeded to arbitration, where the Arbitrator framed the following issues for resolution: "whether [the g]rievant's overtime compensation rate . . . was incorrect, and if so, what is the remedy." *Id.* at 1.

The Arbitrator found it undisputed that the Agency underpaid the grievant for his liquidated aged comp time, *id.* at 4, 5, but the Arbitrator also stated that "[t]he critical question in this case is the Agency's degree of responsibility for this problem and its solution[,]" *id.* at 4. In this regard, the Arbitrator found that the Agency "has no control" over the Defense Finance and Accounting Service (DFAS), which performs the vast majority of the Agency's payroll functions, *id.*, and which is, like the Agency, a component of the Department of Defense (DoD), *id.* at 6. Specifically, the Arbitrator found that when the Agency identifies a payroll problem, its only recourse is to "submit a remedy ticket to DFAS," at which point "the Agency is at the mercy of DFAS." *Id.* at 4. With regard to the grievant in particular, the Arbitrator found that he was not underpaid as the result of errors or inaction by the Agency's Customer Service Representatives (CSRs),[3] but rather, the underpayment occurred because of a "computer glitch" in the system that DFAS uses to process payrolls. *Id.* The Arbitrator found further that CSRs do not have ability or authorization to make changes to DFAS's computer systems. *Id.*

Therefore, the Arbitrator determined that: (1) the Union had failed to establish that the Agency was "at fault" for the underpayment; (2) the "Agency acted at all times in good faith and tried to correct this problem through DFAS"; and (3) the Agency "had no grounds to believe that the Agency's actions violated the FLSA."

[1] Comp time is paid time off that an employee earns and accrues in lieu of immediate cash payment for overtime work. *See* 5 U.S.C. § 5543. As relevant here, if an employee does not use accrued comp time by the end of the 26th pay period after it was earned, then the comp time is liquidated into a cash payment. *See* 5 C.F.R. § 551.531(d), (g).

[2] The MOA states, in relevant part, "Comp[] time . . . must be used by the end of the 26th pay period after the pay period in which it was earned. Comp[] time not used during the established time period shall be paid at the overtime rate at which it was earned." Award at 2 (quoting MOA, cl. 4).

[3] CSRs perform certain in-house payroll functions for the Agency, such as responding to payroll questions from Agency employees, recording and sending time and attendance data to DFAS for processing, and submitting remedy tickets to DFAS when needed. *See* Award at 3-6 (describing actions of CSRs in grievant's case); Tr. at 35-43 (testimony of CSR).

*Id.* at 6 (citing 29 U.S.C. §§ 216, 260 (concerning violations and damages under FLSA)). After distinguishing the court decisions offered by the Union to support an award of damages, the Arbitrator denied the grievance. *Id.* at 6-8 (citing *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938 (8th Cir. 2008) (*Chao*); *Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150 (11th Cir. 2008) (*Perez*)).

## III. Positions of the Parties

### A. Union's Exceptions

The Union argues that the award is "contrary to law because the Arbitrator[] fail[ed] to correctly apply the [legal] standards governing [FLSA] violations." Exceptions at 1. In particular, the Union asserts that "the Arbitrator incorrectly exempted the Agency from responsibility [for the FLSA violations solely because] . . . the underpayment was the result of an error" by DFAS. *Id.* at 1-2; *see also id.* at 6, 9. According to the Union, the Agency violated 29 U.S.C. § 207(a)(1) and 5 C.F.R. § 551.531(g) because it failed to pay the grievant for his liquidated aged comp time at the required rate of one and one-half times his regular rate of pay. *Id.* at 4 & n.1 (citing 29 U.S.C. § 207(a)(1); 5 C.F.R. § 551.531(g)).[4]

The Union asserts that the FLSA imposes strict liability on both private- and public-sector employers, *id.* at 11, and, thus, the Agency may not disclaim its liability for violations of the FLSA merely because another component of DoD performs payroll functions for the Agency, *id.* at 9 (citing *Chao*, 547 F.3d 938), 10 (citing *Perez*, 515 F.3d 1150), 11-12. The Union argues further that if the Agency and other components of DoD were excused for FLSA violations in cases where DFAS's errors contributed to those violations, then that would effectively "nullify the FLSA for all employees of [DoD]." *Id.* at 12; *see also id.* at 21.

The Union also asserts that the Arbitrator's finding that the Agency acted in good faith is contrary to the legal standards for FLSA good-faith defenses. *Id.* at 13-15 (citing 29 U.S.C. § 259 (standard for good-faith defense precluding any FLSA liability); *id.* § 260 (standard for good-faith defense to FLSA liquidated damages award)).[5] In particular, the Union argues that the underpayment to the grievant is undisputed, *id.* at 15, and the Agency did not establish a good-faith defense for its FLSA noncompliance, *see id.* at 17-21 (quoting and citing 29 U.S.C. § 216(b)).[6] Thus, according to the Union, the Arbitrator erred as a matter of law in failing to direct the Agency to pay the compensation owed to the grievant for his liquidated aged comp time and, in addition, an equal amount in liquidated damages, as the FLSA requires. *See id.*

The Union contends that, under the FLSA, the Agency owes the grievant damages for underpayments of liquidated aged comp time extending back "for the full statutory recovery period of two years prior to the filing of the grievance." *Id.* at 9. The Union also contends that the Agency owes damages for underpayments between the grievance filing date and the date of the "closing of the [arbitration hearing] record," *see id.* at 5, because it is undisputed that the incorrect payment rate for liquidated aged comp time was still being used to calculate the grievant's compensation as of that latter date, *see id.* at 4-6. Finally, the Union argues that the FLSA entitles it to attorney fees. *See id.* at 2, 21, 22.

### B. Agency's Opposition

The Agency argues that the Arbitrator properly denied the grievance under the FLSA. Opp'n at 3. The Agency states that the "lack of payment" to the grievant at the rate required for liquidated aged comp time "was undisputed." *Id.* However, the Agency contends that

[4] 29 U.S.C. § 207 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). With regard to 5 C.F.R. § 551.531, although the Union cites subsection "(e)" of that section as mandating the rate of payment for liquidated aged comp time, *see* Exceptions at 4, the wording to which the Union refers was redesignated as subsection "(g)," effective May 14, 2007, *see* 72 Fed. Reg. 12,032, 12,036 (Mar. 15, 2007). Thus, where the Union refers to subsection (e), we cite subsection (g), which states: "The dollar value of compensatory time off when it is liquidated is the amount of overtime pay the employee otherwise would have received for hours of the pay period during which compensatory time off was earned by performing overtime work." 5 C.F.R. § 551.531(g) (2011).

[5] As pertinent here, 29 U.S.C. § 259 excuses an employer from all FLSA liability when the employer acted in good-faith reliance on a written administrative regulation, order, ruling, approval, or interpretation of the Administrator of the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 259(a)-(b)(1). As relevant here, 29 U.S.C. § 260 states that if the employer "shows . . . 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 adjudicator may "award no liquidated damages or award any amount thereof not to exceed the amount specified in" 29 U.S.C. § 216. *See infra* note 6 concerning § 216.

[6] As relevant here, 29 U.S.C. § 216 states that, if an employer violates § 207 of the FLSA, *see* text of § 207 at *supra* note 4, 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).

"[t]he issue here is timely payment through DFAS and not non-payment or payment of an incorrect amount" to the grievant for liquidated aged comp time, *id.* at 4, because, according to the Agency, it: (1) "never refused to correct the problem" of underpaying the grievant, *id.* at 3; and (2) "did not have the power and authority or ability to correct the problem at DFAS," *id.* Moreover, the Agency argues that it was unaware that DFAS's computer system was incorrectly computing the grievant's wages prior to his complaint to the Agency, but that "[o]nce made aware," the Agency attempted to work with DFAS to pay the grievant the amounts required. *Id.* at 5.

In addition, the Agency argues that the Arbitrator properly found that it met the statutory conditions for good-faith defenses under 29 U.S.C. §§ 259 and 260.[7] *Id.* at 4-5. In this regard, the Agency asserts that the Arbitrator correctly found *Chao* and *Perez* distinguishable from the circumstances here because the payroll agencies used by the private-sector employers in those cases were "subordinate to the employer[s, whereas] DFAS is not subordinate to the Agency." *Id.* at 4. As such, the Agency asserts that "an error . . . made by DFAS . . . can[not] be imputed to the Agency" to support an award of damages to the grievant. *Id.*

With regard to its good-faith defense against FLSA liability generally, the Agency states that its "practice of submitting remedy tickets to correct pay problems" with DFAS brings it within the scope of § 259's complete protection against all FLSA liability. *Id.* at 6; *supra* note 5 for text of § 259. With regard to its good-faith defense against FLSA liquidated damages in particular, the Agency asserts that it "had no reason to believe [that] the . . . submission" of the grievant's compensation data would not be properly "recognized by the DFAS computer system." Opp'n at 6 (citing § 260). Because the Agency asserts that it "took action" after the grievant informed it of the problem, the Agency contends that the Arbitrator correctly found that it met the first of two requirements under § 260 for establishing a good-faith defense against liquidated damages. *Id.*; *supra* note 5 for text of § 260. Further, the Agency argues that it "had no reason to believe it was participating in a violation of the FLSA since it was attempting to get the [g]rievant paid," and, consequently, the Arbitrator correctly found that the Agency met the second of the two requirements under § 260 for establishing a good-faith defense against liquidated damages. *See id.*

[7] The requirements for establishing affirmative defenses under §§ 259 and 260 are discussed in greater detail in Sections IV.B. and IV.C. below.

## 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) (*Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

### A. The award is deficient because it does not hold the Agency liable for underpayments to the grievant.

The Arbitrator found that, because the Agency was not "at fault" and had "no control" over DFAS, the Agency complied with its FLSA obligations, notwithstanding the underpayments to the grievant. *See* Award at 4, 6. Under the FLSA, an employer is liable for "any person acting directly or indirectly in the interest of [the] employer in relation to an employee." 29 U.S.C. § 203(d). Thus, "[f]or purposes of the FLSA, [a payroll processor] is an 'extension' of the employer[]." *Chao*, 547 F.3d at 943 (quoting § 203(d)'s definition of "employer"). In addition, in cases involving arbitral awards of backpay with interest under the Back Pay Act (BPA), 5 U.S.C. § 5596, the Authority has rejected the assertion that a DoD component bears no responsibility or liability for untimely payments to an employee, where such delays allegedly resulted from the actions of payroll-processor DFAS. *See U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 880, 885-86 (2000) (*DODEA I*); *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 873, 878 (2000) (*DODEA II*).

Specifically, in both *DODEA I* and *DODEA II*, the DoD employing subcomponent argued that it had "no control over" DFAS and that the employing subcomponent could not "determine . . . the actions of a separately regulated entity . . . merely because [that entity, DFAS,] is an agent of the employing" subcomponent. 56 FLRA at 885 (internal quotation marks omitted); 56 FLRA at 878 (same). The Authority rejected those arguments in *DODEA I* and *DODEA II* because they "seem[ed] to imply that DFAS, as opposed to the [a]gency, somehow [was] liable to the grievant," when, in fact, the employing subcomponent bore the responsibility and liability for ensuring proper payment of its employees. 56 FLRA at 886; 56 FLRA at 878. *Cf. U.S. Capitol Police Bd.*, Case No. 01-ARB-01(CP), 2002 WL 34461687 (Bd. of Dirs. of Office of

Compliance) (Feb. 25, 2002) (upholding arbitrator's liquidated damages award under FLSA because of payment delays to grievant, despite employing office's allegation that payroll processor, National Finance Center, bore responsibility).

Although the Arbitrator found that private-sector precedent holding an employer liable for its payroll processor did not apply to these circumstances, neither the definition of "employer" in 29 U.S.C. § 203(d), nor the Authority's analysis in *DODEA I* and *DODEA II*, recognizes a distinction between an employing agency and its payroll processing agent for backpay liability purposes. *Cf. Phila. Naval Base, Phila. Naval Station & Phila. Naval Shipyard*, 37 FLRA 79, 87-88 (1990) (finding it an unfair labor practice for an agency's subsidiary to refuse to bargain over its employees' working conditions, despite that subsidiary's claim that a different subsidiary of the agency exercised discretion over those conditions). Further, the Agency does not argue, and we discern no basis for finding, that the Authority's analysis in *DODEA I* and *DODEA II* should be limited to cases under the BPA. We note, in this regard, that the relevant analysis in *DODEA I* and *DODEA II* did not depend on the particular statutory wording of the BPA, but rather concerned an employing agency's general liability to its employees for any failures to properly compensate them as required by law or contract.

For the foregoing reasons, we find that the Arbitrator erred as a matter of law by relying on the Agency's alleged lack of control over DFAS as the basis for relieving the Agency of its liability as an employer under the FLSA.

B. The award is deficient to the extent that it found that the Agency established a good-faith defense against all FLSA liability under 29 U.S.C. § 259.

As previously mentioned, *supra* note 5, and as relevant here, 29 U.S.C. § 259 excuses an employer from all FLSA liability when the employer establishes that it acted in good-faith reliance on a written administrative regulation, order, ruling, approval, or interpretation of the Administrator of the Wage and Hour Division of the Department of Labor (Administrator) concerning the employer's obligations under FLSA. 29 U.S.C. § 259(a)-(b)(1). The Authority has previously found this defense applicable only to parties establishing good-faith reliance on materials issued by the Administrator in particular. *E.g., U.S. Dep't of Health & Human Servs., Soc. Sec. Admin, Balt., Md.*, 47 FLRA 819, 832 (1993) (good-faith reliance on OPM regulations does not satisfy § 259). Although the Agency contends that it qualifies for a § 259 good-faith defense, the Agency does not allege that it acted in good-faith reliance on materials issued by the Administrator. Thus, we find that the Agency has not satisfied the requirements for a good-faith defense under § 259.

As we have found that the Agency is not entitled to a § 259 defense, and as the Agency admits the underpayment of overtime to the grievant, *see* Opp'n at 3, we find further that the Agency violated 29 U.S.C. § 207(a)(1) because it employed the grievant for more than forty hours in a workweek but did not pay him the legally required minimum rate of compensation for his overtime work. 29 U.S.C. § 207(a)(1); *see also* 5 C.F.R. § 551.531(g) (agencies must liquidate comp time at overtime rate applicable when comp time earned). In addition, because 29 U.S.C. § 216(b) states that an employer that violates § 207 "shall be liable" for the unpaid overtime compensation, we find that the Arbitrator erred as a matter of law by failing to direct the Agency to pay the grievant the difference in the amount he received for his liquidated aged comp time and the amount to which he was entitled, and we modify the award to direct the Agency to compensate the grievant in the amount of that underpayment.

C. The award is deficient for finding that the Agency satisfied the two requirements of 29 U.S.C. § 260 to establish a good-faith, reasonable-basis defense against liability for FLSA liquidated damages.

In addition to an employer's liability for past due overtime wages, 29 U.S.C. § 216(b) states that an employer is liable to affected employees for liquidated damages in an amount equal to the unpaid wages, unless the employer qualifies for the good-faith, reasonable-basis defense under 29 U.S.C. § 260. *See NTEU*, 53 FLRA 1469, 1482 (1998). As previously mentioned, *supra* note 5, and as relevant here, in order establish a good-faith, reasonable-basis defense against liquidated damages under 29 U.S.C. § 260, the employer must demonstrate: (1) "that *the act or omission* giving rise to [the employee's FLSA] action *was in good faith* and [(2)] that [the employer] *had reasonable grounds for believing that [its] act or omission was not a violation*" of the FLSA (emphases added). If the employer satisfies those two requirements, then 29 U.S.C. § 260 further provides that the adjudicator may "award no liquidated damages or award any amount [of liquidated damages that does not] exceed the amount" of unpaid overtime wages due to the employee. The "substantial burden" of satisfying the two requirements for the § 260 defense, *NTEU*, 53 FLRA at 1481 (internal quotation marks omitted), "in effect, establishes a presumption that an employee who is improperly denied overtime [compensation] shall be awarded liquidated damages," *id.*

Consequently, the award of liquidated damages is the norm, and the denial of liquidated damages is the exception. *See id.* (quoting *Kinney v. Dist. of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993) (*Kinney*)). *See also 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."); *U.S. Dep't of Veterans Affairs, VA Pittsburgh Healthcare Sys.*, 60 FLRA 516, 519 (2004) (Chairman Cabaniss concurring) (citing and quoting *NTEU*, 53 FLRA at 1481, 1482).

When applying § 260, a finding of "[g]ood faith" requires "a showing that the employer subjectively acted with an honest intention to ascertain what the [FLSA] requires and to act in accordance with it[.]" *NTEU*, 53 FLRA at 1481 (and sources cited therein). To meet this burden, "[a]n employer 'must affirmatively establish that [it] . . . attempt[ed] to ascertain the [FLSA]'s requirements [for the specific circumstances involved].'" *Id.* at 1481-82 (quoting *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991)). Thus, the failure to request "any specific advice" about the compliance issue in question is evidence that the employer did not act in good faith. *Kinney*, 994 F.2d at 12.

The Agency does not contend that it requested "any specific advice" regarding whether the repeated underpayments to the grievant satisfied the Agency's obligations under the FLSA. The Agency's contention that it filed "remedy tickets" with DFAS *after* the grievant notified it of the problem, *see* Opp'n at 5-6, also does not establish good faith because "lack of knowledge" does not excuse the underpayments that occurred up to that point. *See Chao*, 547 F.3d at 942. In this regard, the "fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the [FLSA]." *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (*Williams*); *see also Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (*Reich*). Moreover, with regard to the Agency's argument that it "never refused to correct the problem" of underpaying the grievant, Opp'n at 3, the fact that an employer "did not purposefully violate the provisions of the FLSA is not sufficient to establish that it acted in good faith." *Reich*, 121 F.3d at 71; *accord Williams*, 747 F.2d at 129. *Cf. 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). Consequently, we find that the Agency has not demonstrated that it satisfied the first requirement for an affirmative defense against liquidated damages under § 260,[8] and, as such, we set aside the Arbitrator's contrary finding.

29 U.S.C. § 216(b) requires that an employer that violates the FLSA "*shall be liable* . . . in the amount of . . . unpaid overtime compensation . . . *and in an additional equal amount as liquidated damages*" (emphases added). As we have found that the Agency does not qualify for an affirmative defense against liquidated damages, we find further that the award is inconsistent with 29 U.S.C. § 216(b) because it does not award liquidated damages. Accordingly, we modify the award to direct the Agency to pay the grievant liquidated damages in an amount equal to that which he was underpaid for his liquidated aged comp time, as discussed in Section IV.B. above.

D. The award is deficient because it does not permit the grievant to recover underpayments for two years prior to the grievance filing, as well as for the time between the grievance filing and the arbitration record closing.

The Authority has held that, at least where there is no indication that parties have agreed contractually to backpay recovery periods different from those in 29 U.S.C. § 255(a), the question of the applicable recovery period is one of substantive law and not a procedural issue within the discretion of the arbitrator. *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Terre Haute, Ind.*, 60 FLRA 298, 299-300 (2004) (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of NOAA Corps Operations, Atl. Marine Ctr., Norfolk, Va.*, 55 FLRA 816, 821 (1999) (Chair Segal concurring and Member Wasserman dissenting in part) (*NOAA*), *recons. denied*, 55 FLRA 1107 (1999)); *NTEU*, 53 FLRA at 1494. Specifically, 29 U.S.C. § 255(a) provides that a FLSA cause of action "may be commenced within two years after the cause of action accrued, . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

Where § 255(a) applies, the Authority has held that the provision "both limits an employee's ability to bring a cause of action for a violation of the FLSA and limits the period that an employee can recover backpay for such a violation." *IFPTE, Local 386*, 66 FLRA 26, 29 (2011) (*IFPTE*) (quoting *NTEU*, 53 FLRA at 1488-89) (internal quotation marks omitted). *See also* 5 C.F.R.

[8] Because an employer must satisfy both of the requirements in § 260 to establish a defense against liquidated damages, and we have found that the Agency has not demonstrated that it satisfied the first requirement, it is unnecessary to address whether the Agency satisfied the second requirement.

§ 551.702(b) (implementing § 255(a) statute of limitations); *id.* § 551.702(c) ("If a claim for back pay [for a non-willful FLSA violation] is established, the claimant will be entitled to pay for a period of up to [two] years . . . back from the date the claim was received."). Where there is no dispute as to the applicable recovery period and no indication that the parties have agreed contractually to a recovery period different from that set by § 255(a), the Authority has applied the § 255(a) recovery period to a grievant's FLSA claims. *IFPTE*, 66 FLRA at 30 & n.4.

The Union argues that the grievant is entitled to damages "for the full statutory recovery period of two years prior to the filing of the grievance," Exceptions at 9, which is consistent with the period provided by § 255(a) and 5 C.F.R. § 551.702(c) for non-willful FLSA violations. The Agency neither disputes the propriety of that recovery period nor proposes a different recovery period. *See IFPTE*, 66 FLRA at 30 & n.4. In addition, neither party identifies a provision of their collective bargaining agreement calling for a recovery period at odds with § 255(a) and 5 C.F.R. § 551.702(c). *See id.*; *NOAA*, 55 FLRA at 821; *NTEU*, 53 FLRA at 1494. Therefore, we modify the award to allow the grievant to recover underpayments for his liquidated aged comp time, as well as an equal amount in liquidated damages, for up to two years prior to the grievance filing.

The Union argues that the grievant is entitled to recover for a period of time *after* the filing of the grievance as well – specifically, the period of time between the grievance filing date and the date that the arbitration record closed. *See* Exceptions at 4-6. The Arbitrator found, and the parties do not dispute, that as of that latter date, the grievant was still not being paid for his liquidated aged comp time at the correct rate. *See* Award at 4-5 (stating that grievant "might" have been paid some past due compensation *after* the arbitration hearing). The Authority has held that the FLSA statute of limitations operates to determine the earliest date that liability may be established; it does not establish when the liability ends. *See U.S. Dep't of the Army, Army Tank-Automotive & Armaments Command, Warren, Mich.*, 61 FLRA 637, 639-40 (2006) (citing *U.S. Dep't of Transp., Fed. Aviation Admin., Airways Facility Serv., Nat'l Airways Sys. Eng'g Div., Okla. City, Okla.*, 60 FLRA 565, 569-70 (2005) (Back Pay Act)). Consistent with this principle, the Authority has upheld an award of overtime pay for the period after a grievance was filed. *See id.* (citing *Rushing v. Shelby Cnty. Gov't*, 8 F. Supp. 2d 737, 747 (W.D. Tenn. 1997) (awarding FLSA back pay for two years prior to the filing of a complaint until the date of the employer's most recent violation); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430 (2001)). Because the Agency's liability for this time period is undisputed, and in light of the nondiscretionary requirement in 29 U.S.C. § 216(b) that an employer that violates § 207 "shall be liable" for unpaid overtime compensation and liquidated damages, we modify the award to permit the grievant to recover underpayments on his liquidated aged comp time, as well as an equal amount in liquidated damages, for the period of time between the filing of the grievance and the close of the arbitration hearing record.

E. The award is deficient for not finding the Union entitled to attorney fees, but remand is required to determine a reasonable amount for such fees.

A plaintiff who prevails on a claim under the FLSA is entitled to "a reasonable attorney's fee." 29 U.S.C. § 216(b); *IFPTE, Local 529*, 57 FLRA 784, 786 (2002).[9] The Authority has held that an employee is a prevailing party if the employee receives "an enforceable judgment or settlement which directly benefitted [the employee] at the time of the judgment or settlement." *NAGE, Local R4-6*, 55 FLRA 1298, 1301 (1999) (applying standard to Back Pay Act claim) (citation omitted). Consistent with our determinations above to grant the Union's other exceptions, we find that the Union is a prevailing party entitled to reasonable attorney fees under § 216(b) of the FLSA. However, the Arbitrator did not make findings as to what constitutes a reasonable amount of attorney fees in this case, and, as the record does not indicate what amount would be reasonable, we remand the modified award to the parties for resubmission to the Arbitrator, absent settlement, to determine a reasonable amount for such fees.

## V. Decision

The award is modified to provide the grievant with: (1) compensation for underpayments in liquidated aged comp time for a period beginning two years prior to the grievance filing date and continuing through the closing date of the arbitration hearing record; and (2) an equal amount in liquidated damages. The award also is modified to provide the Union with attorney fees, and is remanded to the parties for resubmission to the Arbitrator, absent settlement, to determine a reasonable amount for such fees.

[9] We note that 29 U.S.C. § 216(b) also entitles a prevailing plaintiff to recover the "costs of the action," in addition to "a reasonable attorney's fee." However, the Union does not except to the Arbitrator's failure to award costs. *See* Exceptions at 2, 21, 22 (excepting only to failure to award fees). As such, we do not further address the issue of costs.