

66 FLRA No. 8

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 386
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
UNITED STATES
ARMY CORPS OF ENGINEERS
TULSA DISTRICT
(Agency)

0-AR-4372

DECISION

August 25, 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 Kathy L. Eisenmenger filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority’s Regulations.¹ The Agency filed an opposition to the Union’s exceptions.

The grievance alleges that the Agency failed to pay Fair Labor Standards Act (FLSA) overtime to certain bargaining unit employees. The Arbitrator found that the grievance was not procedurally arbitrable because it was untimely filed. For the reasons that follow, we deny the Union’s exceptions.

II. Background and Arbitrator’s Award

The Agency notified the Union (the Notice) that it intended to change the FLSA status of certain bargaining unit employees from exempt to nonexempt.

Award at 7-8. This notice contained a listing of twenty-two employees who held positions that the Agency determined required a change in their FLSA status. *Id.* at 8-9. This change was implemented shortly thereafter, except for two employees whose FLSA status was changed at the time they received promotions. *Id.* at 9, 11. Nearly a year later, the Union filed a grievance under Article VIII, Section 8 of the parties’ agreement, alleging that the Agency had failed to pay FLSA overtime to certain current and former unit employees at the GS-12 pay grade and below.² *Id.* at 10-11, 24. Before the Arbitrator, the Agency asserted, as a threshold issue, that, because the Union’s grievance had not been filed within the thirty-day time limit set forth in Article VIII, Section 8, it was not arbitrable.³ *Id.* at 3.

Before addressing this issue, the Arbitrator found that, several months after the filing of the grievance, the Agency “submitted a voucher for payment of interest for . . . FLSA [backpay]” to employees listed in the Notice. *Id.* at 12. The Arbitrator found that, of the twenty-two employees listed on the voucher, fifteen were paid interest on the backpay, three had no dollar amount owed to them, and no record could be found for the remaining four. *Id.* The Arbitrator further found that the “calculations used to pay employees . . . did not include any compensatory time . . . employees may have used in lieu of taking . . . overtime pay.” *Id.*

Turning to the issue of arbitrability, the Arbitrator found that, except for matters specifically excluded from the parties’ negotiated grievance procedure, that procedure is the exclusive procedure for resolving grievances. *Id.* at 22 (citing 5 U.S.C. § 7121(a)(1)). The Arbitrator determined that, because the parties did not specifically exclude FLSA claims from the negotiated grievance procedure, the thirty-day time limit set forth in Article VIII, Section 8 applied. *Id.* at 23. In making this determination, the Arbitrator found that: (1) the Union intentionally filed the grievance under the parties’ negotiated grievance procedure; (2) the Union was a negotiating party to the agreement and participated in deciding what matters would be excluded from the negotiated grievance procedure and any applicable time limits; (3) the parties had negotiated several exclusions from the negotiated grievance procedure, but had not excluded claims of FLSA violations; (4) the parties could have included a provision that treated alleged FLSA violations differently and/or incorporated the statute of limitations set forth in 29 U.S.C. § 255(a) into their agreement, but had not done so; and (5) the time limits in

¹ The Authority’s Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Union’s exceptions were filed before that date, we apply the prior Regulations.

² Relevant portions of the parties’ agreement and the FLSA are set forth in the appendix to this decision.

³ It is undisputed that the grievance was filed more than thirty days from both the date that the Union and the date that the affected employees received notice of the change to their FLSA status. Award at 22, 28-29.

the negotiated grievance procedure set forth procedural -- not substantive -- rights. *Id.* at 23-25.

The Arbitrator rejected the Union's argument that the time limit set forth in 29 U.S.C. § 255(a) amends or supersedes the time limit set forth in Article VIII, Section 8, by operation of either the FLSA itself or Article II, Section 1 of the parties' agreement. *Id.* at 27. With respect to the FLSA, the Arbitrator found that Authority precedent does not recognize a federal statute's "period of filing for timeliness purposes" as a substantive right. *Id.* In this connection, the Arbitrator rejected the Union's reliance on *NTEU*, 53 FLRA 1469 (1998) (*NTEU*). According to the Arbitrator, although the Authority in that case found that § 255(a) both limits an employee's ability to bring a cause of action for an FLSA violation and limits the period that an employee can recover backpay for such violation, its holding is "effectively limited to resolving . . . the appropriate use of the statute of limitations by which an aggrieved employee may recover damages incurred by an employing agency's FLSA violations" and does not concern "the application of the FLSA's statute of limitations relative to the procedural right of when a claim may be timely [filed] under a [negotiated grievance procedure]." *Id.* at 25 (citing *NTEU*, 53 FLRA at 1494 n.17). The Arbitrator further found that, because the time limits for filing a claim are procedural, Article II, Section 1 does not establish that the time limit set forth in § 255(a) supersedes the thirty-day time limit set forth in Article VIII, Section 8. *Id.* at 27.

Accordingly, the Arbitrator determined that the grievance was timely only if it had been filed within the thirty-day time limit set forth in Article VIII, Section 8. *Id.* at 27, 29. Because it was undisputed that the grievance had not been filed within that time period, the Arbitrator found that the grievance was not arbitrable. *Id.* at 29.

The Arbitrator also rejected the Union's claim that the grievance was timely because the alleged violation constituted a continuing violation. *Id.* The Arbitrator found that the events giving rise to the grievance were based on a "time-specific event" -- the change in the employees' FLSA status from exempt to nonexempt -- and not on an "inadvertent[] discover[y]" that employees had been improperly classified under the FLSA. *Id.* at 29-31 (citations omitted). According to the Arbitrator, this finding is consistent with Supreme Court precedent in which the Court found that there was no continuing violation where an identifiable action with a determinative date serves as the subject matter of the aggrieved situation. *Id.* at 30-31 (citations omitted).

In so concluding, the Arbitrator noted that the Union's grievance did not identify any specific employee, but was filed "[o]n behalf of current and former

employees at the GS-12 pay grade and . . . below." *Id.* The Arbitrator noted that the Agency, however, identified twenty-two employees for whom it was changing their FLSA status from exempt to non-exempt. *Id.* at 31. The Arbitrator further noted that the Union presented four unit employees to testify at the hearing and that two of these employees (Employees C and S) were listed in the Agency's Notice. *Id.* at 31. Because these employees were listed in the Notice and the change in their FLSA status was also effectuated on the same date as the other employees, the Arbitrator found that, for the reasons discussed above, the Union had not established a continuing violation for these employees, and thus the grievance was also untimely with respect to them. *Id.*

The Arbitrator noted that the Union also claimed that three of the witnesses (Employees C, CC and T) were "classified as exempt in error." *Id.* The Arbitrator found that, if these employees were not exempt, then they would have a non-barred cause of action. *Id.* (citing *Knight v. Columbus, Ga.*, 19 F.3d 579 (11th Cir. 1994) (*Knight*)). The Arbitrator noted, however, that, for the purpose of this grievance, evidence must have been produced demonstrating that the employees "'worked unpaid overtime hours during the statute of limitations window.'" *Id.* at 31 (quoting *Knight*, 19 F.3d at 582). The Arbitrator found that the testimony was insufficient to show that these employees "had worked overtime or had traveled outside regular working hours . . ." *Id.* at 31-32. In this regard, the Arbitrator found that "[n]o dates or hours were mentioned" and that "[n]o documentation was offered . . . such as travel orders, notes on calendars, leave and earnings statements, pay records or memory-jogger notes . . ." *Id.* at 32. The Arbitrator, thus, found that "there [was] no evidence . . . to support that there was a violation that could give rise to a new cause of action [for] each failure to pay overtime under FLSA." *Id.* (internal quotation marks and citation omitted). The Arbitrator stated that this determination "[did] not forever bar these . . . employees' right to assert future claims under the" parties' agreement, provided they did so within thirty days of the occurrence of a new violation. *Id.*

Ultimately, the Arbitrator found the entire grievance untimely and not arbitrable.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's award fails to draw its essence from Article II, Section 1 of the parties' agreement, which states that "[m]atters governed by . . . laws . . . that conflict with this agreement will be controlling." Exceptions at 4. According to the Union, because the time limit under § 255(a) conflicts with the thirty-day time limit under the parties' negotiated

grievance procedure, the Arbitrator was required to apply the statutory time limit. *Id.* at 28-29.

The Union further contends that the Arbitrator erred as a matter of law when she failed to apply the two- or three-year time limit for filing an FLSA claim set forth in 29 U.S.C. § 255(a) in lieu of the thirty-day time limit provided in the parties' agreement. *Id.* at 9. According to the Union, under *NTEU* and subsequent cases, the Authority has held that the two- or three-year time limit for filing an FLSA claim under § 255(a) is a substantive right that is incorporated into the parties' negotiated grievance procedure and that arbitrators are bound to apply. *Id.* at 3, 9. Relying primarily on *NTEU*, the Union asserts that case law, the express language of § 255(a), the legislative history of the FLSA, and common sense support its assertion that the time limit for filing an FLSA claim is a substantive right that may not be waived. *Id.* at 11, 13-14, 19-20. According to the Union, applying the thirty-day contractual time limit, among other things, would frustrate Congress' intent to limit employers' liability and ensure that employees are adequately compensated. *Id.* at 13-15.

In addition, the Union challenges the Arbitrator's distinction between a procedural right (i.e., the time limit for filing an FLSA claim) and a substantive right (i.e., the time period for which an individual can recover backpay for an FLSA violation) as "not supported by law or logic." *Id.* at 16. With respect to logic, the Union asserts that it is impossible to separate the date that a party is allowed to bring an action under the FLSA from the time period used to calculate the recovery period for backpay. *Id.* at 11 (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, 828 (1999) (Chair Segal concurring and Member Wasserman dissenting in part) (*NOAA*), *recons. denied*, 55 FLRA 1107 (1999)). The Union further claims that the Arbitrator's determination that § 255(a) defines the period of recovery for backpay, but not the filing time limit for a FLSA claim, would lead to absurd results. *Id.* at 11-12. In this regard, the Union asserts that an employee who files a grievance thirty-one days after not being paid overtime based on his or her FLSA status would be barred from asserting an FLSA claim, while an employee who files a grievance within thirty days of not being paid overtime based on his or her FLSA status would be able to recover backpay for that instance, as well as for all other improperly denied overtime that occurred during the two years predating the filing of the FLSA claim. *Id.* at 12. As to law, the Union contends that the Arbitrator's reliance on cases preceding *NTEU* is misplaced because, in *NTEU*, the Authority specifically overruled prior precedent "to the extent [it] holds that an arbitrator, resolving a claim brought under the FLSA, is not bound to apply 29 U.S.C. § 255(a)." *Id.* at 16 (quoting *NTEU*, 53 FLRA at 1494). The Union

also cites as support Authority precedent holding that an "award limiting the recovery period for backpay to the filing date of the grievance is contrary to 29 U.S.C. § 255(a)." *Id.* at 17 (quoting *NOAA*, 55 FLRA at 821).

The Union further asserts that, even assuming that the FLSA filing period is not a substantive right, it did not waive its statutory procedural right because there was no clear and specific waiver. *Id.* at 21-22. The Union argues that the failure to incorporate the FLSA statute of limitations into the parties' agreement does not constitute the type of clear and explicit waiver of the Union's rights required under the FLSA. *Id.* (citing *Bull v. U.S.*, 65 Fed. Cl. 407 (2005) (*Bull*) (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (*Wright*))).

The Union further contends that, even assuming that the Arbitrator's application of the contractual time limit is correct, the Arbitrator erred by not applying the continuing violation theory to the Agency's alleged ongoing violation of employees' FLSA rights. *Id.* at 22-25. According to the Union, it is well established that FLSA overtime claims are continuing violations and that the date for determining the timeliness of such claims is each pay period that the bargaining unit employees failed to receive overtime compensation. *Id.* at 23-25.

The Union asserts that the grievance was filed on behalf of "all . . . employees . . . who were improperly compensated" FLSA overtime and that witnesses who testified for the Union "were examples of affected bargaining unit [employees] . . . whose testimony was to be utilized in an interim ruling on the [issue]" concerning whether the Agency improperly classified employees' positions as FLSA exempt. *Id.* at 25 (emphasis omitted). The Union contends that the Arbitrator erred in finding that there was insufficient evidence to show that these witnesses worked unpaid overtime hours under the FLSA and asserts that their testimony shows that they "worked overtime and traveled without receiving . . . overtime compensation." *Id.* at 26. The Union asserts that their "testimony constitutes adequate evidence" that a continuing violation under the FLSA occurred and thus the grievance is timely. *Id.* at 27.

B. Agency's Opposition

The Agency disputes the Union's contention that the award fails to draw its essence from Article II, Section 1 of the parties' agreement. Opp'n at 9-10.

Further, the Agency contends that the Arbitrator correctly found that FLSA grievances are subject to the time limit set forth in the parties' negotiated grievance procedure. According to the Agency, this case is analogous to *AFGE, Local 3882*, 59 FLRA 469 (2003), in which the Authority found that "parties may establish

conflicting time limits to [§] 255(a)” in their negotiated grievance procedure. Opp’n at 5; *see also id.* at 3-5. The Agency further claims that the Arbitrator accurately distinguished between the remedy portion of a FLSA violation as being substantive in nature and the time limits for filing a grievance as being procedural in nature. *Id.* at 6. According to the Agency, the parties “deliberately” failed to adopt the statutory time limits for filing a FLSA claim and, instead, “knowingly” agreed to the procedural time limits set forth in the parties’ negotiated grievance procedure. *Id.*

With respect to the Union’s claim that the Arbitrator’s failure to apply the continuing violation theory is contrary to law, the Agency asserts that the Union has failed to cite any law with which the award conflicts. *Id.* at 7-9.

IV. Analysis and Conclusions

The Arbitrator determined that the grievance was untimely filed under the thirty-day time limit set forth in Article VIII, Section 8 of the parties’ agreement. It is well-established that an arbitrator’s determination regarding the timeliness of a grievance constitutes a procedural arbitrability determination. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003); *U.S. Dep’t of Def., Dependents Sch.*, 55 FLRA 1108, 1110 (1999).

The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA at 470. However, as relevant here, the Authority has stated that a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)).

- A. The Arbitrator’s procedural arbitrability determination draws its essence from the parties’ agreement.

The Union claims that the award fails to draw its essence from Article II, Section 1 of the parties’ agreement. The Arbitrator specifically found that Article II, Section 1 does not establish that the time limit set forth in § 255(a) “amends or supersedes” the thirty-day time limit set forth in Article VIII, Section 8 of the parties’ agreement. Award at 27. Thus, the Union’s essence exception directly challenges the procedural arbitrability determination itself, and, as such, does not establish a basis for finding the award deficient. *See NOAA*, 55 FLRA at 822-23; *see also U.S. Dep’t of Homeland Sec., Customs & Border Prot. Agency, N.Y.C., N.Y.*, 60 FLRA 813, 815 (2005). Consequently, we deny this exception.

- B. The Arbitrator’s procedural arbitrability determination is not contrary to law.

1. The Arbitrator’s timeliness finding is not contrary to § 255(a) of the FLSA

The Union argues that the award is contrary to law because the Arbitrator failed to apply the statutory time limit set forth in 29 U.S.C. § 255(a) for filing a claim for FLSA overtime. As set forth above, an arbitrator’s procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See, e.g., AFGE, Local 3882*, 59 FLRA at 470.

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. *Id.*

Congress established in 29 U.S.C. § 255(a) that “[a]ny action” brought under the FLSA “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[.]” The Authority has held that this 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.” *NTEU*, 53 FLRA at 1488-89 (citations omitted).

In the federal sector, all collective bargaining agreements “shall provide procedures for the settlement of grievances, including questions of arbitrability.” 5 U.S.C. § 7121(a)(1). Further, any collectively bargained agreement “may exclude any matter from the application of the grievance procedures which are provided for in the agreement.” 5 U.S.C. § 7121(a)(2). Thus, under § 7121, parties must establish, through collective bargaining, the procedures for resolving grievances and may exclude any matter (e.g., FLSA claims) from those procedures. In so doing, the parties are free to determine the procedural requirements -- including time limits -- that will govern resolution of grievances that arise under the collective bargaining agreement.

As the Arbitrator correctly found, nothing in the parties' agreement excludes FLSA grievances from the parties' negotiated grievance procedure. Award at 24-25. Similarly, nothing in the parties' agreement expressly incorporates the time limit in § 255(a) for initiating an FLSA claim as part of the parties' grievance procedure. Accordingly, having elected to pursue its FLSA claim through the parties' negotiated grievance procedure, the Union is bound by the grievance procedures for which the parties collectively bargained pursuant to § 7121(a)(1). See, e.g., *O'Conner v. United States*, 60 Fed Cl. 164, 171 (2004) (quoting *Carter v. Gibbs*, 909 F.2d 1452, 1458 (Fed. Cir. 1990) (*Carter*) (overruled in part, *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (*Mudge*)) ("By accepting a position covered by the collective bargaining agreement, appellants effectively chose the procedures negotiated by the union."); see also *Boaz v. Fed. Express Corp.*, 742 F.Supp. 2d. 925, 933 (W.D. Tenn. 2010) (*Boaz*) ("procedural rights of the FLSA can be abridged by contractual limitations") (citing *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009)).

Nevertheless, the Union argues that its grievance is timely. According to the Union, the time limit set forth in § 255(a) for initiating an FLSA claim is a substantive right, and, as such, the statutory time limit -- and not the thirty-day time limit set forth in the parties' negotiated grievance procedure -- applies. Exceptions at 9-19 (citing, among other cases, *NTEU*, 53 FLRA at 1490).

Statutory time limits for initiating a legal claim, however, are generally procedural. See, e.g., *Banas v. American Airlines*, 969 F.2d 477, 485 (7th Cir. 1992) ("statutes of limitations [for initiating a claim] are generally considered to be procedural provisions"); *FDIC v. Petersen*, 770 F.2d 141, 142 (10th Cir. 1985) ("Statutes of limitation [for initiating a claim] are generally considered to be procedural rather than substantive law."); *Kalmich v. Bruno*, 553 F.2d 549, 553 (7th Cir. 1977), cert. denied, 434 U.S. 940 (the basic choice of law rule is that statutes of limitations for initiating a claim are "procedural in their nature"). As explained below, the Union's exceptions provide no basis for departing from this general principle of law.

In arguing that the time limit set forth in § 255(a) for initiating an FLSA claim is a substantive right that is incorporated into the parties' agreement, the Union asserts that the Authority's holding in *NTEU* controls. However, contrary to the Union's assertion, *NTEU* stands only for the narrow proposition that an arbitrator, resolving an FLSA claim brought under the parties' negotiated grievance procedure, is bound to apply 29 U.S.C. § 255(a) to an award of backpay, absent an indication that the parties have agreed contractually to backpay periods different from those in § 255(a). See *U.S. Dep't of Justice, Fed. Bureau of Prisons*,

U.S. Penitentiary, Terre Haute, Ind., 60 FLRA 298, 299-300 (2004) (*BOP*) (citing *NOAA*, 55 FLRA at 821; *NTEU*, 53 FLRA at 1494-95). That is, *NTEU* explicitly applies only to the *recovery period* for a FLSA violation -- not to the *filing period* for initiating a grievance alleging a violation of the FLSA under the parties' negotiated grievance procedure -- and only where the parties have not contractually agreed to time limits different from those in § 255(a).⁴ Indeed, the Authority previously has held that an award is not deficient where an arbitrator followed the time period limiting the filing of grievances to that provided in the parties' collective bargaining agreement, rather than the statute of limitations established in [§]255(a). See, e.g., *Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841, 845 (1993); *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 819, 828 (1993); *U.S. Dep't of the Army, Aviation Ctr., Fort Rucker, Ala.*, 39 FLRA 1113, 1115 (1991).

The Union further asserts, relying primarily on *NTEU*, that the express language of § 255(a) and the legislative history of the FLSA support its assertion that the time limit for filing a FLSA claim is a substantive right. Exceptions at 11, 13-14, 19-20. In this regard, the Union contends, among other things, that applying the contractual time limit would frustrate Congress' intent to limit employers' liability and ensure that employees are adequately compensated. *Id.* at 13.

Contrary to the Union's assertion, nothing in the express language § 255(a) suggests that the time limit contained in the provision is a substantive right. Cf. 48B Am. Jur. 2d *Labor and Labor Relations* § 3394 (2010) (In suit under FLSA, "the statute of limitations is a conventional procedural statute[.]"). Moreover, applying the time limit set forth in the parties' negotiated grievance procedure for initiating an FLSA claim in the negotiated grievance procedure would not undermine Congressional intent. As to employer liability and employee compensation, the contractual time limit for initiating a grievance claiming a FLSA violation neither expands employer liability nor prevents employees from being compensated. Also, employees are free to assert their own, individual FLSA claims. They need not go through the Union and the negotiated grievance procedure. *Mudge*, 308 F.3d 1220 (holding that § 7121(a)(1) of the Statute, as amended in 1994, does not restrict an employee's right to seek a judicial remedy for grievances). Cf. *Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1012 (D.C. Cir. 2009) (in finding that amendment to § 7121(a) of the Statute did not create court jurisdiction under the Administrative Procedure

⁴ Member Beck notes that the Authority's decision in *NTEU* may be wrongly decided. However, because the recovery period for an FLSA violation is not before the Authority, it is unnecessary to address that issue here.

Act, court distinguished *Mudge* on ground that it involved FLSA).

Moreover, by electing to pursue its FLSA claims as a grievance through the parties' negotiated grievance procedure, the Union did not forgo the substantive rights guaranteed to individuals under the FLSA; it only agreed to pursue those claims in an administrative, rather than a judicial, forum. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (*Gilmer*) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (*Mitsubishi*))). As the Supreme Court has noted, as "long as [a] prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (discussing the Age Discrimination in Employment Act). Consistent with this principle, the Federal Circuit has ruled that a party does not forgo the substantive rights afforded by a statute by agreeing to arbitrate a claim brought under the FLSA. *See Carter*, 909 F.2d at 1455. Specifically, the court acknowledged that "the collective bargaining mechanisms created by [the Statute] do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation[.]" *Id.* at 1455 (emphasis added) (quoting *Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 536 (1989)).

Additionally, the Union claims that the Arbitrator's determination that § 255(a) defines the period of recovery for backpay, but not the filing time limit for an FLSA claim, would lead to absurd results. However, such claim provides no basis for finding the award deficient. The Arbitrator simply applied the contractual time limit for an employee to initiate a grievance claiming an FLSA violation under the parties' negotiated grievance procedure. As stated previously, the award neither expands employer liability nor prevents employees from being compensated when a grievance claiming an FLSA violation is found to be timely.

The Union further argues that, even assuming that the time limit for initiating a FLSA claim is procedural, it did not waive this right because there was no clear and specific waiver. *See* Exceptions at 21-22 (citing *Bull*, 65 Fed. Cl. 407 (citing *Wright*, 525 U.S. 70)). However, the Union's reliance on *Bull* and *Wright* is misplaced. These cases both hold that, absent a clear and explicit waiver, a collective bargaining agreement may not waive an employee's right to pursue a statutory claim in court. Here, there is no argument or assertion before us that, under the Arbitrator's interpretation of the parties' agreement, individual

employees were prohibited from filing their FLSA action in federal court.

Consistent with the foregoing, we find that the Union has not demonstrated that the award is contrary to 29 U.S.C. § 255(a).

2. The Union has not established that the Arbitrator erred in finding no continuing violation under the FLSA.

The Union contends that, even if the Arbitrator's application of the thirty-day time limit in the parties' agreement is correct, then the Arbitrator erred by not applying the continuing violation theory to the Agency's alleged ongoing violation of employees' FLSA rights. Exceptions at 22-25. We conclude that, even if the Arbitrator had applied the continuing violation theory, the award is not deficient.

The Arbitrator found that the "burden" was on the Union to show that employees met the requirements of the FLSA to establish a continuing violation. *Id.* at 31. The Arbitrator found that the record contained insufficient evidence to show that the witnesses who testified for the Union as "examples of affected bargaining unit [employees]" worked overtime hours for which they were not paid within this time frame. *Id.* at 25; Award at 31-32. According to the Arbitrator, although the Union was required to produce evidence to show that the employees worked unpaid overtime hours during the statute of limitations window, "[n]o such evidence was offered either at the hearing nor in the grievance letter." Award at 31.

The Union claims that the Arbitrator erred in finding that there was insufficient evidence to show that these witnesses worked unpaid overtime hours under the FLSA. However, the Union does not contend that the award is based on a nonfact, and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. Accordingly, this contention provides no basis for finding the award deficient. *See Dep't of Def.*, 55 FLRA at 40; *see also NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997) (exception challenging an arbitrator's evaluation of the evidence and determination of the weight to be accorded such evidence provides no basis for finding an award deficient).

The Arbitrator also found that fifteen employees listed in the Notice "received backpay plus interest for FLSA benefits[.]" Award at 12. The Arbitrator's factual findings, to which the Authority defers, further show that, other than the Union witnesses, the Union "did not identify any specific employees" who worked unpaid overtime hours under FLSA during the thirty-day

window of the parties' agreement. *Id.* at 30. As the Arbitrator found, there is no evidence to show that there was a violation that could give rise to a new cause of action for each failure to pay overtime under FLSA. *Id.* at 32. In this regard, the Union did not provide any evidence to show that any of the fifteen employees worked unpaid overtime during the thirty-day time limitation provided in the parties' agreement. Because the Union has not pointed to any information in the record to show that these employees worked within thirty days of the date that the grievance was filed pursuant to Article VIII of the parties' agreement, the Union has not established a continuing violation under the FLSA with respect to these employees.

Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied.

APPENDIX

The parties' agreement provides, in relevant part, as follows:

1. Article II, "Purpose," Section 1, provides:

Section I. *SCOPE*: This agreement is based on the desire of the Union and the Employer to work toward the common goal of accomplishing the mission and bettering the working environment of the activity. . . .

The provisions of this agreement shall govern where there is a conflict with policies and regulations originated and established by the Employer. However, matters governed by Department of the Army rules or regulations, laws, or Executive Orders that conflict with this agreement will be controlling.

Award at 4.

2. Article VIII, "Grievance Procedure," Section 8, provides:

Section 8. *UNION PROCEDURE*: Grievances which may impact across organizational lines and involve more than one employee may be submitted in writing by the local president (or designee) directly to the District Engineer within thirty (30) calendar days after the date of the situation. The District Engineer and the Local President will meet within fifteen (15) calendar days after receipt of the grievance to discuss the grievance. The District Engineer shall give the Local President his written answer within fifteen (15) calendar days after the meeting. If the grievance is not settled by this method, the Union may refer the matter to arbitration. Nothing herein will preclude either party from attempting to settle such grievances informally.

Id. at 6.

3. Article IX, "Arbitration," Section 1, provides:

Section 1. *POLICY*: If the Employer and the Union fail to settle any grievance processed under the

negotiated grievance procedures, such grievance, upon written request by either the Employer or the Union within 30 calendar days after issuance of the final decision, may be submitted for arbitration

Id.

29 U.S.C. § 255(a) provides as follows:

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, . . . the Walsh-Healey Act, . . . or the Bacon-Davis Act –

(a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless 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[.]