67 FLRA No. 66

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 5300
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
LAW ENFORCEMENT AND INVESTIGATIONS
REGION 6
(Agency)

0-AR-4923

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DECISION

February 19, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Kenneth J. Latsch found that the Agency did not violate statute, regulation, or the parties' collective-bargaining agreement by providing employees with compensatory time rather than overtime for time that they spent driving home from a training event.

The question before the Authority is whether the Arbitrator's determination that the employees are not entitled to overtime conflicts with the requirement in 5 C.F.R. § 551.422(a)(2) for the payment of overtime when an employee is "required to drive a vehicle" while traveling for work.[1] Because the Arbitrator did not find, and the Union has not shown, that the Agency required employees to drive a vehicle to or from the training, or that the driving itself was a work duty, the answer is no.

II. Background and Arbitrator's Award

Agency employees who work at duty stations throughout Oregon and Washington attended a mandatory, multi-day training in Vancouver, Washington. The Agency released employees at mid-day on the last day of training to travel back to their home duty stations. Because of the distances involved, some employees did not complete their travel within the regular eight-hour work day. Several employees submitted overtime claims for the time they spent in travel beyond the eight-hour work day, but the Agency compensated those employees with compensatory time rather than overtime.

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by compensating employees for the disputed travel time with compensatory time rather than overtime. The parties' agreement provides that employees who work overtime are "entitled to be paid at the overtime rate or earn compensatory time in accordance with 5 [C.F.R. part] 550 and 5 [C.F.R. part] 551."[2] The agreement also states that "[e]mployees shall be compensated for travel time as authorized under 5 [C.F.R. parts] 550 and 551, the Fair Labor Standards Act [(FLSA)], and [f]ederal regulations."[3]

The Arbitrator noted that 5 C.F.R. § 550.112 states, in pertinent part, that "[t]ime in travel status away from the official duty-station of an employee is deemed employment only when . . . [t]he travel . . . [i]nvolves the performance of actual work while traveling."[4] Consequently, the Arbitrator found that "[i]f the affected employees were expected to perform any of their regular work while in travel status, there would be no question that they would be paid at overtime rates."[5] "In this situation, however," the Arbitrator found, "the only act was the travel itself."[6] Accordingly, the Arbitrator found that "the contract and the applicable statutes do[] not support an argument that travel, by itself, is 'work' that can be quantified for purposes of overtime payment."[7] Thus, the Arbitrator denied the grievance.

The Union filed an exception to the Arbitrator's award. The Authority has already informed the parties that it will not consider the Agency's untimely opposition to the Union's exception.

III. Analysis and Conclusions

The Union argues that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law

[1] 5 C.F.R. § 551.422(a)(2).

[2] Award at 7 (quoting collective-bargaining agreement (CBA)).
[3] *Id.* at 8 (quoting CBA).
[4] *Id.* at 13 (quoting 5 C.F.R. § 550.112(g)).
[5] *Id.* at 14.
[6] *Id.* at 14-15.
[7] *Id.* at 15.

de novo.[8] In conducting de novo review, the Authority defers to the arbitrator's underlying factual findings.[9]

The Union argues that the award is contrary to 5 C.F.R. § 551.422(a)(2).[10] According to the Union, § 551.422(a) entitles employees to overtime because "it was inevitable and foreseeable" that, by requiring employees to attend the training, the Agency was also requiring employees to drive to and from the training.[11] But the Arbitrator did not find – and the Union has not shown – that the Agency "required" employees to "drive a vehicle" to or from the training.[12] And even assuming that travel by vehicle was the most common (or preferable) method of transportation, that would not make it inevitable that the Agency *required* employees to use that method or to act as the driver if that method were used.

Even if, as the Union argues, the Agency effectively required employees to drive to and from the training, the Union has not established that employees are entitled to overtime pay. In this regard, § 551.422(a)(2) provides, in pertinent part, that "[t]ime spent traveling shall be considered hours of work if . . . [a]n employee is required to *drive a vehicle or perform other work* while traveling."[13] By stating that driving "or perform[ing] other work" entitles an employee to overtime,[14] the regulation clearly implies that the driving itself must be a work duty in order for the employee to earn overtime. Moreover, where courts have addressed § 551.422(a) in the commuting context, they have found that employees are not entitled to overtime pay for work-to-home travel where they do not perform other work while driving.[15] And, although this case does not involve a typical work-to-home commute, the Union fails to cite any authority in support of its position that, under § 551.422(a)(2), an employee returning from a mandatory training – while performing no compensable work during the journey – is entitled to overtime for time spent traveling.

Therefore, the Union has not demonstrated that employees are entitled to overtime under § 551.422(a)(2). Accordingly, the Union provides no basis for finding that the award is contrary to law, and we deny the exception.

IV. Decision

We deny the Union's exception.

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[8] *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)).
[9] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[10] Exception at 8.
[11] *Id.* at 7-8.
[12] 5 C.F.R. § 551.422(a)(2).
[13] *Id.* (emphasis added).
[14] *Id.*
[15] *See Jaster v. United States*, 86 Fed. Cl. 731, 734 (2009); *Crusan v. United States*, 86 Fed. Cl. 415, 426-27 (2009).