69 FLRA No. 10

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3828
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BASTROP, TEXAS
(Agency)

0-AR-5113

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DECISION

November 13, 2015

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

I. Statement of the Case

The Agency is a correctional institution (the institution) that occasionally sends inmates to various local hospitals for medical treatment. Immediately after working their regular shifts at the institution, bargaining-unit employees (officers) travel to these hospitals to work overtime shifts guarding the inmates (hospital shifts). Arbitrator Vicki Peterson Cohen found that the Agency violated the parties' collective-bargaining agreement and the Fair Labor Standards Act (FLSA)[1] when the Agency did not pay officers for the time that they spent traveling between the institution and the hospitals in order to work hospital shifts (the travel time). The Arbitrator awarded backpay to the officers. However, she also found that the Union did not establish that the Agency's violation was willful, and therefore she denied the Union's request to apply a three-year statute of limitations to the recovery period. In addition, she denied the Union's requests for liquidated damages and attorney fees.

There are five substantive questions before us.

The first question is whether the award is based on a nonfact because the Arbitrator found that it was irrelevant whether the officers voluntarily worked the hospital shifts. Because the relevance of the hospital shifts' voluntariness was disputed below, the answer is no.

The second question is whether the award is based on a nonfact because the Arbitrator found that the Agency was unaware of whether other institutions paid employees for similar travel time. Because the Union has not shown that the challenged finding is clearly erroneous, the answer is no.

The third question is whether the Arbitrator's conclusion that the Agency did not willfully violate the FLSA is contrary to law. Because the Union has not demonstrated that the Agency either knew that its failure to pay officers for the travel time violated the FLSA or acted in reckless disregard of the FLSA's requirements, the answer is no.

The fourth question is whether the Arbitrator's failure to award liquidated damages is contrary to the FLSA. Under the FLSA, liquidated damages are mandatory unless the Agency proves the affirmative defense that it acted in good faith and had a reasonable basis for believing that it was not violating the FLSA. Because the Agency did not prove the affirmative defense, the answer is yes.

The fifth question is whether the Arbitrator's denial of attorney fees is contrary to law. Because the Union, as the prevailing party, is entitled to attorney fees under the FLSA, the answer is yes.

II. Background and Arbitrator's Award

As mentioned above, the Agency occasionally sends inmates to various local hospitals for medical treatment, and officers work hospital shifts to ensure that the inmates are continuously guarded. For approximately twenty-five years, the Agency scheduled hospital shifts to begin one hour after the end of officers' regular shifts at the institution. Because of the distance between the institution and the hospitals, officers traveled directly from the institution after completing their regular shifts to the hospitals to work a second shift guarding inmates there.

The Union filed a grievance alleging that the Agency violated the parties' agreement and the FLSA by not paying officers for the travel time. The grievance went to arbitration.

[1] 29 U.S.C. § 207(a).

At arbitration, the Arbitrator framed the issue before her as whether the Agency violated the parties' agreement and the FLSA by not paying the officers for the travel time.

Under 29 C.F.R. § 785.38, "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked."[2] However, under 29 C.F.R. § 785.16, "[p]eriods [of travel time] during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked."[3]

Before the Arbitrator, the Union argued that, under those regulations, the travel time was compensable because the officers had no time to pursue "purely personal pursuits."[4] In contrast, the Agency argued that the travel time was not compensable because the officers volunteered to work the hospital shifts and were "completely relieved from duty" during the travel time.[5]

Although the Arbitrator found that officers "primarily" volunteered to work the hospital shifts, she found that the voluntariness of the hospital shifts was "irrelevant" to whether the travel time was compensable.[6] The Arbitrator concluded that, because the officers "have no opportunity to pursue personal activities" during the travel time, the travel time was a compensable part of the officers' workday.[7] Consequently, the Arbitrator found that the Agency violated the FLSA and the parties' agreement by not paying the officers for the travel time.

Additionally, the Union argued that the Arbitrator should apply a three-year statute of limitations when calculating the officers' entitlement to backpay. The FLSA provides that its two-year statute of limitations may be extended to three years where an employee proves that the employer's FLSA violation is "willful."[8] An employer's conduct is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[9] The Union alleged that the Agency showed "willful or reckless disregard" for the requirements of the FLSA because the Agency did not "investigate whether it should pay" officers for the travel time, even though other institutions within the Federal Bureau of Prisons paid employees for similar travel time.[10] The Agency argued that it had no reason to investigate the compensability of the travel time until the Union filed its grievance because the Agency believed it was complying with the FLSA.

The Arbitrator found that the Union failed to meet its burden to prove that the Agency willfully violated the FLSA because there was "no evidence" that management "knew its conduct violated the FLSA, yet refused to compensate its employees."[11] In this regard, the Arbitrator found that the Agency had not acted with reckless disregard for the FLSA's requirements because: (1) the Agency had engaged in the challenged pay practice for twenty-five years without any inquiries as to the legality of the practice; and (2) there was no evidence that management was aware of the pay practices at other institutions.

The parties also disputed the Union's entitlement to liquidated damages. Under the FLSA, where an employer is liable for unpaid overtime and does not satisfy its "substantial burden"[12] of proving that it acted both with good faith and had a reasonable basis for believing that it complied with the FLSA,[13] liquidated damages are mandatory.[14] The Union argued that it was entitled to liquidated damages because the Agency "failed to demonstrate good faith."[15] But the Arbitrator found that the Agency was "acting in good faith" because, after twenty-five years without complaints, the Agency had "no reason to believe" it was violating the FLSA by not paying the officers for the travel time.[16] Thus, "[f]or the same reasons" that the Union did not establish that the Agency acted willfully, the Arbitrator concluded that the Union "failed to establish that it is entitled to liquid[ated] damages."[17]

Based on the foregoing, and applying a two-year statute of limitations, the Arbitrator awarded backpay to the officers, but she stated that the Union was "not entitled" to attorney fees.[18]

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[2] 29 C.F.R. § 785.38.
[3] *Id.* § 785.16(a).
[4] Award at 8.
[5] *Id.* at 12.
[6] *Id.* at 13.
[7] *Id.* at 14 (citing 29 C.F.R. §§ 790.6(b), 785.38).
[8] 29 U.S.C. § 255(a); *see also NTEU*, 53 FLRA 1469, 1489 (1998) (*NTEU*) (citations omitted).
[9] *Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (internal quotation mark omitted)).
[10] Award at 11.
[11] *Id.* at 15.
[12] *AFGE, Local 1662*, 66 FLRA 925, 927 (2012) (*Local 1662*) (citation omitted) (internal quotation marks omitted).
[13] 29 U.S.C. § 260.
[14] *Id.* § 216(b); *see also Local 1662*, 66 FLRA at 926-27 (citing *AFGE, Local 987*, 66 FLRA 143, 146-47 (2011) (*Local 987*)).
[15] Award at 10-11.
[16] *Id.* at 16.
[17] *Id.*
[18] *Id.* at 2.

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions. The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[19] the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[20] In its exceptions, the Agency argues that the award is contrary to 5 C.F.R. §§ 551.422(a) and 550.112(g) – regulations that the Agency alleges control the compensability of travel time under the FLSA.[21] As the issue before the Arbitrator was whether the travel time was compensable under the FLSA,[22] the Agency could have cited, or otherwise raised, those regulations before the Arbitrator. But there is no evidence that the Agency did so. Thus, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from raising 5 C.F.R. §§ 551.422(a) and 550.112(g) for the first time before the Authority.[23] Accordingly, we dismiss the Agency's contrary-to-law exceptions.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

Both parties challenge the award on nonfact grounds.[24] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[25] However, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[26]

The Agency challenges, as a nonfact, the Arbitrator's statement that the voluntariness of the hospital shifts was "irrelevant" to the compensability of the travel time.[27] Assuming, without deciding, that the Arbitrator's statement is a factual finding, the relevance of the hospital shifts' voluntariness was disputed at arbitration.[28] Accordingly, we deny the Agency's nonfact exception.

Turning to the Union's nonfact exception, the Union challenges the Arbitrator's finding that the Agency was unaware of other institutions' pay practices regarding travel time.[29] According to the Union, testimony from an Agency witness contradicts the Arbitrator's finding.[30] Although that witness testified about a travel-related pay practice at another institution, the circumstances of that alleged practice are distinguishable from the practice at issue in this case.[31] And, more importantly, the witness did not testify that he told the Agency about the other institution's pay practice. Thus, the cited testimony does not contradict the Arbitrator's finding that the Agency was unaware of other institutions' pay practices. Accordingly, we find that the Union has not demonstrated that the challenged finding is clearly erroneous, and we deny the Union's nonfact exception.

B. The award is contrary to law, in part.

The Union argues that the award is contrary to law in several respects,[32] which we address separately below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[33] 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.[34] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[35]

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[19] 5 C.F.R. §§ 2425.4(c), 2429.5.
[20] *E.g.*, *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[21] Agency's Exceptions at 5-11.
[22] Award at 3.
[23] 5 C.F.R. §§ 2425.4(c), 2429.5.
[24] Agency's Exceptions at 11-13; Union's Exceptions at 20-21.
[25] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).
[26] *SPORT Air Traffic Controllers Org.*, 68 FLRA 9, 11 & n.38 (2014) (citing *Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 457 (2014)).
[27] Agency's Exceptions at 12 (quoting Award at 13) (internal quotation mark omitted).
[28] Award at 10, 12-13; *see also* Agency's Exceptions, Attach. D (Grievance Denial) at 2-3; Union's Opp'n at 30 (citing Union's Exceptions, Attach. 1, Tr. (Tr.) at 116).
[29] Union's Exceptions at 20-21.
[30] *Id.* at 21.
[31] Tr. at 169-70 (testifying that another institution did not stagger shifts and, thus, any paid travel time occurred during an employee's regular shift, rather than between shifts).
[32] Union's Exceptions at 10-21.
[33] *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)).
[34] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[35] *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012).

1. The Arbitrator's finding that the Agency did not willfully violate the FLSA is not contrary to law.

In its exceptions, the Union argues that the Arbitrator's conclusion that the Agency did not willfully violate the FLSA is contrary to law because the Arbitrator: (1) misapplied the law; (2) failed to make factual findings regarding the Agency's investigation into, and interpretation of, the requirements of the FLSA; and (3) relied on the alleged nonfact that the Agency was not aware of the pay practices at other institutions.[36]

Under the FLSA, an employer's conduct is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[37] And "[r]eckless disregard of the requirements of the [FLSA] means failure to make adequate inquiry into whether conduct is in compliance with the [FLSA]."[38] However, an employer that "acts unreasonably, but not recklessly, in determining its legal obligation" does not willfully violate the FLSA[39] because "failure to make adequate inquiry" means "more than a merely negligent or unreasonable failure."[40]

Here, the Arbitrator found that the Union failed to prove that the Agency willfully violated the FLSA because there was "no evidence" that management "knew its conduct violated the FLSA, yet refused to compensate its employees."[41] In particular, the Arbitrator found that: (1) the Agency had engaged in the challenged pay practice for at least twenty-five years without any complaints or inquiries; (2) there was no evidence that management was aware of the pay practices at other institutions; and (3) management was not aware that its conduct violated the FLSA.[42]

With regard to the Union's claim that the Agency had knowledge that its practice violated the FLSA because different institutions paid for similar travel time, we have denied the Union's nonfact exception challenging the Arbitrator's finding that the Agency was unaware of the practices at other institutions. Thus, we defer to that finding. Further, the Arbitrator's findings regarding willfulness are consistent with federal court decisions interpreting the FLSA's willfulness standard. For example, where, as here, an employer's incorrect determination that its pay practice complied with the FLSA went unchallenged for many years, the U.S. Court of Federal Claims found that this fact weighed against finding a willful FLSA violation.[43] In contrast, federal courts have found willful violations where, for example, an employer ignored the advice of legal counsel or a relevant regulatory agency, or had been penalized for a similar previous FLSA violation.[44] The Union does not argue that such circumstances are present here. Consequently, we find that the Union has not established that the Arbitrator erred, as a matter of law, in finding that the Agency did not willfully violate the FLSA.

2. The Arbitrator's denial of liquidated damages is contrary to law.

The Union argues that the Arbitrator's denial of liquidated damages is contrary to law.[45] Under the FLSA, where an employer is liable for unpaid overtime and does not satisfy its "substantial burden"[46] of proving that it acted both with good faith and with a reasonable basis for believing that it was not violating the FLSA,[47] liquidated damages are mandatory.[48] The Authority has explained that, to meet its burden, an employer must "affirmatively establish" that it attempted to discern the FLSA's requirements for the specific circumstances involved[49] and comply with those requirements.[50] Further, the Authority has found that the good-faith requirement is not satisfied simply because the employer "has broken the law for a long time without complaints from employees"[51] or "did not purposefully violate the provisions of the FLSA."[52]

[36] Union's Exceptions at 18-20.
[37] *McLaughlin*, 486 U.S. at 133.
[38] 5 C.F.R. § 551.104.
[39] *McLaughlin*, 486 U.S. at 135 n.13.
[40] *Abbey*, 106 Fed. Cl. at 282 (citations omitted) (internal quotation marks omitted); *see also McLaughlin*, 486 U. S. at 133, 135 n.13.
[41] Award at 15.
[42] *Id.* at 15-16.
[43] *See Abbey*, 106 Fed. Cl. at 283-84.
[44] *Id.* at 282 (citing *Bull v. United States*, 68 Fed. Cl. 212, 273 (2005); *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 918-19 (9th Cir. 2003); *Bankston v. Illinois*, 60 F.3d 1249, 1254 (7th Cir. 1995); *Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994)).
[45] Union's Exceptions at 13.
[46] *Local 1662*, 66 FLRA at 927 (citation omitted) (internal quotation marks omitted).
[47] 29 U.S.C. § 260.
[48] *Id.* § 216(b); *see also Local 1662*, 66 FLRA at 926-27 (citing *Local 987*, 66 FLRA at 146-47).
[49] *Local 987*, 66 FLRA at 147 (quoting *NTEU*, 53 FLRA at 1481-82) (citations omitted).
[50] *Local 1662*, 66 FLRA at 926-27 (citations omitted).
[51] *Local 987*, 66 FLRA at 146-47 (citing *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984)).
[52] *Id.* (citing *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (internal quotation mark omitted)); *see also Local 1662*, 66 FLRA at 926-27 (citing *New England Telecomm.*, 121 F.3d at 71-72; *Elwell v. Univ. Hosp. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002)).

As an initial matter, we note that the Arbitrator found that the Agency violated the FLSA by not paying officers for the travel time,[53] and we have either dismissed or denied each of the Agency's exceptions to that finding. Therefore, the Agency is liable for liquidated damages unless it proved the good-faith, reasonable-basis affirmative defense under 29 U.S.C. § 260.[54] Here, the Arbitrator found that, "[f]or the same reasons" that the Union did not establish that the Agency acted willfully, "the Union has failed to establish that it is entitled to liquid[ated] damages."[55] But, as discussed above, the Union does not bear the burden to establish that it is entitled to liquidated damages.[56] Rather, the Agency must prove that the Union is *not* entitled to liquidated damages.[57]

As part of its argument that the Agency failed to meet this burden, the Union argues that the Arbitrator incorrectly equated her finding that the Agency's FLSA violation was not willful with a demonstration of good faith.[58] In this regard, it is well established that a finding that an agency did not willfully violate the FLSA does not prove that the agency established the good-faith, reasonable-basis affirmative defense.[59] Therefore, the Arbitrator's finding that the Agency did not willfully violate the FLSA does not demonstrate that the Agency established the affirmative defense to liquidated damages under § 260.

The Union also argues that the Agency failed to meet its burden because the Agency did not present any evidence that it attempted to ascertain and comply with the FLSA's requirements.[60] As discussed above, to avoid liquidated damages, an employer must "affirmatively establish" that it attempted to discern the FLSA's requirements for the specific circumstances involved[61] and comply with those requirements.[62] Here, the Agency did not argue to the Arbitrator that it took steps to ascertain whether the travel time was compensable when it began the challenged pay practice. Rather, the Agency argued that it was "clearly acting in good faith and had reasonable grounds to believe" that its practice complied with the FLSA because the Union had not advanced any complaint or request for overtime that would have "trigger[ed] a review" of the practice.[63] But, as discussed above, the Agency's longstanding failure to pay for travel time does not provide a sufficient basis for finding that the Agency proved the good-faith, reasonable-basis affirmative defense.[64]

Because the Agency did not demonstrate to the Arbitrator that it acted both with good faith and with a reasonable basis to believe that it complied with the FLSA, we find that the Agency did not satisfy its burden to establish the affirmative defense to liquidated damages under § 260. Accordingly, we find that the Arbitrator's denial of liquidated damages is contrary to law, and we modify the award to include liquidated damages in an amount equal to the overtime compensation due to the officers.

3. The Arbitrator's denial of attorney fees is contrary to law.

The Union argues that the Arbitrator's denial of attorney fees is contrary to law because a fee award is mandatory when an employee prevails on an FLSA claim.[65] The Union asserts that it is the prevailing party because the Arbitrator sustained its grievance and ordered the Agency to pay the officers for the travel time.[66] The Agency states that if the Authority does not grant the Agency's exceptions, then the Union "would be entitled to file a formal request for attorney fees" with the Arbitrator.[67] Nevertheless, the Agency asserts that "the Union's request for the [Authority] to require the awarding of attorney fees is premature" because the Union did not "formally" request attorney fees from the

[53] Award at 16.
[54] *Local 1662*, 66 FLRA at 927 (citation omitted).
[55] Award at 16.
[56] *E.g.*, *AFGE, Local 2571*, 67 FLRA 593, 594 (2014) (*Local 2571*) (Member Pizzella concurring) (citing *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008)); *U.S. Dep't of Commerce, NOAA, Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 435 (2001) (*NOAA*) (citing *NTEU*, 53 FLRA at 1481).
[57] *E.g.*, *Local 2571*, 67 FLRA at 594 (citation omitted); *NOAA*, 57 FLRA at 435 (citation omitted).
[58] Union's Exceptions at 14-15 (citing Award at 16).
[59] *Local 2571*, 67 FLRA at 594; *see also Adams v. United States*, 46 Fed. Cl. 616, 620 (2000) (29 U.S.C. §§ 216 and 260 operate independently of each other and have different burdens of proof); *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 357 (5th Cir. 1990) ("A finding that the employer did not act willfully does not preclude an award of liquidated damages.").
[60] Union's Exceptions at 16.
[61] *Local 987*, 66 FLRA at 146-47 (quoting *NTEU*, 53 FLRA at 1481-82) (citations omitted).
[62] *Local 1662*, 66 FLRA at 926-27 (citations omitted).
[63] Agency's Opp'n at 13; *see also* Award at 12.
[64] *Local 987*, 66 FLRA at 146-47 (citation omitted); *see also NTEU*, 53 FLRA at 1483-84 ("[absent] any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread practices that violate the [FLSA]'s overtime pay provisions is not evidence of an objectively reasonable good faith violation" (quoting *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991))(internal quotation marks omitted)).
[65] Union's Exceptions at 11-12.
[66] *Id.* at 13.
[67] Agency's Opp'n at 7.

Arbitrator and the Agency must be permitted to respond to the Union's request.[68]

The FLSA provides that a party that prevails on an FLSA claim is entitled to reasonable attorney fees and costs.[69] Because the Agency has not shown that the portion of the award finding that the Agency violated the FLSA is deficient, the Union is the prevailing party. Therefore, consistent with Authority precedent, we remand the portion of the award denying attorney fees to the parties so that the Union may petition the Arbitrator for "reasonable" attorney fees and costs, absent settlement.[70]

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions. We grant, in part, and deny, in part, the Union's exceptions. We modify the award to include liquidated damages, and we remand the award, in part, to the parties so that the Union may petition the Arbitrator for reasonable attorney fees and costs, absent settlement.

[68] *Id.*
[69] 29 U.S.C. § 216(b).
[70] *Local 1662*, 66 FLRA at 928 (quoting 29 U.S.C. § 216(b)); *see also AFGE, Local 446*, 58 FLRA 361, 362 (2003); *IFPTE, Local 529*, 57 FLRA 784, 786 (2002).