70 FLRA No. 119

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3828
(Union)

0-AR-4921
(69 FLRA 176 (2016))

_____

DECISION

May 17, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator T. Zane Reeves issued an award (merits award) finding that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to compensate employees for work performed before and after their assigned shifts, and ordering the Agency to compensate the affected employees with overtime pay. In *U.S. DOJ, Federal BOP, Federal Correctional Institution Bastrop, Texas* (*FCI Bastrop I*),[2] the Authority determined that the pertinent legal standard changed following the Arbitrator's issuance of the merits award, meaning that the Arbitrator did not have the opportunity to apply the correct legal standard. The Authority also found that the Arbitrator did not make sufficient factual findings in the record for the Authority to assess whether the newly-changed legal standard was satisfied.

The Authority therefore remanded the matter with instructions to the Arbitrator to make additional factual findings and to apply the correct legal standard. The Arbitrator issued another award (remand award) which reached the same conclusion in the merits award—that the Agency had violated the FLSA. The Agency now excepts to the remand award.

We must determine whether the remand award is contrary to the FLSA because it awards overtime compensation to the grievants for time spent undergoing security screenings. Because the Arbitrator's conclusory determination that the security screenings undergone by the grievants in these circumstances are "directly related" to the grievants' ability to do their jobs is not supported by any findings of fact that are reviewable by the Authority, the answer to this question is yes.[3]

II. Background and Arbitrator's Awards

A. The first award and *FCI Bastrop I*

As *FCI Bastrop I* sets forth the facts of this case in detail, we will only briefly summarize them here.

The grievants at issue here are correctional officers at a federal, minimum-security prison. All of the grievants begin their workday by passing through a metal detector. The Union filed a grievance, seeking backpay for the ten months preceding the grievance, and, as relevant here, contending that the Agency violated the FLSA by failing to compensate employees from the time they begin the security screening process until the time they exit the facility. The grievance was unresolved, and the parties submitted the matter to arbitration.

In the merits award, the Arbitrator found that undergoing security screening was "an essential and required activity for the security of the facility," and therefore "a principal activity" and "an integral and indispensable activity [that] should be considered compensable work."[4] The Agency filed exceptions to the merits award, arguing that the merits award was contrary to the Portal-to-Portal Act,[5] which states that "the principal activity or activities that an employee is hired to perform" are compensable, but "activities [that] are preliminary to or postliminary to said principal activity or activities" are not compensable.[6] The Agency also argued that the security screenings are not "integral and indispensable" to the grievants' principal

[1] 29 U.S.C. §§ 201-209.
[2] 69 FLRA 176 (2016).
[3] Remand Award at 27.
[4] Merits Award at 66.
[5] *FCI Bastrop I*, 69 FLRA at 178 (citing 29 U.S.C. §§ 252-262).
[6] *Id.* at 179 (quoting *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 936 (2015) (*BOP Lexington*) (Member Pizzella concurring in part and dissenting in part); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (*BOP Allenwood*)).

activities, and therefore are not compensable under Authority precedent.[7]

After considering these exceptions, the Authority issued its decision in *FCI Bastrop I*. The Authority noted that the Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk* (*Integrity Staffing*)[8] was issued after the Arbitrator issued the merits award but before the Agency filed its exceptions.[9] In that case, the Court held that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[10] In so holding, the Court rejected tests, articulated in several federal-court decisions,[11] that had focused on "whether an employer required a particular activity" or "whether the activity is for the benefit of the employer."[12] Instead, the "test is tied to the productive work that the employee is employed to perform."[13]

Because the Court pronounced this standard very recently, the Arbitrator was unable to apply it in the merits award. Accordingly, the Authority remanded the award to the parties for resubmission to the Arbitrator, absent settlement, for further factual findings regarding "whether security screening in the circumstances of this case meets [the] standard" set forth in *Integrity Staffing*.[14]

B. The remand award

The parties were apparently unable to resolve their dispute and resubmitted the first award to the Arbitrator. In the remand award, in relevant part, the Arbitrator observed that the Supreme Court found that the employees in *Integrity Staffing* "could skip the [security] screenings altogether without the safety or effectiveness of their principal activities being substantially impaired."[15] The Arbitrator then found that this "is *not* the case" for the grievants in this case, because the security screenings "are *directly related* to the [grievants'] ability to perform their jobs of ensuring safety and security within the prison safely and effectively."[16]

The Arbitrator further found that the security screenings undergone by the grievants are an intrinsic element of the grievants' principal activities of providing security to the Agency's facility. Accordingly, the Arbitrator concluded that time the grievants spend undergoing security screenings is compensable under the FLSA and marks the beginning of the compensable, continuous workday.

The Agency filed an exception to the remand award, and the Union filed an opposition.

III. Analysis and Conclusion: The remand award is contrary to law.

The Agency argues that the Arbitrator's determination that time spent undergoing security screenings is contrary to law.[17] When a party's exceptions involve an arbitration award's consistency with law, the Authority reviews the questions of law raised by the award and the party's exceptions de novo.[18] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[19] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[20]

As we noted in *FCI Bastrop I*, the Supreme Court held in *Integrity Staffing* that an activity is "integral and indispensable" to an employee's principal activities—and therefore compensable under the FLSA—"if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[21] In so holding, the Court explained that this "test is tied to the productive work that the employee is employed to perform."[22] Applying this test to the warehouse workers at issue in that case, the Court concluded that the security screenings they underwent at the end of each workday were not an intrinsic element of their principal duties of "retrieving products from warehouse shelves or

---

[7] *Id.* (quoting *BOP Lexington*, 68 FLRA at 936) (citing *BOP Allenwood*, 65 FLRA at 999).
[8] 135 S. Ct. 513 (2014).
[9] *FCI Bastrop I*, 69 FLRA at 179.
[10] *BOP Lexington*, 68 FLRA at 936 (quoting *Integrity Staffing*, 135 S. Ct. at 517) (internal quotation marks omitted).
[11] *Id.* (citing *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (*Bonilla*)).
[12] *Id.* (quoting *Integrity Staffing*, 135 S. Ct. at 519) (internal quotation marks omitted).
[13] *Id.* (quoting *Integrity Staffing*, 135 S. Ct. at 519) (internal quotation marks omitted).
[14] *FCI Bastrop I*, 69 FLRA at 180.
[15] Remand Award at 27 (quoting *Integrity Staffing*, 135 S. Ct. at 520 (Sotomayor, J., concurring)).
[16] *Id.*
[17] Exceptions Br. at 6.
[18] *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)).
[19] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[20] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[21] *FCI Bastrop I*, 69 FLRA at 179 (quoting *Integrity Staffing*, 135 S. Ct. at 517).
[22] *Id.* (quoting *Integrity Staffing*, 135 S. Ct. at 519).

packaging them for shipment."[23] In this regard, the Court found that the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."[24]

The Agency argues here that the Arbitrator, in "no more than a few sentences, and with no discussion of the application of *Integrity Staffing*," made a "conclusory statement without providing any analysis as to why going through the security screening is an 'intrinsic element' of being a correctional officer."[25] Indeed, the Arbitrator appears to have entirely sidestepped the Authority's directive in *FCI Bastrop I* to "make sufficient factual findings for us to assess whether security screening in the circumstances of this case meets [the] standard" set forth in *Integrity Staffing*.[26]

The Arbitrator's "findings and conclusions" in the remand award consist of little more than the statement, without any further explanation, that security screenings are "*directly related* to the [grievants'] ability to perform their jobs."[27] The Arbitrator also states that the security screenings are "an intrinsic element of" the grievants' principal duties.[28] However, as the Authority explained in *FCI Bastrop I*, this is a legal conclusion and not a factual one, and is therefore not entitled to deference.[29] And although the Arbitrator spends ample time summarizing the positions of the parties,[30] he does not specify which portions of the parties' positions he credits as factual findings.[31]

Because the Arbitrator provided no additional factual findings to which we can defer and which we utilize to conduct the required de novo review, we are presented with a legal conclusion ("directly related") that has no factual findings in support.[32]

We find that a vacuous legal conclusion, one that has no factual findings to support it, is an erroneous legal conclusion. Therefore, that portion of the award in which the Arbitrator pronounced the grievants' passage through security screening to be directly related to their principal activities and one with which the grievants could not dispense is contrary to law, namely the legal standard as given by *Integrity Staffing*.[33]

In finding the award contrary to law, we do not remand this case for a second time to the parties for resubmission to the Arbitrator. Unlike previous cases where the Authority has remanded cases for a second time,[34] the Arbitrator here provided *no* further factual findings or analysis following the first remand upon which the Authority could rule. Instead, the Arbitrator's "findings" were simply a recitation of the arguments made by the Union in its briefs on remand—which, for the reasons stated above, are insufficient to support the Arbitrator's legal conclusion.[35] A further remand would give the Union—the party with the burden of proof to demonstrate that these screenings are compensable[36]—a second opportunity to prove its case to the Arbitrator when it failed to do so on remand the first time. For these reasons, we find that a second remand would be inappropriate in this case.

Accordingly, we grant the Agency's exception and set aside the award.

IV. Decision

We set aside the award.

[23] *Id.* (quoting *Integrity Staffing*, 135 S. Ct. at 518).
[24] *Id.* (quoting *Integrity Staffing*, 135 S. Ct. at 518).
[25] Exceptions Br. at 9.
[26] *FCI Bastrop I*, 69 FLRA at 180.
[27] Remand Award at 27.
[28] *See* Merits Award at 66; Remand Award at 29.
[29] *FCI Bastrop I*, 69 FLRA at 180 (citing *BOP Lexington*, 68 FLRA at 938).
[30] *See* Remand Award at 7-27.
[31] *Id.* at 27.
[32] *See U.S. Dep't of Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 FLRA 687, 693 (1999). *Contra U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 237 (2014) (reviewing arbitrator's legal conclusions de novo, Authority consistently denied exceptions when arbitrator has applied correct standard of law and made findings of fact that support disputed legal conclusion).
[33] *See BOP Allenwood*, 65 FLRA at 999-1000 (holding that passing through a security screening is not compensable as a principal activity) (citing *Bonilla*, 487 F.3d at 1345; *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592-93 (2d Cir. 2007)).
[34] *See, e.g., AFGE, Local 1992*, 70 FLRA 313, 315 (2017).
[35] *See* Remand Award at 27.
[36] *AFGE, Local 3723*, 67 FLRA 149, 150 (2013).

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's allegedly "vacuous" award.[1] Rather, I find that the Arbitrator's analysis, part of his detailed thirty-page award, complies with *Integrity Staffing*'s requirements.[2] The Arbitrator's findings are sufficient to support his conclusion that "[s]ecurity screening . . . is 'an intrinsic element of' the principal activities that [the correctional officers] are employed to perform and one with which they cannot dispense if they are to perform their principal activities."[3]

The Arbitrator's legal conclusions, as well as the factual findings on which the Arbitrator relies to support his award, are clear from the Arbitrator's extensive, detailed discussion of the case. Contrary to the majority's claim that the Arbitrator "provided no . . . factual findings,"[4] the Arbitrator *does* specify which portions of the parties' positions he credits, and adopts as factual findings. Specifically, in finding that "[t]he security screenings for the correctional employees at issue are *directly related* to the employees' ability to perform their jobs of ensuring safety and security within the prison safely and effectively," the Arbitrator cites the Union's Statement of Material Facts (SOF), "SOF, Part II; ¶ 45." [5] Reasonably interpreted, that reference credits the Union's assertions, set forth in the Arbitrator's discussion of the Union's position, that cite the same source, "SOF, Part II; ¶ 45."[6] Referencing its SOF, the Union asserts that correctional officers are employed to ensure safety and security within the prison, and that the officers are required to submit to security screening to detect weapons, cell phones, and other contraband because "[t]he presence of such contraband obviously affects safety and security[,] . . . the very activity . . . which the employees here have been employed to perform."[7] Adopting those assertions, the Arbitrator finds that were officers to bring such material into the prison, that would jeopardize the very safety and security of the prison that the officers are employed to protect.[8] Put differently, correctional officers trading in contraband cease, in some fundamental ways, to function as correctional officers.

Accordingly, because the Arbitrator's legal conclusions and supporting factual findings are clear from the Arbitrator's extensive discussion of the case, I would deny the Agency's contrary-to-law exception and uphold the award.

[1] Majority at 5.
[2] *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 517 (2014) (An activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an *intrinsic element* of those activities and one with which the employee *cannot dispense if he is to perform his principal activities*." (emphasis added)).
[3] Remand Award at 29.
[4] Majority at 5.
[5] Remand Award at 27.
[6] *Id.* at 12.
[7] *Id.* (describing the position of the Union).
[8] *See id.* at 25-27.