70 FLRA No. 36

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO, PUERTO RICO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4052
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5233

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DECISION

March 28, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency filed exceptions to Arbitrator Wallace Rudolph's award, which sustained the Union's grievance and awarded compensation, plus liquidated damages, under the Fair Labor Standards Act[1] (FLSA) for the Agency's failure to compensate the grievants for instances in which they worked through their unpaid lunch breaks. We must decide five questions.

First, we must decide whether the award is based on nonfacts because the Arbitrator erred in concluding that evidence submitted by the Union established a prima facie claim of entitlement to damages, and because the Arbitrator assigned too much weight to the Union's evidence. Because the Agency's nonfact arguments challenge the Arbitrator's legal conclusions and constitute mere disagreements with the Arbitrator's evaluation of the evidence, and because these issues were disputed between the parties at arbitration, the answer to this question is no.

Second, we must decide whether the award is contrary to the Back Pay Act[2] (BPA) because the Arbitrator did not find that each grievant was affected by an unjustified or unwarranted personnel action. Because the Arbitrator did not find that the Agency violated the BPA – instead, he found violations of the FLSA – and because the Arbitrator awarded damages under the FLSA and not the BPA, the answer to this question is no.

Third, we must decide whether the award is contrary to the FLSA because the Arbitrator improperly shifted the burden of proof for establishing an entitlement to damages from the Union to the Agency. Because the Arbitrator found that the Union satisfied its burden of presenting sufficient evidence to establish a reasonable inference for uncompensated overtime, the answer to this question is no.

Fourth, we must decide whether the Arbitrator's decision to award liquidated damages is contrary to the FLSA because the Agency acted in good faith. Because the Arbitrator found that the Agency did not take active steps to avoid violating the FLSA, and therefore did not demonstrate that it acted in good faith, the answer to this question is no.

Fifth, we must decide whether the award fails to draw its essence from the parties' agreement because the Arbitrator modified the Union's grievance without mutual consent of the parties. Because the violations found by the Arbitrator were alleged within the Union's grievance, the answer to this question is no.

For the foregoing reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievants are assigned to eight-hour daily shifts as well as a thirty-minute, unpaid lunch break. The Union filed a grievance alleging that the Agency frequently required employees to work through their unpaid lunch breaks or failed to provide relief so that the employees could take a duty-free half-hour break, and so, failed to compensate them for this work. The Agency denied the grievance, and the parties proceeded to arbitration.

At arbitration, the Union submitted into evidence employment records called "[d]aily [a]ssignment [r]osters."[3] The Union asserted that these records are an accurate reflection of each employee's work assignments and leave time – including whether or not they worked through an unpaid lunch break – and

[1] 29 U.S.C. §§ 201-219.

[2] 5 U.S.C. § 5596.

[3] Award at 1.

argued that the contents of the daily assignment rosters were sufficient on their own to determine which employees were not compensated for work during unpaid lunch breaks. Accordingly, as the parties did not stipulate to the issue, the Arbitrator framed the issue between the parties as "whether the admission into evidence of the [d]aily [a]ssignment [r]osters is sufficient to" make a "prima facie case" of entitlement to unpaid overtime compensation.[4]

The Agency argued that these assignment rosters did not contain sufficient proof to establish a prima facie case that each grievant's claim was valid. The Agency asserted that each claim was invalid unless it was supported by the direct testimony of each worker who was not relieved for his or her lunch break. The Arbitrator disagreed, finding that "testimony by particular officers as to whether they were relieved on a particular day or time . . . would not be as accurate as a contemporaneous record made at the time of the occurrence."[5]

The Arbitrator thus concluded that the Union had presented a prima facie case for unpaid overtime hours, as reflected in the daily assignment rosters. The Arbitrator also noted that the Agency was in possession of the records presented by the Union, and therefore had the opportunity to rebut any of the Union's claims that it believed to be inaccurate, but failed to do so.

Accordingly, the Arbitrator found that the Agency violated the FLSA by not compensating employees for work performed during their unpaid lunch breaks. The Arbitrator ordered the Agency to reimburse the grievants for all instances of unpaid overtime documented within the daily assignment rosters. The Arbitrator also found that the Agency's refusal to consider the evidence presented by the Union was willful and therefore awarded liquidated damages.

The Agency filed exceptions to the award. The Union filed an opposition.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.[6] The Authority will not grant a nonfact exception and find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[7] Moreover, the Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence.[8] Additionally, challenges to an arbitrator's legal conclusions do not provide a basis for finding an award deficient as based on nonfacts.[9]

The Agency asserts that the award is based on nonfacts because: the Arbitrator erroneously concluded that the daily assignment rosters established a prima facie case of unpaid overtime; the Union's documentary evidence was not corroborated by any representative testimony; and "the Arbitrator failed to balance the Agency's testimonial and documentary evidence at the hearing."[10] These arguments all fail because they either were disputed extensively between the parties at arbitration,[11] or because they constitute nothing more than a mere disagreement with the Arbitrator's evaluation of the evidence. Moreover, to the extent that the Agency challenges the Arbitrator's conclusion that the Union established a prima facie case, such a conclusion is a legal conclusion and not a factual one.[12] As stated above, challenges to an arbitrator's legal conclusions do not provide a basis for finding an award deficient as based on nonfacts.[13]

Additionally, the Agency asserts that the Union "did not provide an example of one . . . correctional officer who submitted in writing to their supervisor" that he or she had not been compensated for working through lunch.[14] The Agency claims that this is contrary to a provision of the parties' agreement that requires employees to notify their supervisor in writing if they believe they have been underpaid.[15] However, to the extent that the Agency contends that the award is

[4] *Id.*
[5] *Id.* at 2.
[6] Exceptions at 7-12.
[7] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009)).
[8] *Nat'l Nurses United*, 70 FLRA 166, 167 (2017) (*NNU*) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (then-Member Pizzella dissenting); *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012)).
[9] *AFGE, Local 3652*, 68 FLRA 394, 397 (2015) (*Local 3652*) (citing *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015); *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010); *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003); *Union of Pension Emps.*, 67 FLRA 63, 64-65 (2012)).
[10] Exceptions at 8-9.
[11] *See, e.g.*, Opp'n, Union Ex. 1, Union Post-Hr'g Br. at 26-27.
[12] *See Local 3652*, 68 FLRA at 399 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (*Mt. Clemens*)).
[13] *Id.* at 397.
[14] Exceptions at 11.
[15] *Id.* at 12 (quoting Exceptions, Agency Ex. 3, Parties' Agreement (CBA) Art. 6, § q.).

inconsistent with the parties' agreement, such a claim does not raise a nonfact exception.[16]

Accordingly, we deny the Agency's exception that the award is based on nonfacts.

B. The award is not contrary to law.

The Agency 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 raised by the exception and the award de novo.[17] 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.[18] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[19]

i. The award is not contrary to the BPA.

The Agency argues that the award is contrary to the BPA because the Arbitrator did not find that each grievant was affected by an unjustified or unwarranted personnel action.[20] However, the Arbitrator did not find that the Agency violated the BPA – he found that the Agency violated the FLSA.[21] As the Arbitrator did not find that the Agency violated the BPA, and did not award any damages under the BPA, the Agency's argument that the award is contrary to the BPA does not provide a basis for setting it aside. Accordingly, we deny this exception.

ii. The award is not contrary to the FLSA.

The Agency argues that the award is contrary to the FLSA,[22] which requires employers to compensate non-exempt employees for all hours of work in excess of forty hours in a workweek.[23] The Agency argues that the award is contrary to the FLSA for two reasons.

First, the Agency argues that the Arbitrator improperly shifted the burden of proof for establishing an entitlement to uncompensated overtime from the Union to the Agency.[24] The Agency asserts that the "Union has the burden of proof to establish entitlement to uncompensated overtime under the FLSA,"[25] and argues that the Union failed to meet this burden.[26]

Although employees have the burden under the FLSA to establish that they have performed work for which they have not been properly compensated,[27] employers have the duty of maintaining proper records of wages, hours, and other conditions and practices of employment.[28] Where such records are inaccurate or inadequate and the employee cannot offer convincing substitutes, the employee is not required to establish the exact number of hours worked, but is only required to provide sufficient evidence "to show the amount and extent of that work as a matter of just and reasonable inference."[29]

Here, upon considering the evidence submitted by the Union – including specific examples of daily assignment rosters that reflected whether an employee had been compensated for missed lunch breaks,[30] as well as testimony from a witness that daily assignment rosters contained such information[31] – the Arbitrator concluded that the Union had satisfied this burden, and "reject[ed] the Agency[']s contention that there was no proof presented by the Union to support [its] claim."[32] The Arbitrator's analysis of the evidence presented by the Union to satisfy its burden under the FLSA is treated as a

[16] *See NNU*, 70 FLRA at 167 (citing *NLRB*, 50 FLRA 88, 92 (1995) (interpretation of parties' agreement cannot be challenged as nonfact)).
[17] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994) (citing 5 U.S.C. § 7122(a)(1)).
[18] *Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[19] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[20] Exceptions at 13-17 (citing 5 U.S.C. § 5596).
[21] *See* Award at 4.
[22] Exceptions at 13, 16, 18-21.
[23] 29 U.S.C. § 207(a)(1); *see also AFGE, Local 0922*, 70 FLRA 34, 36 (2016) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (*BOP Jesup*)).
[24] Exceptions at 13, 16, 18-19.
[25] *Id.* at 18 (citing *AFGE, Local 1741*, 62 FLRA 113, 119 (2007) (*Local 1741*)).
[26] *Id.* at 19.
[27] *AFGE, Local 3723*, 67 FLRA 149, 150 (2013) (*Local 3723*) (citing *Local 1741*, 62 FLRA at 119); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 771 (2006) (*BOP Marion*)); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr. Chicago, Ill.*, 63 FLRA 423, 428 (2009) (citing *Mt. Clemens*, 328 U.S. at 686-87).
[28] *BOP Marion*, 61 FLRA at 771 (citing *Mt. Clemens*, 328 U.S. at 687).
[29] *Local 1741*, 62 FLRA at 119 (quoting *Mt. Clemens*, 328 U.S. at 687).
[30] *See* Opp'n, Union Ex. 2, Santana, J., Daily Assignments; Opp'n, Union Ex. 3, Alicea, C., Daily Assignments.
[31] *See* Exceptions, Agency Ex. 9, Hr'g Tr. (Hr'g Tr.) at 116:1-117:18, 263:1-23.
[32] Award at 2.

factual finding to which the Authority defers.[33] Because, as explained above, the Agency has failed to demonstrate that this finding is a nonfact, we will not set it aside.[34]

Once the Union has satisfied this threshold, the burden then "shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to [negate] the reasonableness of the inference to be drawn from the employee's evidence."[35] Given this precedent, the Arbitrator did not err by shifting the burden to the Agency to refute the Union's claims for uncompensated overtime. We therefore deny the Agency's exception that the award is contrary to the FLSA because the Arbitrator shifted the burden of proof from the Union to the Agency.

Second, the Agency argues that the award is contrary to the FLSA because the Arbitrator wrongfully awarded liquidated damages to the Union.[36] Under the FLSA, where an employer is liable for unpaid overtime and does not satisfy its "substantial burden"[37] of proving that it acted both with good faith and with a reasonable basis for believing that it was not violating the FLSA,[38] liquidated damages are mandatory.[39]

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 and comply with those requirements.[40] Further, the Authority has found that the good-faith requirement is not satisfied simply because the employer "did not purposefully violate the provisions of the FLSA."[41] In this regard, the Authority has held that liquidated damages were appropriate when an agency failed to take "active steps" to ascertain the FLSA's requirements, even if the agency had "legitimate reasons to question" the employees' entitlement to overtime pay.[42]

The Agency argues that it acted in good faith because it "had established a lunch relief schedule for a number of years and had paid overtime to numerous employees over the years when they did not get their lunch relief."[43] According to the Agency, this practice meant that the Agency did not need to consider the evidence provided by the Union that purportedly showed examples of unpaid overtime, because it had reason to believe "that employees were either being relieved for lunch or being compensated if they had not been relieved for lunch."[44]

However, the Arbitrator found that, early in the grievance process, the Agency had the information contained in the daily assignment rosters and "was in a position to object" if the Union's claims of uncompensated overtime were inaccurate, but failed to do so.[45] The Arbitrator also found that an Agency witness conceded at arbitration that the Agency "could have taken a closer look" at the evidence submitted by the Union, but did not do so because it believed the process to be too time-consuming.[46] The Arbitrator further found that "[a]ny records that could impeach the claims [of the Union were] in control of the Agency but the Agency refused to present the evidence claiming that the Union had failed to prove its case."[47]

Given these findings, the Arbitrator did not err in concluding that liquidated damages were appropriate under the FLSA. As the Arbitrator found that the Agency was presented with an opportunity to take "active steps"[48] to ascertain whether it had violated the FLSA – namely, by scrutinizing the daily assignment rosters provided by the Union – but neglected to do so, the Agency did not satisfy its "substantial burden"[49] of proving that it acted in good faith.

Accordingly, we deny the Agency's exception that the Arbitrator's decision to award liquidated damages is contrary to the FLSA.

C. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator modified the Union's grievance without the joint consent of the parties.[50] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration

[33] *Local 3723*, 67 FLRA at 150 (citing *NFFE, Local 1804*, 66 FLRA 512, 514 (2012)).
[34] *See id.*
[35] *Local 1741*, 62 FLRA at 119 (alterations in original) (quoting *Mt. Clemens*, 328 U.S. at 687-88).
[36] Exceptions at 19-21.
[37] *AFGE, Local 1662*, 66 FLRA 925, 927 (2012) (*Local 1662*).
[38] 29 U.S.C. § 260.
[39] *AFGE, Local 3828*, 69 FLRA 66, 69 (2015) (citing 29 U.S.C. § 216(b); *Local 1662*, 66 FLRA at 926-27; *AFGE, Local 987*, 66 FLRA 143, 146-47 (2011) (*Local 987*)).
[40] *Id.* (citing *Local 987*, 66 FLRA at 147; *Local 1662*, 66 FLRA at 926-27).
[41] *Id.* (quoting *Local 987*, 66 FLRA at 146-47).
[42] *BOP Jesup*, 69 FLRA at 200 (citing *Local 1662*, 66 FLRA at 927; *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 150-51 (2d. Cir. 2008)).
[43] Exceptions at 20.
[44] *Id.*
[45] Award at 2.
[46] *Id.* at 3 (citing Hr'g Tr. at 276:8-10).
[47] *Id.*
[48] *BOP Jesup*, 69 FLRA at 200.
[49] *Local 1662*, 66 FLRA at 927.
[50] Exceptions at 17-18.

awards in the private sector.[51] Under this standard, the appealing party must establish that the award evidences a manifest disregard of the agreement.[52] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[53]

The Agency asserts that the Union's grievance "solely relied upon an alleged violation of the [BPA]" and did not allege that the Agency had violated the FLSA.[54] Therefore, the Agency argues that the award fails to draw its essence from Article 32, Section a. of the parties' agreement, which states that once a grievance is filed, "the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement" between the parties.[55] Because the Agency never consented to modifying the grievance to include allegations of FLSA violations, the Agency argues that the Arbitrator's finding of a FLSA violation is incompatible with Article 32, Section a. of the parties' agreement.[56]

However, contrary to the Agency's claims, the Union's grievance did not rely solely upon alleged violations of the BPA; it also requested relief for the violation of a 2002 settlement agreement – one previously agreed upon by the same parties that referenced "FLSA" on the first page[57] – in addition to violations of "any other law, rule, or regulation."[58] The Agency has not demonstrated that the Arbitrator's decision to include the FLSA from the 2002 settlement agreement or within the scope of the phrase "any other law, rule, or regulation" evidences a manifest disregard for Article 32, Section a. of the parties' agreement.

Accordingly, we deny the Agency's exception that the award fails to draw its essence from the parties' agreement.

IV. Decision

We deny the Agency's exceptions.

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[51] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[52] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).
[53] *Id.* (quoting *DOL*, 34 FLRA at 576).
[54] Exceptions at 17-18 (citing Exceptions, Agency Ex. 7, Union Grievance (Grievance) at 4).
[55] *Id.* at 17 (quoting CBA Art. 32, § a.).
[56] *Id.* at 18.
[57] *See* Opp'n, Union Ex. 6, Settlement Agreement at 1.
[58] *See* Grievance at 4.