71 FLRA No. 74

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3310
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
VICKSBURG DISTRICT
(Agency)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
ENGINEER RESEARCH
AND DEVELOPMENT CENTER
(Agency)

0-AR-5467
0-AR-5468

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DECISION

November 7, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we deny the Union's exceptions to Arbitrator David P. Clark's award that determined the Union was not entitled to liquidated damages for unpaid overtime compensation because the Agency adequately established an affirmative defense under the Portal-to-Portal Act.[1]

The main question before us is whether the award is contrary to the Fair Labor Standards Act (FLSA)[2] and the Portal-to-Portal Act.[3] Relying on the specific factual findings made by the Arbitrator, we determine that the Agency acted in good faith and had reasonable grounds for its actions; therefore, we deny this exception.

II. Background and Arbitrator's Award

In October 2016, the human resources division of the Agency initiated an audit of positions that were previously classified as exempt under the administrative exemption of the FLSA.[4] The Agency then reclassified the positions of all eligible bargaining-unit employees from exempt to non-exempt. After the Agency did not reimburse the affected employees for their unpaid overtime, the Union filed identical grievances at two facilities. The Agency responded to the grievances by agreeing to pay the affected employees for any unpaid overtime, plus interest, that had accrued for the two years prior to the reclassifications.

The grievances proceeded to arbitration because the Union claimed that the reimbursements were inadequate. Specifically, the Union sought recovery under either the Back Pay Act (BPA), which allows for a

[1] 29 U.S.C. § 260. The Union's identical grievances for the Vicksburg District and for the Engineer Research and Development Center were jointly decided by the Arbitrator in the same hearing and award. Award at 3. The Agency requests that the cases be consolidated here as well. Because the Union also filed two identical exceptions with the Authority, we have consolidated those exceptions into the instant decision. *See NFFE, Local 951, IAMAW*, 59 FLRA 951, 951 (2004) ("Given the similarities in the cases, and noting that the parties' arguments are the same in both cases, we have consolidated them for decision.").

[2] 29 U.S.C. § 216(b).

[3] When enacted in 1938, the FLSA did not originally define "work" or "workweek." Accordingly, courts found that employees were statutorily owed backpay and overtime compensation for the time they spent travelling from one work area to another. *See Integrity Staffing Solutions Inc. v. Busk*, 574 U.S. 27, 31 (2014) (*Integrity Staffing*). Congress subsequently passed the Portal-to-Portal Act to amend the FLSA and protect employers from the "financial ruin" that would result from backpay and overtime compensation claims for "activities performed by [employees] without any expectation of reward beyond that included in their agreed rates of pay." *Id.* at 32. Consequently, the Portal-to-Portal Act shields employers from liability for future claims relating to the following two types of work activities: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities. . . ." 29 U.S.C. § 254(a); *see also Integrity Staffing*, 574 U.S. at 32. As relevant here, and discussed further below, the Portal-to-Portal Act states that if an employer shows that the act giving rise to liability was taken in good faith and with reasonable grounds for believing that it did not violate the FLSA, the employer is not liable for liquidated damages. 29 U.S.C. § 260.

[4] 29 U.S.C. § 213(a)(1).

six year limitations period with interest ,[5] or the FLSA, which allows for a two year limitations period in addition to liquidated damages.[6] The Arbitrator initially determined that the FLSA's two year limitations period applied to the grievances. As for liquidated damages, the Arbitrator noted that, under the Portal-to-Portal Act, an employer avoids liability for such damages if the employer establishes a "good-faith, reasonable-basis defense."[7] The Agency argued that the Union was not entitled to liquidated damages since the Agency had established this affirmative defense.

On the merits, the Arbitrator determined that the Agency's actions were reasonable under the circumstances and that it attempted to comply with the FLSA in good faith. He found that the Agency acted in good faith by initiating the review of the grievants' classifications to ensure compliance with the FLSA. Moreover, he found that the Agency's decision to reclassify all eligible bargaining-unit employees to non-exempt demonstrated that the Agency acted without bias. The Arbitrator noted that the Agency already agreed to pay the grievants their unpaid overtime, plus interest, prior to arbitration.

The Arbitrator also found that the Agency's prior classifications of the grievant's positions were reasonable. He credited the testimony of human resources employees who stated that they promptly raised classification issues with their supervisors. Additionally, he found that the Agency reclassified all eligible bargaining unit employees to non-exempt despite the fact that an Agency witness testified she would have "retain[ed] several position descriptions as exempt."[8] Because the Agency had already paid the grievants any unpaid overtime that had accrued for two years, plus interest, the Arbitrator found that the Agency had established an affirmative defense, and the grievants were not entitled to liquidated damages or any additional interest.

The Union filed exceptions to the award on January 29, 2019 and the Agency filed oppositions on February 28, 2019.

[5] 5 U.S.C. § 5596(b)(4).
[6] 29 U.S.C. § 255.
[7] Award at 12 (quoting *AFGE, Local 1662*, 66 FLRA 925, 927 (2012)).
[8] *Id.* at 13.

III. Analysis and Conclusions: The award's denial of liquidated damages is not contrary to law.

The Union contends that the Arbitrator's award is contrary to the FLSA and the Portal-to-Portal Act[9] because it fails to award liquidated damages.[10]

Courts and the Authority have held that the FLSA creates a presumption that employees who are improperly denied overtime are owed liquidated damages.[11] Consequently, agencies have the substantial burden of proving that they qualify for the good-faith, reasonable-basis defense under the Portal-to-Portal Act and, therefore, are not liable for liquidated damages.[12] To meet this burden, employers must show that (1) the act or omission giving rise to the employee's FLSA action was in good faith (the good-faith requirement); and (2) the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA

[9] In its opposition, the Agency argues that the Authority should dismiss this argument because the Union failed to raise it before the Arbitrator. Opp'n at 11 (citing 5 C.F.R. §§ 2425.4(c), 2429.5). However, because the Union argued at arbitration that the Agency had not presented sufficient evidence to support a defense to an award of liquidated damages, *see* Award at 9, we decline to dismiss this argument.
[10] Exceptions at 9 (citing *Williams v. Tri-Cnty. Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (*Williams*) (employer's unintentional violation of the FLSA, despite spanning a long period with no complaints from its employees, did not demonstrate that the employer acted in good faith because good faith requires an employer to affirmatively establish that it attempted to ascertain the Portal-to-Portal Act's requirements)). 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. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 71 FLRA 8, 9 (*BOP, Englewood*) (2019) (Chairman Kiko concurring; Member Abbott concurring). In making that determination, the Authority defers to the arbitrator's underlying findings of fact. *Id.*
[11] *Ayala v. Tito Contractors, Inc.*, 82 F. Supp. 3d 279, 285 (D.D.C. 2015) ("The presumption in favor of awarding liquidated damages is strong."); *AFGE, Local 1662*, 66 FLRA 925, 926-27 (2012) (*AFGE*) ("[T]he Authority has found that the FLSA provisions concerning liquidated damages and attorney fees and costs are substantive provisions, with which arbitration awards must be consistent."). While courts have held that the FLSA and the Portal-to-Portal Act create "a strong presumption" favoring liquidated damages, *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (noting that "[t]he FLSA originally made double damages mandatory"), Member Abbott notes that the plain language of the FLSA and the Portal-to-Portal Act do not mention a presumption favoring liquidated damages. *See Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018) (noting the FLSA gives no indication in its text that its exemptions are to be construed "narrowly").
[12] *NTEU*, 53 FLRA 1469, 1481 (1998).

(the reasonable-basis requirement).[13] As part of the good-faith requirement, an employer must show that it subjectively acted with an honest intention to ascertain what the FLSA requires and to act in accordance with it.[14]

While the Union does not contend that the award is based on nonfacts,[15] it argues that certain Union testimony "precludes" a finding that the Agency established a good-faith, reasonable-basis defense under the Portal-to-Portal Act.[16] It contends that this testimony contradicts the Arbitrator's factual finding that the Agency subjectively acted in good faith.[17] However, the Authority will not find an award deficient because a party disagrees with the weight and credibility that an arbitrator ascribed to evidence and testimony.[18] The Arbitrator considered the Union's testimony and he credited the testimony of the Agency's witnesses in his award.[19] Because the Union fails to challenge the Arbitrator's findings as nonfacts, we defer to the Arbitrator's factual findings.[20]

We agree with the Arbitrator that liquidated damages are not warranted here because the Agency met its high burden to demonstrate that it acted in good faith and that it had a reasonable basis for believing its act or omission was not in violation of the FLSA. The requirement for good faith action was met by the Agency's unprompted audit of the bargaining-unit positions in October 2016.[21] The Agency exhibited good faith by initiating the reclassification of the grievants' positions after it decided "to apply a very narrow interpretation" of the administrative exemption under the FLSA.[22] Also, the Agency acted reasonably by reclassifying all eligible bargaining-unit members to non-exempt, even though human resources staff believed that several positions should have been retained as exempt.[23] In this regard, the Arbitrator credited the testimony of an Agency FLSA classification specialist who stated that the original exemption designations were not erroneous, but that she had made the changes based on guidance from the Agency to "look at these [positions] differently" and to "err on the side of the employee."[24] Furthermore, in accordance with the FLSA, the Agency paid the grievants for any unpaid overtime, plus interest, prior to arbitration.[25]

Accordingly, we deny the Union's contrary to law exception.[26]

IV. Decision

We deny the Union's exception.

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[13] *AFGE*, 66 FLRA at 927.

[14] *NTEU*, 53 FLRA at 1481.

[15] *U.S. Dep't of VA, VA Pittsburgh Healthcare Sys.*, 60 FLRA 516, 518 (2004) (Chairman Cabaniss concurring) ("To establish that an award is deficient because it is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.").

[16] Exceptions at 9.

[17] *Id.* at 8-9.

[18] *U.S. Dep't of the Navy, Military Sealift Command Atl. Region, Hampton, Va.*, 65 FLRA 583, 586-87 (2011).

[19] Award at 6-8; *see also U.S. Dep't of the Treasury, IRS, Kansas City Field Compliance Serv.*, 60 FLRA 401, 402-03 (2004) (rejecting a party's claim that an arbitrator erred by failing to credit its witness's testimony and stating that "exceptions disputing an arbitrator's evaluation of the credibility of witnesses and the weight to be given their testimony provide no basis for finding an award deficient"); *NFFE, Local 259*, 45 FLRA 773, 777 (1992) ("The fact that the Arbitrator did not specifically address those factors in his award does not show that the Arbitrator failed to consider them and does not provide a basis for finding the award deficient.").

[20] *See BOP, Englewood*, 71 FLRA at 9 ("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. In making that determination, the Authority defers to the arbitrator's underlying findings of fact.").

[21] *Compare U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, Va.*, 57 FLRA 559, 564 (2001) ("The inquiries made by an employer concerning compliance with the FLSA are clearly relevant to determining whether the employer acted in good faith and reasonably."), *with Williams*, 747 F.2d at 129 (finding that the employer did not make any effort "to ascertain and follow the dictates of the FLSA").

[22] Award at 6, 13; *see also Bratt v. Cnty. of L.A.*, 912 F.2d 1066, 1072 (9th Cir. 1990) ("[T]here is no evidence that the County attempted to evade its responsibilities under the [FLSA].").

[23] Award at 13.

[24] *Id.* at 7; *see also id.* at 13 ("[T]he Arbitrator credits the belief [of the classification specialist] that [the Agency's] initial designations of impacted bargaining[-]unit employees . . . were not made in error."); *id.* (finding testimony of FLSA classification specialist "strongly weigh[ed] in favor of finding that [the Agency's] initial designation of impacted employees as exempt under the FLSA . . . was reasonable").

[25] *Id.* at 13; *see U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 436 (2001) ("[A]n employee may not recover both liquidated damages and interest.").

[26] The Union also argues that the Arbitrator's factual "findings are to[o] general" to properly support a conclusion that the Agency established the good-faith, reasonable-basis defense. *See* Exceptions at 9-10. Because this argument does not raise a recognized ground for review listed in § 2425.6(a)-(c) of the Regulations or otherwise demonstrate a legally recognized basis for setting aside the award, we dismiss. *See* 5 C.F.R. § 2425.6.

Member DuBester, dissenting:

I disagree with the majority's conclusion, and would find that the Arbitrator's denial of liquidated damages is contrary to law.

It is well-settled under the Fair Labor Standards Act (FLSA) that "where an employer is liable for unpaid overtime and does not satisfy its 'substantial burden' of proving that it acted both with good faith and with a reasonable basis for believing that it was not violating the FLSA, liquidated damages are mandatory."[1] In order to meet this burden, "the employer must demonstrate: (1) 'that *the act or omission* giving rise to [the employee's FLSA] action *was in good faith* and [(2)] that [the employer] *had reasonable grounds for believing that [its] act or omission was not a violation*" of the FLSA.[2]

To demonstrate the requisite "good faith," the employer "must affirmatively establish" that it attempted to discern the FLSA's requirements for the specific circumstances involved and comply with those requirements.[3] Moreover, an agency does not satisfy this burden merely by showing that it "did not purposefully violate the provisions of the FLSA."[4]

The majority concludes that the Arbitrator properly denied the grievants liquidated damages because "[t]he requirement for good faith action was met by the Agency's unprompted audit of the bargaining-unit positions in October 2016."[5] On this point, the majority notes the Arbitrator's findings that the Agency initiated the reclassification of the grievants' positions after it decided "to apply a very narrow interpretation" of the FLSA's administrative exemption,[6] and that it subsequently reclassified eligible bargaining-unit members to non-exempt status "even though [its] human resources staff believed that several positions should have been retained as exempt."[7]

The Agency should certainly not be faulted for correcting its misapplication of the FLSA. Indeed, it will benefit from that action by limiting its backpay liability to the misclassified employees. But the relevant inquiry for purposes of determining the grievants' entitlement to liquidated damages is not whether the Agency corrected its misapplication of the FLSA, but is instead whether "the act or omission *giving rise to* [the action for unpaid overtime compensation] was in good faith."[8] This is consistent with Congress's intent in authorizing liquidated damages, by which it "sought to compensate the aggrieved employee for the employer's delay and to restore [the employee] to a position as if the employer had not failed in its obligation to pay in a timely manner that compensation to which [the employee] was entitled."[9]

The Authority has recognized this principle in prior decisions. For instance, in *AFGE, Local 1662*,[10] the Authority rejected the agency's argument that it had met the good-faith requirement where a supervisor "immediately stopped [the unlawful pay practice] once he learned of it,"[11] because this evidence did not "establish good faith with respect to the Agency's FLSA noncompliance *prior to* that official's action."[12] Similarly, in *AFGE, Local 3828*,[13] the Authority concluded that the agency failed to establish good-faith where it failed to argue to the arbitrator that it took steps to ascertain its compliance with the FLSA "when it *began* the challenged pay practice."[14]

Based on these principles, I disagree with the majority's rationale for denying the Union's exceptions. I would also find that the Arbitrator's decision denying liquidated damages is contrary to law.

The Arbitrator based his conclusion on a number of factual findings. First, he found that the Agency classifiers who performed the reclassification audit acted with an "honest intention" to ascertain the FLRA's

[1] *AFGE, Local 3828*, 69 FLRA 66, 69 (2015) (internal citations omitted).
[2] *AFGE, Local 987*, 66 FLRA 143, 146 (2011) (quoting 29 U.S.C. § 260).
[3] *Id.* at 147 (citation omitted); *see also AFGE, Local 1662*, 66 FLRA 925, 927 (2012) ("The 'substantial burden' of satisfying these two requirements, 'in effect, establishes a presumption that an employee who is improperly denied overtime [compensation] shall be awarded liquidated damages.'") (quoting *NTEU*, 53 FLRA 1469, 1481 (1998)).
[4] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 189 (2017) (*BOP Guaynabo*) (citation omitted).
[5] Majority at 4-5.
[6] *Id.* at 5 (quoting Award at 13).
[7] *Id.*
[8] 29 U.S.C. § 260 (emphasis added).
[9] *SSA, Balt., Md. v. FLRA*, 201 F.3d 465, 469 (D.C. Cir. 2000).
[10] 66 FLRA 925.
[11] *Id.* at 927.
[12] *Id.*
[13] 69 FLRA 66.
[14] *Id.* at 70 (emphasis added); *see also Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) (holding that 29 U.S.C. § 260 "requires *retrospective* analysis of an employer's conduct with respect to violations of the FLSA, not appraisal of an employer's post-violation conduct"); *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 99 (D.D.C. 1998) (finding that employer's internal memoranda indicating management's familiarity with the FLSA "cannot serve as evidence of a good faith effort to ascertain the law" at the time the plaintiffs were originally misclassified as FLSA exempt).

requirements, and "acted quickly to ensure that affected employees were granted their full rights under the law."[15] Second, he credited the testimony of both classifiers that they were instructed to review the exemption "in favor of classifying employees as non-exempt."[16] Third, he credited the belief of one of the classifiers that the Agency's original designations of the employees as exempt "were not made in error."[17] And the Arbitrator noted that the Agency provided employees with two years of backpay overtime shortly after the Union requested this reimbursement.

In my view, these findings – to which we defer – do not support the Arbitrator's conclusion that the Agency established a good-faith, reasonable basis defense. Not one of the findings relates to any action the Agency took to ascertain the FLSA's requirements while it was incorrectly maintaining the grievants' exempt status. And the only finding related to whether the Agency's determination in this respect was "reasonable" – the classifier's belief that the determination had not been "made in error" – is insufficient to meet the Agency's substantial burden under the FLSA.[18]

Accordingly, I dissent from the majority's conclusion that the Arbitrator's award denying liquidated damages is consistent with the FLSA and would grant the Union's contrary-to-law exception.

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[15] Award at 13.

[16] *Id.*

[17] *Id.* On this point, the Arbitrator noted the classifier's testimony that "her interpretation of FLSA rules would have counseled retaining several position descriptions as exempt as a result of her review." *Id.* (emphasis omitted). The Arbitrator concluded that this "strongly weighs in favor of finding that [the U.S. Army Civilian Human Resources Agency's] initial designation of impacted employees as exempt under the FLSA, prior to October of 2016, was reasonable." *Id.*

[18] *BOP Guaynabo*, 70 FLRA at 189 ("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") (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 200 (2016)).