

72 FLRA No. 118

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1612
COUNCIL OF PRISON LOCALS #33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
MEDICAL CENTER FOR FEDERAL PRISONERS
SPRINGFIELD, MISSOURI
(Agency)

0-AR-5658

DECISION

January 6, 2022

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

Decision by Member Abbott for the Authority

I. Statement of the Case

After finding that the Agency paid overtime compensation “as soon after the regular pay period as [was] practicable,”¹ Arbitrator Richard Van Kalker concluded that the Agency did not violate the Fair Labor Standards Act (FLSA).² Because that conclusion is consistent with the FLSA’s implementing regulations, we deny the Union’s exceptions.

II. Background and Arbitrator’s Award

The grievants are employed by the Agency at its facilities in Springfield, Missouri. The instant dispute arose when the Union filed a grievance alleging that the Agency violated the FLSA by failing to timely pay the grievants for overtime worked at the Agency’s facilities. The Agency denied the grievance because an internal audit found no instances where the grievants were not timely paid for overtime. The parties could not resolve the dispute and the matter proceeded to arbitration.

At the heart of this matter is the interpretation of 29 C.F.R. § 778.106. Although that regulation provides a “general rule” that overtime compensation should be paid in the pay period it is earned,³ the regulation also provides an exception to that rule. “When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, . . . the requirements of the [FLSA] will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.”⁴ The Arbitrator found that there were “certain instances when overtime was paid beyond the pay period that the overtime was worked,”⁵ but that the Agency had paid overtime as soon as was “practicable.”⁶ The Arbitrator also found that the Agency had instituted “an audit program. . . regarding the timely payment of overtime,”⁷ and established “procedures to ensure overtime was paid as soon after the regular pay period as was practicable.”⁸ Based on these findings, the Arbitrator concluded that the Agency complied with the FLSA and § 778.106. Therefore, the Arbitrator denied the Union’s grievance.

On July 24, 2020, the Union filed exceptions to the award, and on August 24, 2020, the Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusion: The award is not contrary to law.

The Union argues that the award is contrary to law.⁹ Specifically, the Union claims that the award is contrary to law because the Agency violated the FLSA

³ 29 C.F.R. § 778.106.

⁴ *Id.* The text of the regulation states the following:

There is no requirement in the [FLSA] that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the [FLSA] will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

Id.

⁵ Award at 11.

⁶ *Id.* at 12.

⁷ *Id.*

⁸ *Id.* at 15.

⁹ Exceptions at 5-8.

¹ 29 C.F.R. § 778.106.

² 29 U.S.C. §§ 201-219.

and 29 C.F.R. § 778.106 when it did not pay overtime on the regular payday of the pay period when the overtime was earned.¹⁰ The Union also argues that the award is contrary to the FLSA because the Arbitrator failed to award liquidated damages or attorney’s fees.¹¹ 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.¹²

As noted by the Arbitrator, the regulation at issue—29 C.F.R. § 778.106—does not require an agency to pay overtime in the same pay period it is earned when “the correct amount of overtime compensation cannot be determined until some time after the regular pay period.”¹³ In those circumstances, overtime must be paid “as soon after the regular pay period as is practicable.”¹⁴ On this point, the Arbitrator found that the Agency had established procedures to ensure that overtime was paid either in the pay period in which it was earned¹⁵ or as soon as was practicable.¹⁶ Accordingly, the Arbitrator concluded that the Agency had not violated the FLSA or the regulation.¹⁷

Furthermore, a party alleging a violation of the FLSA must prevail on that claim to be entitled to

¹³ 29 C.F.R. § 778.106.

¹⁴ *Id.*; see *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 71 FLRA 8, 10 (2019) (Concurring Opinion of Chairman Kiko). The Union argues that it was denied a fair hearing because the Arbitrator did not award damages, attorney fees, or retroactive pay increases. The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that the arbitrator conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. *NAGE*, 71 FLRA 775, 777 (2020). That the Arbitrator failed to rule in the Union’s favor does not establish—in and of itself—that the Arbitrator denied the Union a fair hearing. See, e.g., *id.* at 778; *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 382 (2016) (Member Pizzella dissenting) (“The [a]gency’s belief that it may have been prejudiced, without more, does not demonstrate that the [a]rbitrator denied the [a]gency a fair hearing.”). Therefore, we deny this exception.

¹⁵ Award at 13-15.

¹⁶ *Id.* at 15.

¹⁷ See 29 C.F.R. § 778.106. Our dissenting colleague argues that the award should be remanded to the Arbitrator because he did not find that “that the delayed payments referenced in his award resulted from the Agency’s inability to determine the amount owed, or that these delayed payments were made as soon as practicable.” Dissent at 5. However, as noted above, the Arbitrator found that the Agency established “procedures to ensure overtime was paid as soon after the regular pay period as was practicable.” Award at 15. Clearly, this finding satisfies the requirements set forth in 29 C.F.R. § 778.106. Member Abbott notes that while the dissent casually dismisses this finding because it “arguably” could also apply to the Arbitrator’s FLSA analysis, Dissent at 5, the dissent’s parsing of the Arbitrator’s findings is the type of “technical hair splitting” that the Authority has repeatedly criticized. *U.S. DOD, Educ. Activity*, 71 FLRA 900, 902 n.20 (2020) (Member Abbott concurring; then-Member DuBester dissenting) (affirming that the Authority “refuse[s] to engage” in “technical hair splitting” (internal quotation marks omitted)); *SSA, Off. of Hearings Operations*, 71 FLRA 123, 124 (2019) (then-Member DuBester dissenting) (“We do not believe that Congress intended for the application of election-of-forum provisions . . . to be based on technical hair-splitting and artful pleading.” (internal quotation marks omitted)).

¹⁰ *Id.*

¹¹ *Id.* at 14-17.

¹² *AFGE, Loc. 1633*, 70 FLRA 752, 753 (2018).

attorney's fees or liquidated damages.¹⁸ Because the Union did not prevail on its claim that the Agency had violated the FLSA, the Arbitrator did not err by declining to award attorney's fees or liquidated damages.¹⁹

Consequently, the Union has not established that the award is contrary to law and we deny the Union's exceptions.²⁰

IV. Decision

We deny the Union's exceptions.

¹⁸ 29 U.S.C. § 216(b). The Union also argues that the award is based on a nonfact, contrary to law, and fails to draw its essence from the parties' agreement because the Arbitrator "ignor[ed] retroactive money and damages owed for non[-]payment and underpayment of overtime worked when government-wide retroactive pay increases were made by Executive Order[,] but the affected overtime rates were not retroactively increased." Exceptions at 3, 17. However, the framed issue only concerned the timely payment of overtime and it made no reference to retroactive wage increases. Award at 3. Also, the Union did not file an exceeds-authority exception to challenge the Arbitrator's framing of the issues. *AFGE, Loc. 1617*, 51 FLRA 1645, 1647 (1996) ("Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority or award relief to those not encompassed within the grievance."). Furthermore, the Union also asserts that "[t]he Arbitrator was biased and refused to consider or rule on issues presented to him." Exceptions at 3. However, the Union does not provide any further support for this argument beyond this brief assertion. *See id.* Accordingly, we deny these exceptions as unsupported. *See Fraternal Ord. of Police, Pentagon Police Lab. Comm.*, 65 FLRA 781, 784-85 (2011) (*FOP*) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review).

¹⁹ *FOP*, 51 FLRA at 784-85. Furthermore, while the Union also claims that attorney's fees are warranted under the Back Pay Act (BPA), entitlement to attorney's fees under the BPA first requires an award of backpay. *See U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't*, 72 FLRA 94, 95 (2021) (Chairman DuBester dissenting) ("In this case, it is clear that the [a]rbitrator awarded attorney fees without an accompanying award of backpay or other monetary relief. Therefore, the award of attorney fees is not authorized by the BPA."). Thus, because the Arbitrator denied the Union's grievance, the BPA does not authorize an award of attorney fees. Award at 15-16.

²⁰ The Union also argues that the award fails to draw its essence from the parties' agreement and that it is based on a nonfact. Exceptions at 2. However, these exceptions reiterate that the Agency must comply with the FLSA, and government-wide regulations like 29 C.F.R. § 778.106. *Id.* at 2, 14-17. Because these exceptions merely reiterate the Union's unsuccessful contrary-to-law exceptions, we will not separately address them. *See AFGE, Loc. 3627*, 64 FLRA 547, 550 n.3 (2010) (declining to separately address agency's essence claims, which did nothing more than restate its exceeds-authority claim).

Chairman DuBester, dissenting:

I disagree with the majority's decision to deny the Union's contrary-to-law exception. In my view, the Authority should remand the award for further findings.

Under the Department of Labor's guidance concerning the Fair Labor Standards Act (FLSA), "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends."¹ This provision also sets forth an exception to this rule "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay period."² In those circumstances, "the requirements of the [FLSA] will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable."³

Here, the Arbitrator correctly noted the requirements imposed upon the Agency by this provision. Moreover, he found that the Agency had failed to pay overtime owed to specific grievants on the regular payday for the period in which the overtime hours were worked.⁴ But despite these findings, the Arbitrator failed to analyze whether these delayed payments were the result of the Agency's inability to determine the amounts owed during the employees' regular pay period, or whether – even assuming this condition was met – the Agency paid the amounts owed as soon after the pay period as was practical.

Notwithstanding these deficiencies, the majority rejects the Union's exception because the Arbitrator found that the Agency "had established procedures to ensure that overtime was paid either in the pay period in which it was earned or as soon as was practicable."⁵ But the Arbitrator arguably made this finding in the context of determining whether the Agency was liable for liquidated damages under the FLSA. And even though the Arbitrator also found that the Agency "generally paid overtime in the same pay period in which it was worked and as soon as practicable when overtime was not paid in the same pay period in which it was worked,"⁶ he failed to support this conclusion with any findings that the delayed payments referenced in his award resulted from the Agency's inability to determine the amount owed, or

that these delayed payments were made as soon as practicable. As noted, these findings are necessary to determine whether the Agency's delayed payments were consistent with the FLSA's requirements.

On this basis, I do not believe that the Authority can properly determine whether the award is contrary to law. Therefore, I would remand the award to the Arbitrator for further findings on these issues.⁷

¹ 29 C.F.R. § 778.106.

² *Id.*

³ *Id.*

⁴ Award at 14-15 (listing a specific number of hours for which six grievants were paid overtime in a different pay period); *see also id.* at 11 ("The Arbitrator finds that there were certain instances when overtime was paid beyond the pay period that the overtime was worked.")

⁵ Majority at 3 (citing Award at 13-15).

⁶ Award at 15.

⁷ *See, e.g., AFGE, Loc. 3955*, 69 FLRA 133, 134-35 (2015) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Off. of NOAA Corps Operations, Atl. Marine Ctr., Norfolk, Va.*, 55 FLRA 816, 821 (1999)) (remanding where award fails to contain factual findings necessary to assess an arbitrator's legal conclusions, and the findings cannot be derived from the record).