73 FLRA No. 154

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MENDOTA, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1237
(Union)

0-AR-5882

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DECISION

January 30, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union filed a grievance alleging the Agency paid certain employees (the grievants) an incorrect overtime premium under the Fair Labor Standards Act (FLSA).[1] After framing the issues for resolution, Arbitrator C. Allen Pool issued an award finding the grievance timely and sustaining it on the merits.

The Agency filed exceptions to the award arguing that it fails to draw its essence from the parties' collective-bargaining agreement; is contrary to law; and is incomplete, ambiguous, or contradictory. We deny one of the Agency's essence exceptions, but we are unable to resolve two of the Agency's other exceptions because the award does not provide sufficient findings. Therefore, we remand the case to the parties for resubmission, absent settlement, to arbitration.

II. Background and Arbitrator's Award

The grievants are teachers in the Agency's education department, and – as correctional officers – they also perform correctional duties. The Agency classifies these employees as FLSA-exempt based on their educational duties but pays them a "premium rate" when they perform overtime correctional-duty work.[2] That premium rate is less than the overtime rate for FLSA-nonexempt employees.[3]

The Union filed a grievance with the Agency's Human Resource Management Division alleging the Agency violated the parties' agreement and the FLSA by paying the grievants overtime at the wrong rate. Prior to filing the grievance, the Union requested that the Agency toll the filing deadline while the parties attempted informal resolution. However, the Agency did not agree to tolling. Ultimately, the grievance proceeded to arbitration.

Before the Arbitrator, the Agency raised arbitrability arguments, including that the Union filed the grievance untimely and with the wrong Agency division. Because the parties disagreed on the issues, the Arbitrator framed them as whether (1) the Union timely filed the grievance, and (2) the Agency properly compensated the grievants under the FLSA, and, if not, what is the remedy.

In addressing the timeliness issue, the Arbitrator did not discuss any terms of the parties' agreement. He merely stated: "A preface to this discussion is a notice to the parties that inherent in every collective[-]bargaining agreement is the doctrine of good faith and fair dealing. . . . My review of the record led me to conclude that the grievance was timely and therefore arbitrable."[4] He also observed that: "the Union made a reasonable request . . . that the Agency toll the statutory time limits and meet informally to discuss a possible resolution"; the Agency "could have easily tolled the time limits" for filing a grievance; if the parties were unable to resolve the grievance during informal discussions, then "the Agency could have again tolled the time limits"; and the Agency's "refusal to toll the time limits was unreasonable."[5] He concluded the Union timely filed the grievance.

On the merits, the Arbitrator provided a similarly concise analysis. He observed that the Agency "classed" the grievants as FLSA-exempt, yet paid them an overtime rate that "the Agency termed a *premium rate*."[6] He also noted that this premium rate was less than the "FLSA regular overtime rate of time-and-a-half," and that the Agency contended this lower premium was justified based on the grievants' FLSA-exempt status.[7] After summarizing the Agency's position, the Arbitrator held that the Agency's decision to pay a lower rate was "arbitrary . . . and unreasonable."[8] The Arbitrator

[1] 29 U.S.C. §§ 201-19.
[2] Award at 4.
[3] *See* 5 C.F.R. § 551.501(a) (nonexempt employees are entitled to "a rate equal to one and one-half times the employee's hourly regular rate of pay" for overtime work).
[4] Award at 4.
[5] *Id.* at 5.
[6] *Id.*
[7] *Id.*
[8] *Id.*

concluded his analysis by stating: "An employee should be paid the regular FLSA overtime rate for the work they perform."[9]

Based on the above rationale, the Arbitrator sustained the grievance and directed the Agency to make the grievants whole for "all lost wages, with interest, and benefits."[10] He also stated that attorney fees should "be made available to the Union's attorneys," and he retained jurisdiction over disputes concerning implementation of the award.[11]

On April 6, 2023, the Agency filed exceptions to the award. After requesting and receiving an extension of time, the Union filed an opposition on May 25, 2023.[12]

III. Analysis and Conclusions

A. The Agency does not establish that the Arbitrator's framing of the arbitrability issue fails to draw its essence from the parties' agreement.

The Agency contends the Arbitrator disregarded jurisdictional limits in the parties' agreement by failing to consider whether the Union filed the grievance with the proper Agency division.[13] The Authority will find an arbitration award fails to draw its essence from the parties' agreement when the appealing party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[14]

The Agency argues the Arbitrator erroneously failed to address whether the Union filed the grievance in accordance with Article 31, Section f.3 of the parties' agreement (Section f.3).[15] That section requires grievances to be filed with the appropriate Agency division.[16] However, the Arbitrator did not identify, interpret, or discuss Section f.3 in the award, because the only arbitrability issue he framed concerned the grievance's timeliness.[17] Further, the Agency does not identify any provision in the parties' agreement that requires arbitrators to frame specific arbitrability issues.[18] We find the Agency has not established that the Arbitrator's framing of the procedural-arbitrability issue fails to draw its essence from the parties' agreement, and we deny the exception.[19]

B. We remand the award for further proceedings.

The Agency raises another essence exception to the Arbitrator's arbitrability findings[20] and alleges the merits findings are contrary to law.[21] We consider these exceptions in turn.

According to the Agency, the Arbitrator's conclusion that the Union timely filed the grievance is inconsistent with Article 31, Section d of the parties' agreement (Section d). Generally, Section d requires grievances be filed within forty days of a grievable occurrence, but also provides that where a "statute[] provide[s] for a longer filing period, then the statutory

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* 5 C.F.R. § 2429.23(a) (allowing Authority to grant timely filing-extension requests "for good cause shown").
[13] Exceptions at 9-11 (arguing that the Arbitrator's failure to address this procedural deficiency means the award fails to draw its essence from the parties' agreement).
[14] *SSA*, 73 FLRA 708, 713 (2023).
[15] Exceptions at 9-11.
[16] *See id.* at 9 (quoting Section f.3).
[17] Award at 2 (noting the Agency's proposed issue of whether "the grievance [was] procedurally arbitrable and properly before the Arbitrator," but framing the only arbitrability issue as "[w]as the grievance timely filed?").
[18] *See* Exceptions at 9-11 (making arguments about interpretation of filing-official provision). We note the Agency does not argue the Arbitrator exceeded his authority by failing to address this arbitrability issue, and "the Authority will not construe parties' exceptions as raising grounds that the exceptions do not raise." *AFGE, Loc. 1738*, 73 FLRA 339, 341 (2022) (quoting *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015)); *see also AFGE, Loc. 2338*, 73 FLRA 756, 758 (2023) (noting arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, but "[w]here an arbitrator has framed the issues, the Authority examines only whether the award is directly responsive to the issues as framed by the arbitrator" (citing *AFGE, Loc. 2338*, 73 FLRA 522, 523 (2023)).
[19] *See NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (denying essence exception where the excepting party failed to show that the arbitrator was required to address the cited contract provisions); *Nat'l Nurses United*, 70 FLRA 166, 168 (2017) (denying essence argument based on contract provisions the arbitrator "did not discuss or interpret"); *see also AFGE, Loc. 3601*, 73 FLRA 515, 516 (2023) (noting, while denying exceeded-authority exception, that arbitrators need not address every argument that parties raise).
[20] Exceptions at 7-9.
[21] *Id.* at 12-13.

period would control."[22] In response to the Agency, the Union cites the "critically important" wording regarding longer statutory periods controlling, and claims that "the FLSA's statutory deadline . . . applies to th[e] grievance."[23]

The Arbitrator identified Section d as a relevant provision.[24] However, he did not address it – or any terms of the parties' agreement – in his timeliness analysis.[25] Instead, he simply asserted that "the doctrine of good faith and fair dealing" is "inherent in *every* collective[-]bargaining agreement"[26]; that the Union "made a reasonable request . . . that the Agency toll the *statutory* time limits and meet informally to discuss a possible resolution" of the grievance;[27] and that the Agency "unreasonabl[y]" refused to toll the filing deadline.[28] It is unclear: (1) whether the Arbitrator interpreted *the parties'* agreement, including Section d's sentence regarding statutory filing periods; and (2) how, if at all, the Agency's refusal to toll affects the grievance's timeliness. Put simply, the award contains no contract interpretation, whatsoever, that would enable us to resolve the Agency's essence challenge to the Arbitrator's timeliness determination.[29]

Regarding the Arbitrator's merits determination, the Agency argues the Arbitrator's findings are contrary to law.[30] 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.[31] 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.[32] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[33]

As noted above, the Arbitrator concluded the Agency's payment of the lower premium rate was arbitrary and unreasonable.[34] The Agency asserts that this conclusion violates the FLSA because the grievants, being FLSA-exempt, "are not entitled to [the] FLSA overtime rate."[35] The Union challenges this assertion, arguing the Arbitrator made factual findings about the grievants' duties that imply the Agency misclassified the grievants under the FLSA.[36]

However, the Arbitrator made no finding as to whether the grievants are FLSA-exempt or -nonexempt. Instead, the Arbitrator stated only that: the Agency "classed" the grievants as FLSA exempt; the Agency paid the grievants a "premium rate" for overtime work; and that premium rate is less than the rate for FLSA-nonexempt employees.[37] Without a finding as to whether the grievants are FLSA-nonexempt[38] – and the basis for that conclusion – we are unable to determine whether the award is contrary to law, as alleged.[39]

Where an arbitrator's findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party's exceptions, the Authority will remand the award.[40] Consistent with this principle, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings. Any resulting award should include an analysis of whether the Union timely filed the grievance and explain the basis for any timeliness determination by reference to the parties' agreement, law, or both. If the grievance is timely, then the Arbitrator should state whether the Agency violated the FLSA and, if so, explain how.

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[22] *Id.* at 7-8.
[23] Opp'n Br. at 14-15.
[24] Award at 2-3.
[25] *See id.* at 4 (finding grievance timely based on "review of the record").
[26] *Id.* (emphasis added).
[27] *Id.* at 5 (emphasis added).
[28] *Id.*
[29] *See U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., San Diego, Cal.*, 73 FLRA 495, 496 (2023) (*MCC San Diego*) (concluding there were inadequate findings to resolve essence exception where "the [a]rbitrator provided no contractual interpretation that the Authority can review").
[30] Exceptions at 12-13.
[31] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 751 (2023).
[32] *Id.*
[33] *Id.*
[34] Award at 5.
[35] Exceptions at 12 (emphasis omitted).
[36] Opp'n at 7 (noting factual findings in background section "regarding the actual, day-to-day job duties of the grievants"); *id.* at 22 (arguing the Arbitrator found the "Agency's reliance on an Agency-wide classification decision, without considering the actual, day-to-day duties of the grievants, 'was an arbitrary decision by the Agency and unreasonable'" (quoting Award at 5)).
[37] Award at 5.
[38] *See id.* (stating generally that "[*a*]*n employee* should be paid the regular FLSA overtime rate for the work they perform" (emphasis added)).
[39] *See U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148-49 (2021) (Chairman DuBester dissenting in part on other grounds) (determining arbitrator's findings were inadequate to conduct de novo review).
[40] *Id.* (citing *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010)); *MCC San Diego*, 73 FLRA at 497.

Because we are remanding the case for further findings concerning both the grievance's arbitrability and merits, it is premature to consider the Agency's challenges to the award's make-whole and attorney-fee remedies,[41] or to determine whether certain of those arguments are properly before us.[42] However, if any further award includes backpay, then the Arbitrator should specify the length of the backpay recovery period and whether the grievants are entitled to liquidated damages or attorney fees, along with factual findings that support these determinations.[43]

IV. Decision

We deny one of the Agency's essence exceptions and remand the case to the parties for action consistent with this decision.

[41] Exceptions at 11-13 (contending the award is incomplete, ambiguous, contradictory, and impossible to implement because the Arbitrator awarded FLSA overtime without addressing the employees' FLSA-exempt classification and because the Arbitrator did not specify a recovery period for the awarded backpay); *id.* at 13 (claiming the award is contrary to the FLSA because the Arbitrator did not "identify how the[grievants] are to be made whole or how far the recovery period extends"); *id.* (alleging the award is "contrary to law because the [A]rbitrator order[ed] attorney's fees without identifying the basis for such fees"); *see also U.S. Dep't of HHS.*, 72 FLRA 522, 525 n.28 (2021) (Chairman DuBester concurring) (finding it unnecessary to address exception concerning matter remanded for further findings). Our remand is without prejudice to the Agency's ability to resubmit its exceptions to the Authority if they remain unresolved after the completion of remand proceedings. *See SSA*, 30 FLRA 1003, 1005-06 (1988).

[42] Opp'n at 23 (alleging the Agency waived arguments related to appropriate recovery period by failing to raise such arguments to the Arbitrator).

[43] *See AFGE, Loc. 3955*, 69 FLRA 133, 134-35 (2015) (explaining Authority precedent concerning extension of backpay recovery period for willful violation of the FLSA when remanding case for further findings); *AFGE, Loc. 3945*, 73 FLRA 39, 44 (2022) (explaining Authority precedent concerning the "good faith" defense to liquidated damages under the FLSA when remanding case for further findings).