73 FLRA No. 171

UNITED STATES
DEPARTMENT OF THE ARMY
KENTUCKY NATIONAL GUARD
(Agency)

and

ASSOCIATION OF
CIVILIAN TECHNICIANS
BLUEGRASS CHAPTER AND
KENTUCKY ARMY CHAPTER
(Union)

0-AR-5918

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DECISION

May 21, 2024

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

I. Statement of the Case

Arbitrator Matthew M. Franckiewicz issued an award finding the Agency violated the Fair Labor Standards Act (FLSA)[1] and the parties' collective-bargaining agreement by failing to properly compensate certain employees (the grievants) for overtime. As remedies, the Arbitrator directed the Agency to make the grievants whole and pay them liquidated damages. The Agency filed exceptions arguing the award is impossible to implement and based on a nonfact, and that the Arbitrator exceeded his authority. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The grievants work as Military and Family Readiness Specialists, directing military members and their families to governmental and private services, and documenting those activities in an electronic records system. Because the grievants' position was classified as FLSA exempt, the Agency compensated the grievants with compensatory time instead of overtime pay when they worked over forty hours in a week. The Union filed a grievance alleging the Agency violated the FLSA by failing to pay the grievants time and a half for overtime. The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue. As relevant here, the Arbitrator framed the issues as whether the Agency "violate[d] the [FLSA] by failing to compensate the [grievants] at the appropriate rate of pay for work performed beyond [forty] hours in a week" and "[i]f so, what is the appropriate remedy?"[2]

The Arbitrator found the Agency failed to meet its burden of demonstrating that the grievants' position is FLSA exempt. On this point, the Arbitrator found the Agency "offered no evidence or argument" that the position met any FLSA exemptions.[3] Noting that the FLSA's administrative exemption requires that the employee's "primary duty include[] the exercise of discretion and independent judgment with respect to matters of significance,"[4] the Arbitrator determined the grievants' position did not fall within that exemption because it is "repetitive and routine, and does not involve supervision of other employees or the exercise of any significant discretion or judgment."[5] Based on these findings, the Arbitrator directed the Agency to designate the grievants' position as FLSA non-exempt. In doing so, he rejected the Agency's claim that it "has no authority to change the [position's] FLSA designation" because only the National Guard Bureau (Bureau) or the Office of Personnel Management (OPM) has the power to remedy the violation.[6] Rather, the Arbitrator found the Agency – not the Bureau or OPM – is the grievants' employer because the agreement is between the Agency and the Union.[7]

Finding it undisputed that the Agency failed to compensate the grievants at the rate of time and a half for hours over forty in a week, the Arbitrator directed the Agency to make the grievants "whole . . . for economic losses suffered by reason of its violation, including through payment of liquidated damages."[8] However, he rejected the Union's argument that the FLSA's statute of limitations should be extended from two years to

[1] 29 U.S.C. §§ 201-219.
[2] Award at 4.
[3] *Id.* at 12.
[4] *Id.* at 13 (quoting 5 C.F.R. § 551.206).
[5] *Id.* at 15.
[6] *Id.* at 10.
[7] *Id.* The Arbitrator made this finding in the context of rejecting the Agency's argument that the grievance was not arbitrable.
[8] *Id.* at 16.

three years, because he was "not persuaded that the [Agency's] violation was a knowing or willful one."[9]

On September 27, 2023, the Agency filed exceptions to the award. On October 27, 2023, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: The Agency's exceptions do not warrant dismissal.

The Union argues the Authority should dismiss the Agency's exceptions as procedurally deficient because the Agency failed to serve the Union with the attachments to its exceptions.[10] The Authority's Regulations provide that a party filing a document with the Authority must serve a copy on all counsel of record or other designated representatives of the parties.[11] When timely filed exceptions have been served on an opposing party after the expiration of the filing period for exceptions, the Authority views such service to be procedurally sufficient, unless the opposing party establishes that it was prejudiced by such service.[12]

According to the Union, the Agency failed to include the Agency's arbitration briefs and the parties' agreement when it served its exceptions on the Union.[13] In response to the Union's allegation, the Authority directed the Agency to correct its procedural deficiency by serving a complete copy of the exceptions with all attachments on the Union, and the Agency cured the deficiency. Although the Agency cured the deficiency after the Union filed its opposition, the record indicates the Union had previously received copies of the Agency's arbitration briefs in July 2023.[14] Moreover, the Union does not assert that it did not have a copy of the parties' agreement, or that it was prejudiced in filing its opposition. Therefore, the Union's arguments do not warrant dismissing the Agency's exceptions.[15]

IV. Analysis and Conclusions

A. The Agency has not demonstrated that the award is incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Agency argues that implementation of the award is "impossible" because it "does not have the authority to change the FLSA designation of a position."[16] The Agency asserts "only [OPM] or the . . . Bureau has the power to remedy the alleged violation."[17]

The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.[18] For an award to be found deficient on this ground, the appealing party must demonstrate the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[19] The Agency does not argue, let alone demonstrate, that the meaning and effect of the award are too unclear or uncertain. Therefore, we deny this exception.[20]

B. The award is not based on a nonfact.

The Agency argues the award is based on a nonfact.[21] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[22] The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[23]

According to the Agency, the award is based on a nonfact because the "[A]rbitrator disputes that the [A]gency lacks the authority" to change the position's FLSA designation, but "provides no factual findings, contractual requirements, or legal basis to support his

[9] *Id.*
[10] Opp'n Br. at 3.
[11] 5 C.F.R. § 2429.27(a).
[12] *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 403 (2015) (citing *IFPTE, Loc. 77, Pro. & Scientists Org.*, 65 FLRA 185, 188 (2010) (*IFPTE*)).
[13] *See* Opp'n Br. at 3; *see also* Exceptions at 6-7 (listing as attachments the Agency's initial and reply briefs and the parties' agreement).
[14] *See* Award at 1.
[15] *IFPTE*, 65 FLRA at 188 (denying motion to dismiss exceptions based on failure to timely serve exceptions where opposing party did not allege it was prejudiced by the service).
[16] Exceptions at 4.
[17] *Id.*
[18] *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 341 (2019) (*Pope Air Force*) (Member DuBester concurring) (citing 5 C.F.R. § 2425.6(b)(2)(iii)).
[19] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 505 (*VA Pershing*) (citing *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021) (*Local 2516*)), *recons. denied*, 73 FLRA 628 (2023).
[20] *Local 2516*, 72 FLRA at 570 (denying exception when excepting party failed to demonstrate how award's implementation was impossible because its "meaning and effect" were too unclear or uncertain); *see also Pope Air Force*, 71 FLRA at 341 (denying impossible-to-implement exception because, notwithstanding the excepting party's objection to the awarded remedy, "it cannot be said that the award is unclear").
[21] Exceptions at 5.
[22] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 748 (2023) (citing *VA Pershing*, 73 FLRA at 501).
[23] *Id.* (citing *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023)).

finding."[24] However, the Agency acknowledges the parties disputed, at arbitration, whether the Agency lacks authority to change the position's FLSA designation.[25] Therefore, the Agency's argument provides no basis for finding the award is based on a nonfact, and we deny this exception.[26]

C. The Arbitrator did not exceed his authority.

The Agency argues the Arbitrator's awarded remedies exceeded his authority because the Arbitrator: (1) "found no violation of law or contract by the Agency"; (2) failed to justify his conclusion that the Agency "willfully violated the FLSA"; and (3) directed the Agency to change the position's FLSA designation when it has no authority to do so.[27] 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 persons who are not encompassed by the grievance.[28] The Authority has denied exceeded-authority exceptions where the excepting party's arguments misinterpret the arbitrator's award.[29]

With regard to the Agency's first two arguments, the Arbitrator expressly concluded the Agency violated the FLSA and the parties' agreement by failing to compensate the grievants with time and a half compensation for hours worked over forty in a week.[30] Moreover, he *rejected* the Union's argument that "the statute of limitations should be extended from the normal two years to three years," because he was "*not* persuaded that the [Agency's] violation was a knowing or willful one."[31] Thus, these arguments misinterpret the award and, consequently, provide no basis for finding the Arbitrator exceeded his authority.[32]

As for the Agency's third argument, the issue before the Arbitrator was whether the Agency violated the FLSA by failing to pay the grievants overtime, and the Arbitrator resolved that issue.[33] The Agency asserts that only the Bureau determines the FLSA designation of positions – and, thus, that the Arbitrator had no basis for finding the Agency violated the FLSA, or directing it to change the position's designation.[34] However, to support its argument, the Agency merely cites unrelated Authority precedent and pages in its arbitration briefs in which it asserts – without supporting evidence – that the Bureau has not delegated to the Agency the authority to change the FLSA-exemption status of positions.[35] Further, the Agency does not explain how the documents it cites demonstrate that the Arbitrator was precluded from finding the Agency violated the FLSA or awarding the challenged remedy. Therefore, we reject the Agency's third exceeded-authority argument as unsupported under § 2425.6(e) of the Authority's Regulations.[36]

We deny this exception.[37]

V. Decision

We deny the Agency's exceptions.

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[24] Exceptions at 5.
[25] *Id.* (stating "This matter was disputed before the Arbitrator." (citing Agency Initial Br. at 3, 9)).
[26] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023) (denying nonfact exception challenging matter parties disputed at arbitration (citing *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586, 588 (2021))); *VA Pershing*, 73 FLRA at 501 (citing *NTEU, Chapter 298*, 73 FLRA 350, 351 (2022)) (same).
[27] Exceptions at 6.
[28] *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022) (*Local 3954*) (citing *AFGE, Council of Prisons Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016)).
[29] *AFGE, Loc. 15*, 68 FLRA 877, 881 (2015) (*Local 15*) (citing *NTEU, Chapter 45*, 52 FLRA 1458, 1463 (1997)).
[30] Award at 16.
[31] *Id.* (emphasis added).
[32] *Local 15*, 68 FLRA at 881 (denying exceeded-authority exception based on a misinterpretation of an award).
[33] Award at 4; *see also id.* at 12, 16.
[34] Exceptions at 6.
[35] *Id.* (citing Agency Initial Br. at 3, 9; Agency Reply Br. at 3-4; *NFFE, Loc. 1437*, 53 FLRA 1703 (1998) (remanding to arbitrator where Authority could not determine whether award was contrary to 5 U.S.C. § 2302(b)(6) as alleged in exceptions); *AFGE, Loc. 1770*, 51 FLRA 1302 (1996) (denying exceeded-authority, contrary-to-regulation, and contrary-to-law exceptions challenging award that upheld a disciplinary suspension); *AFGE, Loc. 1843*, 51 FLRA 444 (1995) (granting management-rights exception challenging remedy directing agency to select grievant for future vacancy); *NTEU, Chapter 24*, 50 FLRA 330 (1995) (reversing arbitrator's determination that holiday-pay statute rendered credit-hour contract provision unenforceable)).
[36] 5 C.F.R. § 2425.6(e) ("[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground"); *see AFGE, Loc. 1367*, 67 FLRA 378, 379 (2014) (denying exception based on excepting party's failure to explain how arbitrator exceeded his authority under the applicable standard); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014) (denying exceeded-authority exception as unsupported where party cited Comptroller General decisions but failed to explain how the arbitrator exceeded his authority under the applicable standard).
[37] *See Local 3954*, 73 FLRA at 42.

Member Kiko, concurring:

In previous cases involving units of the national guard, I explained my strong reservations about exercising federal jurisdiction over national-guard units because of their distinctly state character.[1] However, as I explained in my concurrence in *Laborers International Union of North America, Local 1776*,[2] the United States Supreme Court recently addressed this issue, and the Court held that Adjutants General are "subject to the authority of the [Federal Labor Relations Authority] when acting in their capacities as supervisors" of national-guard units.[3] I recognize that the Court has clearly set forth "what the law is,"[4] and I respect the Court's pronouncement on this issue. Further, I am persuaded that the logic of the Court's decision extends to all cases before the Authority – such as the case here – where the National Guard Bureau has designated an Adjutant General to supervise federal employees with rights under the Federal Service Labor-Management Relations Statute.[5] Accordingly, I no longer raise jurisdictional objections to the Authority's resolution of cases involving units of the national guard.

Nevertheless, I write separately to note that this case highlights an instance where the distributed locus of responsibility for employees in national-guard units puts state entities – here the Kentucky National Guard – at a disadvantage. As both parties acknowledge, the federal agency (the National Guard Bureau), not the state entity (the Kentucky National Guard), created the position description under which the grievant works. Further, the National Guard Bureau categorized that position description as exempt from the Fair Labor Standards Act. Now, because the Commonwealth of Kentucky has acted in accordance with the National Guard Bureau's position description, the state entity must pay the grievant, and similarly situated employees, two years of overtime backpay and liquidated damages.

I agree that the Kentucky National Guard has failed to demonstrate the award is deficient, but this outcome is nevertheless peculiar. For following the guidance of a higher-level federal authority, the state entity must foot the bill.

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[1] *See, e.g.*, *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829, 833 (2020) (Member Abbott concurring in part) (Dissenting Opinion of Chairman Kiko), *pet. for review denied sub nom. Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021), *aff'd*, 598 U.S. 449, 461 (2023) (*Ohio*).

[2] 73 FLRA 591, 595 (2023) (Concurring Opinion of Member Kiko).

[3] *Ohio*, 449 U.S. at 461.

[4] *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[5] *See Ohio*, 449 U.S. at 457-59; *e.g.*, *Nat'l Guard Bureau, Air Nat'l Guard Readiness Ctr.*, 72 FLRA 350, 351 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part) (noting that the National Guard Bureau "designated the state Adjutants General to 'appoint' and 'employ' . . . social workers assigned to their respective states" (quoting 10 U.S.C. § 10508(b)(2))).