74 FLRA No. 46

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 172
(Union)

0-AR-6024

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DECISION

August 21, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner, Member

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to pay overtime to employees on compressed work schedules when they worked more than eighty hours in a biweekly pay period. Arbitrator Jeffrey W. Jacobs issued an award granting the grievance, finding that the Agency violated the FLSA. The Agency filed exceptions to the award on contrary-to-law, essence, and nonfact grounds. In its contrary-to-law exception, the Agency argues that the award conflicts with §§ 6121 and 6128 of the Federal Employees Flexible and Compressed Work Schedules Act (the Work Schedules Act).[2] For the reasons that follow, we find the Arbitrator's conclusion that the Agency violated the FLSA is contrary to the Work Schedules Act, and we set aside the award.

II. Background and Arbitrator's Award

The Union represents customs and border protection officers and agriculture specialists assigned to Chicago O'Hare airport, which is part of the Agency's Area Port of Chicago operations. Annually, the Agency consults with the Union before the Port Director determines which schedules and shifts will be available for employees to bid on in the upcoming year.

In accordance with the Work Schedules Act and the parties' collective-bargaining agreement, the Agency offers alternative work schedules (AWS) including, as relevant here, three compressed schedules for employees assigned overnight shifts.[3] Section 6121(5)(A) of the Work Schedules Act defines a compressed schedule as "an [eighty]-hour biweekly basic work requirement which is scheduled for less than [ten] workdays."[4] Within the bargaining unit, employees could bid for a "4/10" compressed schedule, with four ten-hour workdays per week, or a "5/4/9" compressed schedule, requiring five nine-hour workdays in one week, and three nine-hour workdays and one eight-hour workday the other week. The unit employees' compressed schedules rotate work days and off days regularly from one pay period to the next—for example, an employee with regularly scheduled days off on Monday and Tuesday in one pay period would be off on Tuesday and Wednesday the following pay period.

Occasionally, "due to the rotating nature" of the relevant compressed schedules,[5] night-shift employees would start a shift on Saturday – the last day of a pay period – and conclude that shift on Sunday – the first day of the next pay period. As a result, an employee's time entries could reflect fewer than eighty hours worked in one pay period, and more than eighty hours in a subsequent pay period. When these imbalances occurred, the Agency's time-and-attendance system permitted managers to "carryover" an employee's work hours from one pay period to another.[6] That involved subtracting hours from the pay period exceeding eighty work hours and adding those excess hours to the pay period that had fewer than eighty work hours. Consequently, the Agency paid employees eighty hours of straight-time compensation for

[1] 29 U.S.C. § 216.
[2] 5 U.S.C. §§ 6121, 6128.
[3] Award at 19; *see also* 5 U.S.C. § 6127(a) ("[E]ach agency may establish programs which use a [four]-day workweek or other compressed schedule."); Exceptions, Attach. 4, Joint Ex. 1, National Collective-Bargaining Agreement at 51 (authorizing "bargaining over the establishment and implementation of" AWS "[a]t the local level").
[4] 5 U.S.C. § 6121(5)(A).
[5] Award at 20.
[6] *Id.*

pay periods involved in a carryover, rather than paying overtime.

In 2024, the Agency transitioned to a new timekeeping system. Because the new system did not allow supervisors to carryover hours between pay periods, the Agency notified the Union that it would adjust the existing AWS start and stop times to ensure employees did not exceed eighty work hours in a pay period. Following negotiations, the parties executed a memorandum of agreement establishing new AWS schedules. Once the new schedules went into effect, the Union filed a grievance alleging, in pertinent part, that the Agency continuously violated the FLSA over the previous three years by failing to pay overtime when employees worked more than eighty hours in a pay period. The Agency denied the grievance, and the matter proceeded to arbitration.

At arbitration, the Arbitrator framed the following issue for resolution: "Whether the Agency violated the . . . [FLSA] by failing to properly compensate employees . . . placed on AWS schedules that were not compliant with 5 U.S.C. [§] 6121(5), and if so, what is the appropriate remedy?"[7]

Addressing the framed issue, the Arbitrator found that "any employee who works more than [eighty] hours in a pay period is entitled to overtime for those hours," under the FLSA.[8] The Arbitrator determined that the Agency's timekeeping practice of using carryover hours violated the FLSA "to the extent that there were employees who worked more than [eighty] hours in a pay period but who were not paid overtime."[9] Although the Agency argued that its compressed schedules complied with the FLSA as modified by the Work Schedules Act,[10] the Arbitrator concluded that the FLSA mandated overtime pay for hours worked in excess of eighty in a pay period, "even if an employee worked fewer than [eighty] hours in the pay period before the one at issue."[11] On this point, the Arbitrator emphasized that the FLSA "does not contain any language" limiting the obligation to pay overtime based on events that occurred in "the pay period prior."[12] Additionally, the Arbitrator noted that the Agency's decision to change the compressed schedules outside the annual schedule-bidding process suggested that the Agency knew the schedules were unlawful.[13] Therefore, the Arbitrator sustained the grievance and awarded FLSA remedies, including backpay and liquidated damages.

The Agency filed exceptions to the award on April 7, 2025, and the Union filed an opposition on May 6, 2025.

III. Analysis and Conclusion: The award is contrary to the Work Schedules Act.

The Agency argues that the award is contrary to law because it conflicts with the Work Schedules Act and its implementing regulations.[14] According to the Agency, the Arbitrator erroneously applied the FLSA because the Work Schedules Act specifically exempts hours worked within compressed schedules from the FLSA's overtime requirements.[15] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[16] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[17] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[18]

Employees covered by the FLSA are entitled to one and a half times their regular rate of pay for all work hours over forty in a workweek.[19] However, § 6128(a) of the Work Schedules Act provides that the FLSA's overtime requirement "shall not apply to the hours which constitute a compressed schedule."[20] Instead, the Work Schedules Act states that, with respect to employees working compressed schedules, only "hours worked in excess of the compressed schedule shall be overtime hours."[21]

The Authority has held that § 6128 of the Work Schedules Act "prohibit[s]" agencies "from making overtime payments for 'hours which constitute a

[7] *Id.* at 2. In the award, the Arbitrator stated that "[t]he parties stipulated to" the issue for arbitration. *Id.* The Agency disputes that the parties stipulated to an issue, Exceptions Br. at 4 n.1, and the Union's post-hearing brief notes that "[t]he parties were unable to stipulate a statement of the issue." Exceptions, Attach. 4, Union's Post-Hr'g Br. at 3. Because the existence of a stipulation, or lack thereof, does not affect the resolution of this case, it is unnecessary to address the matter further.

[8] Award at 31.

[9] *Id.*

[10] *Id.* at 10 (summarizing Agency's argument).

[11] *Id.* at 32.

[12] *Id.*; *see also id.* (observing that the FLSA "does not . . . condition" the requirement to pay overtime "on the number of hours worked in a prior pay period").

[13] *Id.*

[14] Exceptions Br. at 22-27.

[15] *See id.* at 22.

[16] *NTEU, Chapter 133*, 74 FLRA 242, 244 (2025).

[17] *Id.*

[18] *Id.*

[19] 29 U.S.C. § 207(a).

[20] 5 U.S.C. § 6128(a).

[21] *Id.* § 6128(b); *see also* 5 C.F.R § 610.111(d) ("[A]ll work performed by an [AWS] employee within the basic work requirement is considered regularly scheduled work for premium pay and hours[-]of[-]duty purposes.").

compressed schedule.'"[22] As noted above, a compressed schedule is defined as "an [eighty]-hour biweekly basic work requirement which is scheduled for less than [ten] workdays."[23] It is undisputed that the compressed schedules at issue in this case required employees to work eighty hours every two weeks, although employees' workweeks did not always align with the Sunday through Saturday biweekly pay periods established by the Office of Personnel Management.

Citing the FLSA, the Arbitrator concluded that "any employee who works more than [eighty] hours in a pay period is entitled to overtime for those hours," as a matter of law.[24] In reaching this conclusion, the Arbitrator failed to recognize that the FLSA's overtime standard does "not apply to the hours which constitute a compressed schedule" under the Work Schedules Act.[25] Rather, § 6128(b) of the Act permits the Agency to pay overtime *only* if employees work more hours than the hours set forth in their compressed schedule, regardless of the number of work hours in a particular pay period.[26] But here, the Arbitrator did not find that any employee on a compressed schedule worked more than the hours specified in their compressed work schedule. In fact, the Arbitrator expressly found that when employees occasionally exceeded eighty hours worked in a pay period, it was "due to the rotating nature of . . . [their] schedules"[27] – not because the Agency ordered or approved, or suffered or permitted, any employee to work overtime. And to the extent the Arbitrator's award relies on the Agency's decision to modify its compressed schedules in coordination with the Union,[28] that fact has no bearing on whether the Agency owed any employee overtime compensation. Because employees are not entitled to overtime merely for fulfilling a compressed schedule's biweekly basic work requirement,[29] the Arbitrator's finding that the Agency unlawfully denied overtime pay is legally deficient.[30]

The Union does not assert that any employee worked hours *in addition* to the hours comprising their compressed schedules. Rather, the Union argues that the compressed schedules themselves violated § 6121(5) of the Work Schedules Act by "caus[ing] employees to work less or more than [eighty] hours *in a biweekly period*" – specifically, a biweekly pay period.[31] However, § 6121(5) defines a compressed schedule as "an [eighty]-hour *biweekly basic work requirement* which is scheduled for less than [ten] workdays" and makes no reference to biweekly *pay periods*.[32] Similarly, the Union contends that the definition of overtime in § 6121(7) contemplates biweekly pay periods,[33] yet that subsection refers only to hours worked outside the compressed schedule – not to biweekly pay periods.[34] Thus, § 6121's plain wording does not support the Union's argument that the Work Schedules Act requires biweekly compressed work schedules to precisely align with biweekly pay periods.

For these reasons, we find the award is contrary to the Work Schedules Act. Accordingly, we set aside the award,[35] and we find it unnecessary to resolve the Agency's remaining exceptions.[36]

IV. Decision

We set aside the award.

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[22] *FAA, Little Rock Air Traffic Control Tower, Little Rock, Ark.*, 51 FLRA 1046, 1050 (1996) (*FAA*) (quoting 5 U.S.C. § 6128(a)).

[23] 5 U.S.C. § 6121(5)(A).

[24] Award at 31.

[25] 5 U.S.C. § 6128(a); *see also* 5 C.F.R. § 551.501(a)(6) (excluding from FLSA overtime-pay provisions "hours of work that are not 'overtime hours,' as defined in 5 U.S.C. [§] 6121, for employees under . . . compressed work schedules").

[26] 5 U.S.C. § 6128(b) ("[H]ours worked in excess of the compressed schedule shall be overtime hours."); *see also* 5 C.F.R. § 610.111(d) (providing that work performed "within the basic work requirement" of a compressed schedule "is considered regularly scheduled work for premium pay and hours[-]of[-]duty purposes").

[27] Award at 20.

[28] *Id.* at 32.

[29] 5 C.F.R. § 610.111(d) (work performed "within the basic work requirement" of a compressed schedule "is considered regularly scheduled work for premium pay and hours[-]of[-]duty purposes").

[30] *See FAA*, 51 FLRA at 1051 (finding Work Schedules Act barred agency "from making overtime payments for . . . hours[] which were part of regularly assigned shifts that comprised the grievants' compressed schedules").

[31] Opp'n Br. at 13-14.

[32] 5 U.S.C. § 6121(5)(A) (emphasis added).

[33] Opp'n Br. at 14.

[34] 5 U.S.C. § 6121(7) (describing "overtime hours" as "any hours in excess of those specified hours which constitute the compressed schedule").

[35] *See FAA*, 51 FLRA at 1050-51 (setting aside award "as contrary to the Work Schedules Act" where "the facts, as found by the [a]rbitrator, d[id] not establish that the grievants were required to work any hours in excess of their compressed schedules").

[36] *See, e.g.*, *U.S. DHS, U.S. CBP, U.S. Border Patrol, Del Rio Sector*, 74 FLRA 239, 241 (2025) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Se. Fisheries Sci. Ctr.*, 74 FLRA 205, 206 (2025)) (finding it unnecessary to resolve party's additional exceptions after setting aside award as contrary to law).