64 FLRA No. 108

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CUSTOMS AND
BORDER PROTECTION
DALLAS, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 140
(Union)

0-AR-4374

DECISION

March 26, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Barnett Goodstein filed by the Agency under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' agreement by not placing in a pay status, and paying, an employee who had recalled his personal cell phone information and returned a government-issued cell phone at which he could be reached outside his regular work hours. Accordingly, the Arbitrator ordered the Agency to pay that employee backpay for any periods during which the Agency requested that he either carry a paging device or provide a phone number where he could be reached.

For the reasons discussed below, we set aside the award.

II. Background and Arbitrator's Award

The Agency assigns two employees whom it employs at the Dallas-Fort Worth (DFW) Port to conduct duties outside their regular work hours. For a period of time, the Agency assigned the employees to "stand by status, awaiting a call" to perform duties outside their regular work hours, and did not pay them for time spent in that status. Award at 2. The employees each had provided the Agency with a telephone number where they could be reached. *Id.*

Subsequently, one of the employees (the employee) "recalled his information concerning his telephone," returned a government-issued cell phone, and requested overtime pay for periods during which he had been on call. *Id.* The Union filed a grievance on the employee's behalf and alleged that the failure to pay him for overtime violated the parties' agreement. *Id.*

When the grievance was unresolved, it was submitted to arbitration. The Arbitrator stated the issues, in pertinent part, as: "Does the Agency violate the . . . agreement . . . by the way it uses the call out agreement at the DFW Port?"; and "If so, what is the appropriate remedy therefor?" [1] *Id.* at 1.

The Arbitrator stated that the issues before him involved "contract interpretation," not "statutory, or other, interpretation." *Id.* at 7. The Arbitrator considered paragraph 2 of the parties' agreement, which provides, in pertinent part, that an employee "will not be considered in a pay status . . . if the employee, for the purpose of being contacted, has volunteered to leave a telephone number or carry a paging device." [2] *Id.* at 1-2. The Arbitrator found that the "flip side" of this wording is that "if the [employee] has not volunteered . . . to carry a paging device . . ., and is asked to carry one," then the employee is in a pay status. *Id.* at 5-6.

The Arbitrator determined that the two employees at the DFW Port "were informed that, if they did not respond to a telephone call to them within 15 minutes from time of such call, while they are on call out duty,

1. The Arbitrator also resolved an arbitrability issue. As no exceptions were filed regarding that issue, we do not address it further.

2. In its entirety, paragraph 2 of the agreement provides:

> Employees required to be on standby status where their movements are restricted shall be deemed on duty and in pay status. Restricted is defined as requiring an employee to (1) be available by telephone or other paging device (i.e. answering telephone calls or waiting for telephone calls) or (2) perform related property duties at home. Once an employee is notified of a specific call out time and the original call out time changes, the employee will then be placed on standby status until the restriction is removed. Stand by status is not the preferred method of operation. A bargaining unit employee will not be considered in a pay status (read as 'on call'[)] if the employee, for the purpose of being contacted, has volunteered to leave a telephone number or carry a paging device.

Award at 1-2.

they are subject to disciplinary action[,]" and, "[t]hus, responding to telephone calls . . . is a mandatory part of their duties[.]" *Id.* at 7. The Arbitrator concluded that the Agency violated the agreement "by not placing in a pay status those [employees] who [did] not volunteer to leave a telephone number or carry a paging device, and [were] assigned such 'call out' duty." *Id.* at 8. He awarded the employee backpay, retroactive to the date of the filing of the grievance, "for each time he was assigned 'on call' duty and requested to leave a telephone number (unless he had already done so) or was requested to carry a paging device, and did not volunteer to do so before being asked to leave a number and/or carry a paging device." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to case law and Federal regulations interpreting the Fair Labor Standards Act (FLSA). Exceptions at 6. Specifically, the Agency asserts that these authorities establish that an employee is not entitled to compensation merely for carrying a communications device, *see id.* at 9, and also "establish that the notion of being restricted for work related reasons refers only to the degree to which employee[s are] unable to use their off-duty time for their own purposes[]" – an issue that the Arbitrator did not address. *Id.* at 8. According to the Agency, the employee is permitted to use his off-duty time for his own purposes, is not restricted to his home, and is permitted to swap shifts with other employees. *Id.* at 10. In addition, the Agency contends that the award is based on nonfacts and is contrary to management's right to assign work. *See id.* at 6, 15-23.

B. Union's Opposition

The Union argues that the award is not contrary to the FLSA. According to the Union, the Arbitrator found that the Agency had agreed to order employees to carry cell phones only when in standby status, and to properly compensate them when it places them in such status. Opp'n at 13. In this connection, the Union asserts that paragraph 2 of the parties' agreement is enforceable and that, under that provision, "it was up to the Agency to place more restrictions upon the [employee's] movements[]" in order to enable him to be entitled to pay. *Id.* at 8, 9. For support, the Union cites *U.S. Dep't of Veterans Affairs, Med. Ctr., St. Louis, Mo.*, 57 FLRA 296 (2001) (*Veterans Affairs*) (Chairman Cabaniss dissenting); *AFGE, Council of Marine Corps Locals (C-240)*, 39 FLRA 773 (1991) (*Marine Corps Locals*), *aff'd sub nom. U.S. Dep't of the Navy v. FLRA*, 962 F.2d 1066 (D.C. Cir. 1992). Finally, the Union argues that the award is not based on nonfacts and is not contrary to management's rights. *See* Opp'n at 16-19, 20-24.

IV. Analysis and Conclusion

The Agency argues that the award is contrary to the FLSA. 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*. *E.g., NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusion is consistent with the applicable standard of law. *Id.*

Under 5 C.F.R. § 551.431(a)(1), an employee's standby duty is considered hours of work under the FLSA if the employee is restricted by official order to a designated post of duty, assigned to be in a state of readiness to perform work, and substantially limited in the use of his or her time. [3] *See AFGE, Nat'l Border Patrol Council, Locals 2544 & 2595*, 62 FLRA 428, 431 (2008). An employee's activities may not be found "substantially limited" merely because the employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restricting alcohol consumption

3. 5 C.F.R. § 551.431 provides, in pertinent part:

> (a)(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.
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> (2) An employee is not considered restricted for "work-related reasons" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. . . .
>
> (b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:
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> (1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or
>
> (2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

or the use of certain medicines. *Id.* As the Office of Personnel Management explained in promulgating § 551.431, "[i]f an employee is relieved from duty and free to pursue personal activities (though, for practical reasons, limited in where he or she may go), the employee is not in a duty status and the hours are not compensable . . . [t]he fact that some restrictions may be placed on an employee's personal activities does not mean that the employee must be placed in duty status." *Id.* (quoting 64 Fed. Reg. 69165, 69167 (1999).

The mere fact that an employee is required to carry an electronic paging device does not place the employee in standby duty within the meaning of 5 C.F.R. § 551.431; in fact, that regulation "precludes an employee in an on-call status from being paid regardless of whether the employee must carry or respond to a beeper." *AFGE, Local 1897*, 51 FLRA 1290, 1292 (1996). In addition, the mere fact that an employee is required to respond to an employer call within a limited amount of time does not, by itself, demonstrate that the employee is entitled to standby pay. *See, e.g., Bright v. Houston N.W. Med. Ctr. Survivor, Inc.,* 934 F.2d 671, 677 (5th Cir. 1991) (*Bright*), *cert. denied* 502 U.S. 1036 (1992) (no pay entitlement despite requirement to arrive at premises within twenty minutes of receiving call). Further, parties may not negotiate over proposals that would entitle employees to standby pay unless such pay would be consistent with the requirements of 5 C.F.R. § 551.431. *See NFFE, Forest Serv. Council*, 45 FLRA 1204, 1210-12 (1992); *AFGE, AFL-CIO, Local 1867*, 42 FLRA 787, 792-94 (1991). *Cf. U.S. Dep't of the Army, Evans Army Cmty. Hosp., Fort Carson, Colo.*, 58 FLRA 244, 246 (2002) (Authority found that there was "no claim, or other basis on which to conclude," that parties are permitted to negotiate entitlements for FLSA-exempt employees to receive compensation greater than that provided for by regulation).

The Arbitrator interpreted the parties' agreement to require the Agency to pay the employee for any time during which he was required to carry a cellular phone. The Arbitrator did not find that the agreement entitled the employee to pay only when his activities were substantially limited, as the FLSA requires. Although the Arbitrator did find that the employee was required to respond to calls within fifteen minutes, as discussed above, this alone did not entitle the employee to pay under the FLSA. *See, e.g., Bright*, 934 F.2d at 677. In short, the Arbitrator interpreted the agreement as requiring that the employee be paid without regard to the requirements of the FLSA.

We note the Union's assertion that the parties' agreement required the Agency "to place more restrictions upon the [employee's] movements[]" in order to enable him to be entitled to pay. Opp'n at 9. However, the Arbitrator did not interpret the parties' agreement as requiring the Agency to place such restrictions on the employee, and the Union did not file exceptions to the award.[4] As such, the Union's assertion does not provide a basis for finding that the agreement, as interpreted and applied by the Arbitrator, is enforceable. *Cf. Veterans Affairs*, 57 FLRA at 297-98 (agreement requiring agency to restrict employee's movements so as to entitle employee to pay under FLSA, enforceable); *Marine Corps Locals*, 39 FLRA at 777-79 (proposal preventing management from requiring employees to carry beepers unless they were in pay status was negotiable, even if it required agency to substantially limit employees' activities so that standby pay would be appropriate).

For the foregoing reasons, we set aside the award as contrary to the FLSA.[5]

V. Decision

The award is set aside.

4. To the extent that the Union's assertion could be considered an exception to the award, it would be untimely because it was not filed within "thirty (30) days beginning on the date the award wa[s] served on" the Union. 5 C.F.R. § 2425.1(b).

5. Accordingly, we find it unnecessary to address the Agency's remaining exceptions.