65 FLRA No. 97

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 720
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

0-AR-4502

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DECISION

January 31, 2011

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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 Virginia Wallace-Curry filed by the Agency under § 7122(a) 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 two settlement agreements when it stopped paying overtime compensation to certain employees. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

This case is another in a series of cases involving disputes between Union locals and the Agency relating to overtime pay for pre-shift and post-shift activities. In a previous award, Arbitrator D'Eletto found that the Agency had violated the Fair Labor Standards Act (FLSA) by failing to compensate employees for certain pre-shift and post-shift activities. In *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Terre Haute, Indiana*, 58 FLRA 327, 330 (2003), the Authority found it "unclear whether [Arbitrator D'Eletto's] award include[d] compensation for picking up equipment at the control center and walking to the place of performance of principal activities, which the Agency concede[d was] legally permissible." Accordingly, the Authority remanded Arbitrator D'Eletto's award for clarification in this regard. *Id.*

Rather than resubmitting the award to Arbitrator D'Eletto for clarification, the parties executed a portal-to-portal settlement agreement (the portal-to-portal agreement), in which they agreed that "[s]hift starting and stopping times for all bargaining unit employees . . . shall begin and end at the [c]ontrol [c]enter[.]" Award at 1 (quoting the portal-to-portal agreement). The parties subsequently identified 120 posts where employees continued to perform compensable pre-shift and post-shift activities. *Id.* at 1-2.

When the Agency did not pay overtime to employees working the specified 120 posts, the Union requested a supplemental award from Arbitrator D'Eletto. Prior to a hearing before Arbitrator D'Eletto, the parties executed a settlement agreement (the settlement agreement), in which the Agency agreed to pay backpay and liquidated damages and to begin prospectively paying fifteen minutes of overtime per day to employees assigned to the specified 120 posts "until the Agency makes changes to the Correctional Services roster or takes other measures which eliminate pre-shift and post-shift work." *Id.* at 2 (quoting paragraph 4 of the settlement agreement). The settlement agreement also provided that "[s]hould the Agency exercise its rights under 5 U.S.C. § 7106, the Agency recognizes its obligation to negotiate appropriate arrangements for employees adversely affected by the exercise of authority and procedures with the Union in accordance with 5 U.S.C. § 7106 and the Master Agreement." *Id.* (quoting paragraph 4 of the settlement agreement).

Subsequently, the Agency notified the Union that the Agency had "eliminated or reorganized the assignment of pre-shift and post-shift tasks." *Id.* The Agency advised the Union that "the posts identified in the settlement agreement . . . will no longer be required to perform tasks associated with their principal activities while they are traveling to and

from their assigned post." *Id.* Instead, shifts would begin and end at the post of duty rather than at the control center. Accordingly, the Agency ceased paying employees fifteen minutes of overtime per day for pre-shift and post-shift activities. *See id.* at 12-13.

The Union then filed the grievance in this case alleging that the Agency violated: (1) the settlement agreement when the Agency ceased paying the fifteen minutes of overtime; and (2) the portal-to-portal agreement when it ceased paying the overtime and when it changed the location at which shifts started and ended. *Id.* at 1. The parties were unable to resolve the grievance and submitted it to arbitration.

B. Arbitrator's Award

The Arbitrator framed the issue, as follows: "Did the Agency violate [the portal-to-portal agreement and the settlement agreement] when it made changes to the pre-shift and post-shift activities of the 120 posts in question, thus eliminating the payment of [fifteen] minutes of overtime?" *Id.* at 3. With regard to the Agency's unilateral change to the shift starting and ending point, the Arbitrator noted the Agency's argument that paragraph 4 of the settlement agreement allowed it to unilaterally take any measures to eliminate pre-shift and post-shift activities, including eliminating the control center as the shift starting and ending point. *Id.* at 14-15. The Arbitrator rejected the Agency's claim that it could act unilaterally and held that, if the Agency wanted to change the control center as the starting and ending point of each shift, then it was required to negotiate with the Union. *Id.* at 17. Accordingly, she concluded that the Agency violated the agreements "by unilaterally changing the shift starting and stopping point . . . from the [c]ontrol [c]enter to the assigned duty post and eliminating the compensable pre-shift and post-shift work." *Id.* at 14.

The Arbitrator further determined that, even if the Agency could unilaterally eliminate pre-shift and post-shift activities, "the proposal offered by the Agency to change the start/end point of the shift to the duty post d[id] not sufficiently eliminate the pre-shift and post-shift work." *Id.* at 16. In this regard, she found "that the Union raised undisputed allegations that some of the Agency's 'new' changes had been implemented prior to the [s]ettlement [a]greement without eliminating the pre and post-shift work." *Id.* In determining that the Agency had not sufficiently eliminated pre-shift and post-shift activities, she stated that "if it w[ere] so easy to eliminate the pre-shift and post-shift work by changing the starting and stopping point of the shift, the Agency would have done so long ago." *Id.* at 15-16.

For these reasons, the Arbitrator sustained the grievance and directed the Agency to comply with the portal-to-portal agreement requirement that shifts begin and end at the control center. As a remedy, she directed the Agency to pay such employees backpay and to begin prospectively paying employees assigned to the specified 120 posts fifteen minutes of overtime per day. *Id.* at 17.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award fails to draw its essence from the portal-to-portal agreement and the settlement agreement. Exceptions at 8. Specifically, the Agency claims that the Arbitrator incorrectly found that paragraph 4 of the settlement agreement could not override the portal-to-portal agreement. In this connection, the Agency argues that paragraph 4 of the settlement agreement allowed it to make the disputed changes so that employees would no longer perform pre-shift and post-shift activities. *Id.* at 10.

The Agency additionally contends that the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. The Agency argues that, by not allowing the disputed changes, the Arbitrator has applied the settlement agreement to prohibit the Agency from exercising its right to assign work. *Id.* at 11 n.6.

The Agency further contends that the award is contrary to the FLSA and 5 C.F.R. § 551.412(b) (§ 551.412(b)).[1] *Id.* at 4. In support, the Agency asserts that the Arbitrator found that the Agency had eliminated compensable pre-shift and post-shift activities when she found that the Agency had "chang[ed] the shift starting and stopping point . . . from the [c]ontrol [c]enter to the assigned duty post and eliminate[ed] the compensable pre-shift and post-shift work." *Id.* at 6 (quoting Award at 14). Consequently, the Agency maintains that, regardless

1. Section 551.412(b) defines "preliminary and postliminary activities" as "preparatory or concluding activity that is not closely related to the performance of the principal activities" and provides that time spent in such activities "is excluded from hours of work and is not compensable[.]"

of the Arbitrator's finding that the Agency was not authorized to make the changes, the Arbitrator has directed payment of overtime for work that was never performed. *Id.* at 6-7. The Agency also claims that the issue of whether the Agency bargained properly over the disputed changes was not at issue because the Union did not raise to the Arbitrator any issues of a failure to bargain over the changes or improper implementation of the changes. *Id.* at 6 n.4.

B. Union's Opposition

The Union contends that the award draws its essence from the portal-to-portal agreement and the settlement agreement. Opp'n at 7. The Union also contends that the award is not contrary to the FLSA and § 551.412. The Union claims that the Agency misstates the Arbitrator's factual findings on whether the Agency eliminated overtime work, and asserts that the Arbitrator "did not find that the Agency eliminated all compensable pre-shift and post-shift work." *Id.* at 5 (citing Award at 16). The Union additionally argues that, under the settlement agreement, the Agency was required to negotiate any such changes. *Id.* at 6.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreements.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *E.g., AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing party establishes that 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. *E.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

The Agency argues that paragraph 4 of the settlement agreement permitted it to make the disputed changes. However, the Agency does not acknowledge that paragraph 4 also specifically obligated it to negotiate over procedures and appropriate arrangements pursuant to § 7106(b) if it exercised any management right under § 7106(a). In this regard, as stated previously, the Arbitrator held that "[i]f the Agency wants to change the [c]ontrol [c]enter as the starting/ending point of the shift, it must negotiate this with the Union." Award at 17. As the Agency asserts that the changes constituted an exercise of its right to assign work under § 7106(a)(2)(B) and makes no claim that it provided the Union with an opportunity to negotiate over procedures and appropriate arrangements under § 7106(b), the Agency provides no basis for finding that the award is irrational, unfounded, implausible, or manifestly disregards the settlement agreement. Accordingly, we deny this exception.

B. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews de novo any questions of law raised by the exception and the award. *E.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Warner Robins Air Force Base, Ga.*, 53 FLRA 1344, 1347 (1998) (*Warner Robins AFB*). In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

1. Section 7106(a)(2)(B) of the Statute

The Agency first contends that the award is contrary to § 7106(a)(2)(B). The Authority recently revised the analysis that it will apply when reviewing exceptions alleging that awards are contrary to law because they are inconsistent with management rights. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[2]

2. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7; *U.S. Dep't of Health & Human Servs., Office*

If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[3] *Id.*

It is not disputed that the award affects management's right to assign work. With regard to whether the award enforced a contract provision negotiated under § 7106(b), the Arbitrator enforced the settlement agreement to find that, if the Agency wants to change the starting and ending points of shifts, then the Agency must negotiate with the Union. The Authority has held that contract provisions that incorporate the bargaining obligations of the Statute constitute provisions negotiated under § 7106(b) of the Statute. *Warner Robins AFB*, 53 FLRA at 1349. Consequently, the Arbitrator was enforcing a provision negotiated under § 7106(b) of the Statute, and the Agency does not demonstrate that the award is contrary to management's right to under § 7106(a)(2)(B). *See id.* Accordingly, we deny this exception.

2. FLSA and § 551.412

The Agency contends that the award is contrary to the FLSA and § 551.412 because, regardless of the Arbitrator's finding that the changes were unauthorized, once the changes were made, no overtime work was performed. In this regard, the Agency alleges that the award confirms this and quotes the Arbitrator's statement that the Agency "eliminate[ed] the compensable pre-shift and post-shift work." Award at 14.

When evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole. *See, e.g., U.S. Dep't of Energy, Oak Ridge Operations Office, Oak Ridge, Tenn.*, 55 FLRA 1293, 1296 (2000) (reading "award[] as a whole" and finding agency "misconstrued the award"). That is, the Authority interprets the language of an award in context. *See, e.g., U.S. Dep't of Def., Def. Contract Audit Agency, Central Region, Irving, Tex.*, 60 FLRA 28, 29 (2004).

The Agency relies on the Arbitrator's statement that the Agency "eliminate[ed] the compensable pre-shift and post-shift work." Award at 14. However, as stated previously, the Arbitrator found, more specifically, that: (1) even if the Agency could unilaterally eliminate pre-shift and post-shift activities, "the proposal offered by the Agency to change the start/end point of the shift to the duty post d[id] not sufficiently eliminate the pre-shift and post-shift work[,]" *id.* at 16; (2) "the Union raised undisputed allegations that some of the Agency's 'new' changes had been implemented prior to the [s]ettlement [a]greement without eliminating the pre and post-shift work[,]" *id.*; and (3) "if it was so easy to eliminate the pre-shift and post-shift work by changing the starting and stopping point of the shift, the Agency would have done so long ago[,]" *id.* at 15-16. Based on the award and the record as a whole, the Agency does not establish that the award confirms that employees no longer perform overtime work. Consequently, the Agency provides no basis on which to find that the award is contrary to the FLSA or § 551.412.[4]

Moreover, even assuming that the Agency eliminated pre-shift and post-shift activities, the Agency does not establish that the award is deficient. In this regard, the Authority has found that, even if employees did not actually work overtime, they may receive overtime pay under the Back Pay Act, 5 U.S.C. § 5596, if a contract violation resulted in their failure to work overtime. *E.g., U.S. Dep't of the Navy, Puget Sound Naval Shipyard*, 62 FLRA 4, 7-8 (2007) (quoting *U.S. Dep't of the Navy, Supervisor of Shipbuilding Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 746-47 (2002) (it is "well-settled that an employee may be awarded overtime compensation for overtime hours that were not worked because of a violation of a contract")); *see also Soc. Sec. Admin., Balt., Md.*, 57 FLRA 538, 542

of Medicare Hearings & Appeals, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

3. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

4. The Agency also claims that the issue of whether the Agency bargained properly over the disputed changes was not at issue because the Union did not raise to the Arbitrator any issues of a failure to bargain over the changes or improper implementation of the changes. However, the Union in its post-hearing brief alleged that the "Agency made a unilateral change to the shift starting and stopping point without negotiating with the Union as required by the [s]ettlement [a]greement." Opp'n, Attach. B, Union's Post-Hearing Brief at 8-9. Consequently, to the extent that the Agency is contending that the award is deficient because the Union did not raise an issue of a failure to bargain, the Agency's contention misstates the position of the Union, and, thus, provides no basis for finding the award deficient.

(2001) (citing approvingly 54 Comp. Gen. 1071 (1975), in which the Comptroller General confirmed that the "no work, no pay" rule no longer applies to preclude an award of backpay to remedy the violation of a collective bargaining agreement that causes an employee to lose pay).

As the Arbitrator found that the Agency violated the portal-to-portal agreement and the settlement agreement -- and as the Back Pay Act authorizes backpay to remedy the loss of overtime pay resulting from a violation of a collective bargaining agreement even when employees perform no overtime work -- the Agency's claim that the award is deficient because employees performed no overtime work provides no basis for finding the award deficient.

For the foregoing reasons, we deny this exception.

V. Decision

The Agency's exceptions are denied.