64 FLRA No. 150

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
ATWATER, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1242
(Union)

0-AR-4435

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DECISION

May 27, 2010

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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 an exception to an award of Arbitrator Jack H. Calhoun 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 exception.

The Union filed a grievance alleging that the Agency violated the overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* The Arbitrator determined that the employees at issue were entitled to overtime compensation under the FLSA. For the reasons set forth below, we dismiss the Agency's exception.

II. Background and Arbitrator's Award

A. Background

This dispute arises out of a grievance filed by the Union alleging that the Agency violated the overtime compensation provisions of the FLSA by failing to compensate correctional officers for working overtime. Award at 1. The Agency denied the grievance.

The parties were unable to resolve the grievance and submitted it to arbitration.

The Arbitrator framed the following issue:

> [W]hether bargaining unit employees have been required to work more than a *de minimis* amount of time in excess of their regular shifts without compensation performing work that is integral and indispensable to their principal work activities during the applicable statutory period, and, if so, what compensation are they due?

Id.

B. Arbitrator's Award

The Arbitrator found that the officers were required to work more than a *de minimis* amount of time in excess of their regular shifts without compensation while performing work that is integral and indispensable to their principal work. *Id.* at 13. The Arbitrator further found that, on average, the total amount of time that employees worked in excess of their regular shifts was thirty minutes per day. *Id.* at 4.

At arbitration the Union contended, among other things, that the Agency knowingly and willfully violated the FLSA. *Id.* at 7. Because the violations were willful, the Union argued, the correctional officers should be awarded appropriate compensation for three years preceding the filing of the grievance, plus interest, attorney fees, and costs. *Id.*

The Arbitrator concluded that the Agency "knowingly and willfully" failed to comply with the FLSA. *Id.* at 13. The Arbitrator found that management had been aware since at least 2002 that a portal-to-portal issue existed at the institution in question. *Id.* at 6. The Arbitrator further noted that management was aware that officers arrive prior to their shift start time to perform pre-shift activities. According to the Arbitrator, the Agency neither compensated the officers for these activities, nor implemented "an over-lapping shifts program" to relieve the officers of the pre-shift work. *Id.* at 4. The Arbitrator noted that, at one time, the Agency prohibited officers from entering the institution until 15 minutes prior to their shift starting time; however

this practice was ended because outgoing officers were not being relieved until after their shifts had already ended. *Id.* at 6.

As the Arbitrator concluded that the Agency "knowingly and willfully" failed to comply with the FLSA, he awarded thirty minutes of overtime pay to the correctional officers for three years preceding the date of the grievance. *Id.* at 13. The Arbitrator also awarded interest in the amount allowed by law and attorney fees.

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award is contrary to the FLSA, 29 U.S.C. § 255(a), because the Arbitrator applied a three-year instead of a two-year statute of limitations to the back pay award. Section 255(a) provides that a claim to enforce any cause of action under the FLSA for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" must be brought within two years after the cause of action accrued unless the cause of action arose out of a "willful violation," in which case the claim must be brought within three years after the cause of action accrued. Exception at 4 (quoting 29 U.S.C. § 255(a)). Accordingly, the Agency argues that the Arbitrator erroneously awarded back pay reaching back three years rather than two years because its actions were willful.

The Agency claims that the Arbitrator should have applied the two-year statute of limitations because he failed to make "the requisite findings" to support his application of the three-year statute of limitations. Exception at 5. Citing the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Agency argues that the Arbitrator was required to make clear factual findings that the Agency either knew that its conduct was prohibited by the FLSA or showed a reckless disregard for the FLSA's requirements. Exception at 5-6. According to the Agency, the Arbitrator failed to meet his burden to set forth the facts justifying his finding that the Agency willfully violated the FLSA. *Id.* at 6.

The Agency argues that its conduct was not willful because it had an "honest and justified belief" that it was in compliance with the FLSA. *Id.* at 7. The Agency contends that this is demonstrated by its claims in 2005 that "[a]ll staff are given ample time" to report to their assigned posts and that "there is no requirement that staff conduct any pre-, or post-shift business[.]" *Id.* According to the Agency, an employer's violation of the FLSA is not willful if it makes efforts to "keep abreast" of FLSA requirements but fails to comply with them because of mistaken interpretations of the law. *Id.* The Agency argues that, because it "kept abreast" of the FLSA's requirements and did not genuinely believe that it was violating the FLSA, the Authority should set aside the award. *Id.* at 7-8.

B. Union's Opposition

The Union argues that the award is not contrary to law. According to the Union, the Arbitrator made factual findings to support his conclusion that the Agency willfully violated the FLSA. Opp'n at 3. The Union asks that the Authority uphold the Arbitrator's award and requests attorney fees incurred while responding to the Agency's exception.[*]

IV. Analysis and Conclusion

For the following reasons, we dismiss the Agency's exception.

The Agency's arguments that the Arbitrator should only have applied the two-year statute of limitations under 29 U.S.C. § 255(a), and that the Agency's conduct was not willful for a variety of specific reasons, are not properly before the Authority. Section 2429.5 of the Authority's Regulations provides in pertinent part that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. Authority precedent makes clear that § 2429.5's provisions will be applied to bar consideration of a parties' exceptions where an issue could have been, but was not, presented to an arbitrator. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009) (dismissing exceptions where evidence presented at hearing established that agency was aware that resolution of dispute entailed enforcement of a management right limitation but did not raise management right issue

[*] With regard to the Union's request for attorney fees, the Authority will not consider such a request for fees and expenses incurred in the preparation of exceptions and oppositions in cases filed under 5 U.S.C. § 7122. *AFGE, Local 2382*, 58 FLRA 270, 272 (2002) (citing *SSA*, 57 FLRA 530, 537 n.16 (2001)). Instead, in a case such as this, a request for attorney fees may be presented only to the arbitrator. *See Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841, 844 n.2 (1993)).

before arbitrator); *U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003) (refusing to consider issue raised in agency's exception that union violated a provision of the Statute where arbitrator's award found agency had alleged union violated only the parties' collective bargaining agreement).

Application of § 2429.5's provisions in this case mandates dismissal of the Agency's exception. There is no evidence in the record that the Agency sought to make its case for the two-year statute of limitations, or its lack of willfulness, before the Arbitrator. Although the Agency made several arguments at arbitration, it did not respond to the Union's contention that the correctional officers should be awarded three years of compensation because the Agency knowingly and willfully violated the FLSA. *See* Award at 8-10; Exception, Attach. B (Management's Closing Argument before the Arbitrator). To the contrary, both the award and the Agency's post-hearing brief reflect the Agency's failure to raise those issues in that forum. In fact, the Agency did not address any aspect of the willfulness question on which the Arbitrator ultimately ruled in his award. As the Agency did not present those issues to the Arbitrator in the first instance, it may not do so now. We therefore dismiss the Agency's exception.

V. Decision

The Agency's exception is dismissed.