

67 FLRA No. 31

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 376
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
U.S. FOREST SERVICE
(Agency)

0-AR-4843

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DECISION

December 18, 2013

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator LaVerne N. Boyd denied a grievance seeking overtime compensation and reimbursement of travel and per diem expenses for the grievant's travel to an alternative work site. The Arbitrator found that the grievant's travel did not exceed the fifty-mile radius required by a government-wide regulation for overtime compensation. He also found that the grievant's travel did not qualify for travel and per diem reimbursement under an Agency regulation. This case presents the Authority with three substantive questions.

The first substantive question is whether the Arbitrator denied the grievant's overtime compensation based on a nonfact – the Arbitrator's finding that a fifty-mile, rather than a twenty-five-mile, radius applied to determine entitlement to overtime compensation. Because the parties disputed the required mileage radius below, we find that the award is not based on a nonfact.

The second substantive question is whether the award is contrary to 5 C.F.R. § 551.422, which provides that: (1) travel from home to work is compensable as overtime if the travel takes the employee outside of the area of the employee's official duty station; and (2) an agency may prescribe a mileage radius of not greater than fifty miles to determine the geographic limits of the employee's official duty station. The Union fails to establish that the mileage radius in this regulation does not apply, and because the Arbitrator determined, and it

is undisputed, that the grievant's travel did not exceed fifty miles, we find that the award is not contrary to law.

The third substantive question is whether the award fails to draw its essence from the parties' collective-bargaining agreement because the Arbitrator failed to find that the grievant was entitled to: (1) overtime compensation under "Part 551,"¹ as incorporated into the parties' agreement by Article 19, Section 10; and (2) reimbursement of travel and per diem expenses under an Agency regulation, Forest Service Handbook (FSH) 6509.33 301-71, as incorporated into the parties' agreement by Article 19, Section 3. Because the Union's claim concerning Part 551 reiterates the contrary-to-law claim regarding § 551.422, which we reject, we find that this claim also provides no basis for finding the award deficient. With regard to the second essence claim, because the Arbitrator's interpretation of the Agency regulation is not implausible, irrational, or otherwise deficient under the essence standard, we deny the claim.

II. Background and Arbitrator's Award

The grievant is a heavy-equipment operator whose official duty station is located in Fredonia, Arizona. During the "fire season,"² which runs from May to October, the Agency requires the grievant to report to an alternative worksite located in Jacobs Lake, Utah. The Jacobs Lake worksite is approximately thirty-and-one-half miles from the grievant's official duty station.

The Union filed a grievance claiming that the Agency failed to compensate the grievant for time and travel expenses to the alternative worksite. The parties did not resolve the grievance and submitted it to arbitration. The Arbitrator considered the following issue: "Whether the [g]rievant being directed to travel to a location away from his official duty station, Fredonia, Arizona, on his own time, in his own vehicle, and at his own expense to start his normal work duties is in violation of [f]ederal regulations, [FSH] [d]irection, and the [parties' agreement]."³

The Arbitrator first concluded that the grievant was not entitled to overtime compensation under FSH 6109.11.13.72e, which provides that "work a[n] . . . employee must perform while traveling" constitutes "hours worked."⁴ According to the Arbitrator, that section of the FSH applies only to employees who perform work while traveling. As relevant here, the Arbitrator found that the grievant's work day did not

¹ Exceptions at 8.

² Award at 18.

³ *Id.* at 17.

⁴ Exceptions, Attach. F., FSH 6109.11.13.72e.

begin until he reported to the alternative worksite, and that while traveling, he was not working or acting on behalf, or at the request, of the Agency. Thus, the Arbitrator concluded that the grievant's travel to his alternative worksite was normal home-to-work travel – not work. In addition, the Arbitrator found that because the grievant traveled a distance of only approximately 30.5 miles from his official duty station to the alternative worksite (and an additional seven miles if he drove directly from his home), he was not entitled to overtime compensation for his travel time under § 551.422(d), which provides, as relevant here, that:

(d) . . . an agency may prescribe a mileage radius of not greater than [fifty] miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under this part. However, an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 C.F.R. 101-11.303-3.1).⁵

The Arbitrator also concluded that the grievant was not entitled to reimbursement for his travel and per diem expenses under FSH 6509.33 301-71, which provides such reimbursement in connection with "official travel" that meets certain requirements, including distance (outside a twenty-five-mile radius of the employee's duty station or residence), and time in travel status (greater than twelve hours).⁶ Based on his previous determination – that the grievant was not working while traveling – he found that the grievant's travel was not "official travel," under the FSH provision.⁷ In addition, the Arbitrator found that, although the grievant's travel exceeded the twenty-five-mile radius set forth in the regulation, it did not exceed what the Arbitrator found to be the twelve-hour requirement in the regulation.

Based on the foregoing, the Arbitrator concluded that the Agency did not violate law, rule, regulation, policy, or the parties' agreement by denying the grievant overtime compensation and reimbursement for travel and per diem expenses. Accordingly, he denied the grievance.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union asserts that the Arbitrator based his award on a nonfact.⁸ According to the Union, the Arbitrator's finding that "the Agency had prescribed a distance of [fifty] miles" as a requirement for entitlement to overtime pay is a nonfact because the Agency's regulation (FSH 6509.33 301-71) establishes a twenty-five mile radius for this purpose.⁹

The Authority will not find an award deficient on the basis of the arbitrator's determination of any factual matter that the parties disputed at arbitration.¹⁰ Here, the record demonstrates that the parties disputed before the Arbitrator the mileage required to be eligible for overtime compensation.¹¹ As the parties disputed the issue below, the Union's exception provides no basis for finding that the Arbitrator based his award on a nonfact.¹² Accordingly, we deny the Union's nonfact exception.

B. The award is not contrary to 5 C.F.R. § 551.422.

The Union claims that, in determining whether the grievant was entitled to overtime compensation, the Arbitrator considered § 551.422(b) without regard to § 551.422(d), which provides that travel from home to work is compensable if the travel takes the employee outside of the area of the employee's official duty station.¹³ The Union argues that the Arbitrator erred by using the wrong mileage radius to measure the travel distance from the grievant's official duty station.¹⁴ According to the Union, FSH 6509.33 301-71 establishes

⁵ 5 C.F.R. § 551.422(d).

⁶ Award at 22-23.

⁷ *Id.* at 23.

⁸ Exceptions at 9.

⁹ *Id.*

¹⁰ *E.g., NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009).

¹¹ *See Award at 20-23; Exceptions, Attach. B, Brief on Behalf of NFFE, Local 376 at 7, 9; Exceptions, Attach. C, Brief in Support of Agency's Position at 5-6.*

¹² *See AFGI, Local 376*, 62 FLRA 138, 141 (2007); *U.S. DOD, Hale Koa Hotel*, 55 FLRA 651, 652 (1999).

¹³ Exceptions at 5.

¹⁴ *Id.*

the relevant mileage radius as twenty-five miles, not fifty miles, as the Arbitrator determined.¹⁵

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*.¹⁶ In applying the standard of *de novo* review, the Authority assesses whether an 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 appealing party establishes that those factual findings are deficient as nonfacts.¹⁸

In considering whether the grievant was entitled to overtime compensation, the Arbitrator applied § 551.422, which governs entitlement to overtime pay under the Fair Labor Standards Act for time spent traveling. As set forth above, § 551.422(d) provides that an agency may establish a mileage radius no greater than fifty miles to determine whether an employee's travel time warrants overtime pay. As relevant here, the Arbitrator found that the grievant was not entitled to overtime compensation because his travel was within the fifty-mile radius.¹⁹

The Union claims that the Arbitrator should have applied the twenty-five-mile radius prescribed in FSH 6509.33 301-71 to measure the travel distance from the grievant's official duty station to the alternate worksite.²⁰ However, the Agency regulation on which the Union relies contains no reference to overtime compensation and instead refers to "per diem" and reimbursement of "transportation and miscellaneous expenses."²¹ The Union has not established that the Agency adopted or negotiated any radius, other than the fifty-mile radius in § 551.422, for the purpose of determining overtime compensation. In this regard, we note that we have rejected the Union's nonfact challenge to the mileage radius used by the Arbitrator. And as the Union does not challenge the Arbitrator's finding that the grievant's actual travel distance was less than fifty miles,²² there is no basis for finding the award contrary to § 551.422. Accordingly, we deny the Union's contrary-to-law exception.

C. The award does not fail to draw its essence from the parties' agreement.

The Union makes two essence claims.²³ First, it claims that the Arbitrator's failure to find that the grievant was entitled to overtime compensation does not draw its essence from the parties' agreement because Article 19, Section 10 "incorporate[s] [5 C.F.R. §] 551 in[to] the [parties'] agreement."²⁴ Second, the Union claims that the Arbitrator's failure to find that the grievant was entitled to reimbursement for mileage and per diem expenses does not draw its essence from the parties' agreement because Article 19, Section 3.a. incorporates FSH 6509.33 301-71 into the parties' agreement.²⁵

The Union's first essence claim is a reiteration of the Union's contrary-to-law claim – that the Arbitrator erred in applying § 551.422. We have rejected that contrary-to-law claim. The Authority does not analyze separately an essence exception that is substantively the same as a contrary-to-law exception that the Authority has rejected.²⁶ Accordingly, the first essence claim provides no basis for finding the award deficient.

The Union's second essence claim challenges the Arbitrator's interpretation of FSH 6509.33 301-71, an Agency regulation that is incorporated into the parties' agreement by Article 19, Section 3.²⁷ The Union specifically challenges the Arbitrator's interpretation of the requirements of the regulation as to mileage and time in travel status.²⁸ When an agreement incorporates an agency regulation, and a party claims that an award conflicts with the regulation, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.²⁹ Thus, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.³⁰ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining 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 collective-bargaining

¹⁵ *Id.* at 6.

¹⁶ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

¹⁷ *U.S. DOD, Dep't of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹⁸ *See, e.g., AFGE, Local 1164*, 66 FLRA 74, 78 (2011).

¹⁹ Award at 22.

²⁰ Exceptions at 5-6.

²¹ Exceptions, Attach. I at 4..

²² Award at 20-21.

²³ Exceptions at 8-10.

²⁴ *Id.* at 8-9.

²⁵ *Id.* at 9-10.

²⁶ *AFGE, Local 2128*, 66 FLRA 801, 804 n.4 (2012).

²⁷ Exceptions at 9-10.

²⁸ *Id.*

²⁹ *See U.S. Dep't of the Army, U.S. Army Aberdeen Proving Ground, Aberdeen Proving Ground, Md.*, 49 FLRA 950, 953 (1994) (*Army*).

³⁰ *See 5 U.S.C. § 7122(a)(2); AFGE, Council 220*, 54 FLRA 156, 159 (1998).

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.³¹

As pertinent here, FSH 6509.33 301-71 provides that:

a. When the *official travel* occurs within [one] calendar day, local travel is considered to be travel which occurs within a [twenty-five]-mile radius of the employee's duty station or residence. . . . If the travel is greater than [twenty-five] miles from either the employee's duty station or residence and greater than [twelve] hours, [temporary-duty] authorizations must be issued. Per diem is not authorized if the period in travel status is less than [twelve] hours. If the period in travel status is less than [twelve] hours, reimbursement is limited to transportation and miscellaneous expenses only.³²

As noted above, the Arbitrator found that the grievant was not engaged in "official travel" under the regulation.³³ The Union does not dispute this finding, which is a prerequisite under the regulation for the reimbursement of travel and per diem expenses. As a result, it is unnecessary to address the Union's claim regarding the Arbitrator's interpretation of the requirements of the regulation as to mileage and time in travel status. Accordingly, the Union has not established that the Arbitrator's interpretation of the regulation is implausible, irrational, or otherwise fails to draw its essence from the parties' agreement and, thus, the Union's exception does not provide a basis for finding the award deficient.³⁴

Accordingly, we deny the Union's essence exception.

IV. Decision

We deny the Union's exceptions.

³¹ *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

³² Exceptions, Attach. I at 4 (emphasis added).

³³ Award at 23.

³⁴ *See Army*, 49 FLRA at 953.