

67 FLRA No. 36

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3723
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
SEAL BEACH, CALIFORNIA
(Agency)

0-AR-4885

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DECISION

December 19, 2013

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

I. Statement of the Case

As relevant here, Arbitrator Fred D. Butler found that the Union failed to provide sufficient evidence to demonstrate that civilian police officers (officers) were entitled to overtime compensation under the Fair Labor Standards Act (FLSA). The central issues in this case are whether the Arbitrator's finding that the Union failed to provide such evidence is based on a nonfact or is contrary to law. We conclude that the award is not based on a nonfact because the Arbitrator's determination that the Union failed to provide sufficient evidence was disputed at arbitration. Additionally, we find that the award is not contrary to law because the Arbitrator's factual findings support the Arbitrator's legal conclusion that the officers were not entitled to overtime compensation.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the FLSA by "suffering or permitting" the officers to perform certain work as overtime both before and after their shifts without proper compensation.¹ The grievance was unresolved and was submitted to arbitration.

As relevant here, the Arbitrator found that Agency officers are required to wear both a uniform and protective gear. According to the Arbitrator, it was "clear" that the Agency advised the officers "that they must be in uniform with [protective] gear at the start of their shift[s]" but that they were permitted to put on, or don, their uniforms at home.² The Arbitrator found, however, that it "was not clear" from the officers' testimony where they actually donned their uniforms.³

The Arbitrator then addressed the Agency's requirement that the officers prepare for their shifts by donning protective gear and picking up their weapons, or "arming up."⁴ The Arbitrator considered court decisions that have addressed the distinctions between the donning and removing (or doffing) of a uniform and the donning and doffing of protective gear.⁵ He noted, in this regard, that some courts have held that officers who have the "option" to don and doff their uniforms at home are not entitled to overtime compensation for those duties.⁶ But he found that those courts have treated the donning and doffing of protective gear that must be completed at the agency's facility differently. Specifically, he noted that, when protective gear must be donned and doffed at the agency's facility, the courts view those duties as "integral and indispensable" to an officer's principal duties and thus are compensable as overtime, unless the time spent performing those duties is "de minimis."⁷

Applying this precedent, the Arbitrator found that the time the officers spend donning protective gear and "arming up" qualified as compensable time because those duties are integral and indispensable to the officers' principal activity of protecting the Agency's facility.⁸ The Arbitrator thus held that, in the future, the Agency would be required to compensate the officers for the time they spend on these activities. The Arbitrator also found, however, that the officers "could not state with certainty" the amount of time they spent donning or doffing protective gear and "arming up."⁹ He also noted that the Union failed to show any specific evidence that overtime was claimed, documented, or denied for those activities. Therefore, he concluded that there was "insufficient proof to warrant a finding of a violation of the FLSA" for the failure to pay the officers overtime in the past.¹⁰

² Award at 21.

³ *Id.*

⁴ *Id.* at 22-23.

⁵ *Id.* at 22 (citing *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010) (discussing several court cases related to donning and doffing of uniforms and protective gear)).

⁶ *Id.* at 21-22.

⁷ *Id.*

⁸ *Id.* at 22, 24.

⁹ *Id.* at 23-24.

¹⁰ *Id.* at 24.

¹ Award at 7-8; Exceptions, Attach. 2, Union's Post-Hr'g Br. at 1, 3.

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 claims that the award is based on a nonfact.¹¹ Specifically, the Union asserts that the Arbitrator erred in finding that it failed to establish the specific times and dates for which the officers were entitled to overtime compensation.¹² The Union claims, among other things, that it presented sufficient evidence to demonstrate that the officers were entitled to thirty minutes of overtime compensation for performing the duties at issue every day for three years.¹³

The Authority will not find that an award is based on a nonfact when the factual matter at issue was disputed at arbitration.¹⁴ Here, the record shows that the factual matter at issue – whether the Union presented sufficient evidence demonstrating that the officers were entitled to overtime on specific dates and at specific times – was disputed at arbitration.¹⁵ As such, the Union's assertions do not demonstrate that the award is based on a nonfact.¹⁶

Accordingly, we deny the Union's exception.

B. The award is not contrary to law.

The Union argues that the Arbitrator's conclusion – that the officers were not entitled to overtime compensation because they failed to demonstrate the amount of time they spent donning and doffing protective gear in the past – is contrary to law.¹⁷ 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*.¹⁸ In applying the standard of *de novo* review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.¹⁹ In making that determination, the Authority defers to the arbitrator's

underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.²⁰ Additionally, the Authority consistently has denied exceptions when the arbitrator has applied the correct standard of law and made findings of fact in support of the disputed legal conclusion.²¹

The Union contends that the evidence it presented at arbitration demonstrated that the time the officers spent donning and doffing protective gear and arming up entitled those officers to overtime compensation under the FLSA.²² That is, the Union argues that it submitted sufficient evidence to meet its burden of proof, and the Arbitrator's opposite conclusion is contrary to law.

Under the FLSA, employees have the burden to establish that they have performed work for which they have not been properly compensated²³ and must provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."²⁴ An arbitrator's analysis of the evidence a union presents to satisfy the foregoing burden is treated as a factual finding to which the Authority defers.²⁵ Thus, the Authority will not set aside such a finding unless an excepting party demonstrates that it is based on a nonfact.²⁶

In this case, the Arbitrator evaluated the evidence that the Union submitted and concluded that it did not demonstrate that the officers were entitled to compensation under the FLSA. Specifically, he found that the officers "could not state with certainty" the days they came in at least fifteen minutes early or stayed at least fifteen minutes late to perform compensable pre- and post-shift duties.²⁷ He further noted that the Union provided "no specific times or dates . . . as part of the requested relief."²⁸ Moreover, he found that the Union provided "no records or claims" to show that the officers "requested and were denied overtime in the past."²⁹ Although the Union has argued that the Arbitrator's findings are nonfacts, as explained above, we have

¹¹ Exceptions at 13-16.

¹² *Id.* at 14-15.

¹³ *Id.* at 15.

¹⁴ *E.g.*, *AFGE, Local 2382*, 66 FLRA 664, 668 (2012) (*Local 2382*).

¹⁵ *See Award at 9-10, 13, 15, 23-24; Exceptions, Attach. 2, Union's Post-Hr'g Br. at 7.*

¹⁶ *See Local 2382*, 66 FLRA at 668.

¹⁷ *See Exceptions at 8-13.*

¹⁸ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006) (*BOP, Marion*).

¹⁹ *Id.*

²⁰ *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*).

²¹ *NFFE, Local 1804*, 66 FLRA 512, 514 (2012) (*Local 1804*).

²² *See Exceptions at 8-13.*

²³ *AFGE, Local 1741*, 62 FLRA 113, 119 (2007) (*Local 1741*); *BOP, Marion*, 61 FLRA at 771.

²⁴ *Local 1741*, 62 FLRA at 119 (internal quotation marks omitted); *see also BOP, Marion*, 61 FLRA at 771.

²⁵ *Local 1804*, 66 FLRA at 514.

²⁶ *Id.* at 515.

²⁷ *Award at 23.*

²⁸ *Id.*

²⁹ *Id.* at 24.

rejected this argument. As such, we defer to the Arbitrator's factual findings.³⁰

Additionally, the Union argues that the award is contrary to law because the Arbitrator erroneously required the Union to provide records to support its claims. According to the Union, an employee does not have to supply "actual records or logs to demonstrate work performed," but rather, "may establish the amount of overtime worked through their own testimony."³¹ However, as discussed above, the Arbitrator found that this testimony was not persuasive, and the Union has not demonstrated that this finding is based on a nonfact. Further, the Authority previously has found that, in addressing FLSA claims, arbitrators are permitted to consider employees' failures to submit documentary evidence.³² The Union's argument, therefore, is unavailing.

Based on the foregoing, the Arbitrator's factual findings support his legal conclusion that the officers were not entitled to overtime compensation.³³ Accordingly, we reject the Union's claim that the award is contrary to law, and deny the Union's exception.

IV. Decision

We deny the Union's exceptions.

³⁰ *Marshals Serv.*, 67 FLRA at 22.

³¹ Exceptions at 10.

³² See, e.g., *Local 1741*, 62 FLRA at 119-20; see also *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 457 (2003).

³³ *Local 1804*, 66 FLRA at 514-15.