

67 FLRA No. 6

UNITED STATES
DEPARTMENT OF JUSTICE
U.S. MARSHALS SERVICE
JUSTICE PRISONER AND ALIEN
TRANSPORTATION SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2272
(Union)

0-AR-4841

0-AR-4861

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DECISION

October 26, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an initial award (initial exceptions) and a supplemental award (supplemental exceptions) of Arbitrator Jane Minnich 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.¹ The Union filed an opposition to the initial exceptions (initial opposition) and an

¹ Because Case Nos. 0-AR-4841 and 0-AR-4861 involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision. *See U.S. Dep't of Homeland Sec., Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 813 (2005) (consolidating cases where they involved same parties and arose from same arbitration proceeding).

opposition to the supplemental exceptions (supplemental opposition).²

In the initial award, the Arbitrator found that the Agency violated the parties' agreement by not treating the grievants' approved leave as hours of work for the purpose of determining overtime pay. Accordingly, she awarded the grievants unpaid overtime and the recrediting of their leave accounts for any approved leave that they had forfeited as a result of the Agency's violation. In the supplemental award, she also awarded liquidated damages. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards

This case involves the Agency's October 2009 changes to the grievants' work schedules and to how the Agency counts their leave when calculating their entitlement to overtime pay. Prior to the changes, the grievants had a forty-hour, regularly scheduled administrative workweek of Monday through Friday, eight hours per day. *See* Initial Award at 4. The grievants were required to submit leave requests before taking leave, and any preapproved leave that they took during the workweek was counted for purposes of calculating any entitlement that they had to overtime pay. *See id.* at 5. For example, if a grievant took eight hours of preapproved leave on Monday, and worked forty hours during the rest of the week, then the grievant earned eight hours of overtime pay. *See id.*

In order to increase scheduling flexibility, the Agency implemented the October 2009 changes. *See id.* at 4. Specifically, the Agency changed the grievants' work schedules to a "First [Forty] Work Schedule," under which they still were required to work forty hours a week, but no longer had definite days or hours of duty. *Id.* Rather, they had a six-day administrative workweek, and their schedules varied according to mission requirements. *See id.* Additionally, the first forty hours that they worked during that week were counted as regular hours of work in order to satisfy their forty-hour-a-week work requirement. *See id.*

² The Agency also filed a motion to strike the Union's supplemental opposition as untimely, the Union filed an opposition to the Agency's motion and a motion for sanctions against the Agency, and the Agency filed a response to the Union's motion. However, as the parties did not request permission to file these supplemental submissions under 5 C.F.R. § 2429.26, we do not consider them. *See, e.g., U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010) (declining to consider motion to strike without request for leave to file).

When the Agency implemented the First Forty Work Schedule, it also changed how it counted the grievants' paid leave for purposes of calculating any entitlement that they had to overtime pay. *See id.* at 5-6. Although the grievants still were required to submit leave requests before taking leave, the Agency charged their leave balances only if the approved leave was needed to ensure that they completed a forty-hour week; if the leave was not needed for that purpose, then the Agency did not charge their leave balances. *See id.* Using the same example set forth above – if a grievant took eight hours of preapproved leave on Monday and worked forty hours during the rest of the week – the grievant did not earn eight hours of overtime pay; instead, the Agency did not charge the grievant's leave balance for the eight hours of leave that the grievant took on Monday.

This change negatively affected the grievants' weekly overtime pay and, in some instances, resulted in the forfeiture of accrued leave in excess of the maximum amount of leave that the grievants could carry over into the next year. *See id.* at 15-16. Accordingly, the Union filed a grievance alleging that the Agency "violated the [parties'] [a]greement when it failed to treat paid leave as hours of work when determining an employee's entitlement to overtime compensation under the [Fair Labor Standards Act (FLSA)]." *Id.* at 7. As a remedy, the Union requested that the paid leave approved by the Agency and taken by the grievants be treated as hours of regular work, and that the grievants receive the following remedies: (1) unpaid overtime; (2) liquidated damages; and (3) restoration of leave forfeited as a result of the Agency's actions. *See id.* at 9.

The grievance was unresolved and submitted to arbitration. *See id.* at 1. Because the parties did not stipulate the issues, the Arbitrator framed them as: "[W]hether the Agency violated the [parties'] [a]greement . . . when it cancelled or credited the paid leave of the [g]rievants working a First [Forty] Work Schedule. If so, what shall the remedy be?" *Id.* at 2.

As an initial matter, the Arbitrator noted that, in March 2010 – prior to the filing of the grievance – the Agency sent the Union a letter (the March 2010 letter) stating that it intended to return to the pre-October-2009 leave practice. *See id.* at 7. She also determined that the Union had opposed the Agency returning to that practice at that time because there was a pending unfair-labor-practice charge, so the Agency delayed returning to the prior practice until January 2011. *See id.* Consequently, she found that the parties did not dispute that the period of the alleged violation was limited to October 2009 through January 2011. *See id.*

With regard to the merits of the grievance, the Arbitrator found that the grievants "are covered by the [FLSA] and are entitled to overtime . . . as FLSA non-exempt federal employees." *Id.* at 4. Citing 5 C.F.R. § 551.401(b)³, an Office of Personnel Management (OPM) regulation implementing the FLSA, the Arbitrator determined that "paid leave constitutes hours of work for non-exempt federal employees," *id.* at 14, and that such leave "is to be included in calculating weekly overtime compensation," *id.* at 15. In this connection, the Arbitrator found that 5 C.F.R. § 610.111(b)⁴ does not permit the Agency to exclude paid leave taken by employees on the First Forty Work Schedule from their hours of work by cancelling or crediting such leave. *See id.* at 14-16. Thus, she determined that "[t]he Agency's actions were contrary to laws and regulations and therefore in violation of Article 2 of the [parties'] agreement."⁵ *Id.* at 16.

As a remedy, the Arbitrator awarded the grievants "all overtime compensation that [they] would have received but for the Agency's violation." *Id.* at 17. She also determined that, "to the extent that any [g]rievants actually suffered leave forfeiture, such [g]rievants are entitled to a restoration of leave forfeited as a result of the Agency's . . . violation of the [parties'] [a]greement." *Id.* at 16. Accordingly, she directed the Agency to restore any leave forfeited by the grievants due to the Agency's actions. *See id.* at 17. Although the Arbitrator acknowledged the Union's request for liquidated damages, *see id.* at 9, she did not resolve it. And the Arbitrator retained jurisdiction "should a question regarding [the] award arise." *Id.* at 17.

Following the issuance of the initial award, the Union requested that the Arbitrator issue a supplemental award granting liquidated damages. *See Supplemental Award at 1.* In the

³ Title 5 C.F.R. § 551.401(b) provides, in pertinent part: "[H]ours in a paid nonwork status (e.g. paid leave . . .), are 'hours of work.'" 5 C.F.R. § 551.401(b).

⁴ Title 5 C.F.R. § 610.111(b) provides, in pertinent part:

A first [forty]-hour tour of duty is the basic workweek without the requirement for specific days and hours within the administrative workweek. All work performed by an employee within the first [forty] hours is considered regularly scheduled work for premium pay and hours of duty purposes. Any additional hours of officially ordered or approved work within the administrative workweek are overtime work.

5 C.F.R. § 610.111(b).

⁵ Article 2 of the parties' agreement provides, in pertinent part: "In the administration of all matters covered by the [parties'] [a]greement, the parties are governed by existing or future laws and regulations." Initial Award at 2.

supplemental award, the Arbitrator framed the issues as follows: (1) “Whether the [A]rbitrator has retained jurisdiction with respect to the issue of liquidated damages”; and (2) “Whether an award of liquidated damages is warranted.” *Id.* at 2. The Arbitrator determined that the initial award “referenced the Union’s request for liquidated damages[,] but did not address or resolve the issue.” *Id.* Thus, she concluded that she had failed to resolve all of the issues submitted at arbitration. *See id.* The Arbitrator further found that her failure to resolve a submitted issue and her retention of jurisdiction permitted her to address the Union’s request for liquidated damages. *See id.*

In addressing that request, as an initial matter, the Arbitrator declined to consider certain documents submitted by the Agency in a brief – specifically, emails between the Agency and OPM (the OPM emails) – because the OPM emails had not been submitted during the arbitration proceedings. *See id.* at 2 n.1; Supplemental Exceptions at 6 n.2. Addressing the merits of the Union’s request, the Arbitrator found that, as of the date of the March 2010 letter – when the Agency notified the Union that it intended to return to the pre-October-2009 leave practice – the Agency met its burden of proving “both good faith and reasonable grounds” for its actions. Supplemental Award at 4. In this connection, she determined that the March 2010 letter “sufficiently demonstrated that the Agency . . . was attempting to act in accordance with [the FLSA].” *Id.* Accordingly, the Arbitrator awarded liquidated damages for only the period between the initial violation of the FLSA – October 2009 – and the issuance of the March 2010 letter. *See id.*

III. Positions of the Parties

A. Agency’s Exceptions

The Agency argues that the remedies awarded in the initial award are contrary to the Back Pay Act (the Act), 5 U.S.C. § 5596, and its implementing regulations because: (1) the Arbitrator awarded overtime pay while also allowing the grievants to “retain the hours of leave that were not debited from their leave balances,” which “results in the grievants recovering more than they would have received but for the personnel action at issue,” Initial Exceptions at 5; (2) the Arbitrator directed the Agency “to pay the grievants for periods of time during which they were not in paid leave status, or available for duty,” by awarding overtime without debiting the grievants’ leave balances, *id.* at 6; and (3) “there was no evidence that any forfeiture of leave resulted from the Agency’s actions,” *id.* at 7.

With respect to the supplemental award, the Agency contends that the Arbitrator exceeded her authority because she violated the doctrine of *functus officio*. *See* Supplemental Exceptions at 6-8. Specifically, the Agency argues that, under the doctrine of *functus officio*, the Arbitrator lacked the authority to award liquidated damages in the supplemental award because that award constituted a modification of the initial award. *See id.* at 6.

Alternatively, the Agency claims that the supplemental award is contrary to the FLSA. *See id.* at 8-11. Specifically, the Agency argues that the Arbitrator erred in finding that the Agency did not establish a good-faith, reasonable-basis defense to liquidated damages under 29 U.S.C. § 260.⁶ *See id.* at 10-11. In this connection, the Agency maintains that the Arbitrator failed to consider the OPM emails, which allegedly demonstrate that the Agency “sought and obtained advice from OPM before implementing the leave policy.” *Id.* at 11. The Agency further contends that, because the FLSA does not support the award of liquidated damages, the supplemental award is not based on a valid waiver of sovereign immunity. *See id.* at 8-9.

B. Union’s Oppositions

As an initial matter, the Union contends that the Agency’s initial exceptions are interlocutory because the initial award “did not constitute a complete resolution of all the issues submitted to arbitration” – specifically, liquidated damages. *See* Initial Opp’n at 8. With respect to the merits of the Agency’s initial exceptions, the Union argues that the FLSA – not the Act – applies to the instant case, and, therefore, the Agency’s initial exceptions provide no basis for finding the initial award deficient. *See id.* at 9-10. Alternatively, the Union argues that the initial award does not conflict with the Act. *See id.* at 10.

With regard to the supplemental award, the Union argues that the Arbitrator did not exceed her authority and was not *functus officio* after she issued the initial award because she: (1) did not resolve all issues submitted to arbitration in that award; and (2) retained jurisdiction to resolve questions concerning that award. *See* Supplemental Opp’n at 8-11. The Union also argues that the supplemental award is not contrary to law because the Agency failed to establish a defense to liquidated damages. *See id.* at 11-18. Specifically, the Union contends that the record contains no evidence to support the Agency’s good-faith and reasonable-basis arguments. *See id.* In this connection, the Union states that the OPM emails relied on by the Agency are “not part of the record[,] and the Agency has not challenged

⁶ The pertinent wording of 29 U.S.C. § 260 is set forth below.

the Arbitrator's decision to deny [their] admission into evidence." *Id.* at 12.

IV. Preliminary Matter

The Union contends that the Agency's initial exceptions are interlocutory because the initial award "did not constitute a complete resolution of all the issues submitted to arbitration" – specifically, liquidated damages. Initial Opp'n at 8. But the supplemental award resolved that issue, and there is no claim that any other issues are still pending before the Arbitrator. Thus, the Union's argument that the Agency's initial exceptions are interlocutory is moot. *Cf. U.S. Dep't of the Army, Army Info. Sys. Command, Savanna Army Depot*, 38 FLRA 1464, 1468 (1991) (finding that, because a deficiency in the initial award was later cured when the arbitrator issued a supplemental award, the union's exceptions to the initial award were moot).

V. Analysis and Conclusions

- A. The Arbitrator did not exceed her authority.

The Agency contends that the Arbitrator exceeded her authority by violating the doctrine of *functus officio*. *See* Supplemental Exceptions at 6-8. Specifically, the Agency argues that the Arbitrator lacked the authority to award liquidated damages in the supplemental award because that award modified the initial award. *See id.* at 6.

Under the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010). The doctrine of *functus officio* prevents arbitrators from reconsidering a final award. *See AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (citing *Devine v. White*, 697 F.2d 421, 433 (D.C. Cir. 1983)). Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (citing *Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 FLRA 410, 415 (1988)).

The Authority has recognized exceptions to the doctrine of *functus officio*, such as when an arbitrator merely clarifies an award, or corrects an award to correct clerical mistakes or obvious errors in arithmetical computation. *See, e.g., AFGE, Local 400*, 50 FLRA 525, 526 (1995). But courts have recognized an additional

exception – specifically, a "completion exception," which "applies when an arbitration award fails to resolve an issue." *Int'l Brotherhood of Teamsters, Chauffeurs, Warehouseman & Helpers of Am., AFL-CIO, Local 631 v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997) (quoting *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 279 (1st Cir. 1983) (internal quotation marks omitted)); *see also Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995); *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967).

Although the Authority has not previously discussed this additional exception, there is no basis for finding that the Authority should not also recognize it, consistent with the practice of the courts. Thus, we address whether this exception applies here.

In the instant case, the Arbitrator found, and there is no dispute, that the Union submitted the issue of liquidated damages to her before she issued the initial award. *See* Initial Award at 9. Although the Arbitrator referenced the Union's request for liquidated damages in the initial award, *see id.*, she failed to resolve the issue in that award. As the Arbitrator's supplemental award of liquidated damages resolves an issue that was submitted to her before the initial award, but not resolved in that award, we find that the completion exception applies, and that the Arbitrator did not violate the doctrine of *functus officio* by resolving the issue in the supplemental award. Accordingly, we deny the Agency's exceeded-authority exception.

- B. The awards are not contrary to law.

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*. *See 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)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). 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. *See, e.g., AFGE, Local 1164*, 66 FLRA 74, 77-78 (2011).

1. The initial award is not contrary to law.

The Agency argues that the initial award is contrary to the Act and its implementing regulations. *See* Initial Exceptions at 5-9. The Authority has held that awards of backpay should not be granted under the Act where there is an independent statutory basis for such an award. *See U.S. Dep't of the Navy, U.S. Naval Academy, Nonappropriated Fund Program Div*, 63 FLRA 100, 103 (2009). In addition, the Authority has found that the FLSA is an independent statutory basis for awards of backpay. *Id.* at 102-03.

The Arbitrator resolved the issue of whether the Agency's actions violated the FLSA and, therefore, the parties' agreement. *See* Initial Award at 4, 7, 13-16. Thus, her award of backpay was awarded under the FLSA, not the Act. And the Agency makes no claim that the award of backpay fails to satisfy the FLSA's requirements. Accordingly, we find that the Agency's initial exceptions provide no basis for finding the initial award deficient, and we deny the exceptions.

2. The supplemental award is not contrary to law.

The Agency argues that the supplemental award is contrary to 29 U.S.C. § 260 and the doctrine of sovereign immunity. *See* Supplemental Exceptions at 8-11. Where an employer is liable for unpaid overtime under the FLSA, and the employer does not establish an affirmative defense, liquidated damages are mandatory. *See AFGE, Local 987*, 66 FLRA 143, 146-47 (2011). The standard for when an award of liquidated damages is appropriate is set forth in 29 U.S.C. § 260. "That standard, in effect, establishes a presumption that an employee who is improperly denied overtime shall be awarded liquidated damages." *NTEU*, 53 FLRA 1469, 1481 (1998). To avoid an award of liquidated damages, an employer bears the substantial burden of establishing a good-faith, reasonable-basis defense. *See id.* (quoting *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993)). To establish that defense, the employer must show that: (1) its act or omission giving rise to the violation of the FLSA was in good faith, and (2) it had reasonable grounds for believing that it was in compliance with the FLSA. *See id.* To meet this burden, the employer must establish that it attempted to ascertain the FLSA's requirements. *See id.*

Here, the Arbitrator determined that the Agency met its burden of proving "both good faith and reasonable grounds" as of the issuance of the March 2010 letter. Supplemental Award at 4. In this connection, she determined that the letter "sufficiently demonstrated that the Agency . . . was attempting to act in accordance with

[the FLSA]." *Id.* Accordingly, she awarded liquidated damages for only the period between the initial violation of the FLSA and the issuance of the March 2010 letter. *See id.* That leaves the period before March 2010. Read in context, the most reasonable inference to draw from the award's findings concerning the Agency's actions in March 2010 is that the Arbitrator implicitly found that the Agency had not met the FLSA's good-faith and reasonable-basis requirements before that date.

The Agency asserts that the Arbitrator failed to consider the OPM emails attached to its brief. *See* Supplemental Exceptions at 11. But the Arbitrator decided not to consider these emails because they had not been presented during the arbitration proceedings, *see* Supplemental Award at 2 n.1, and the Agency has not filed a fair-hearing exception to that decision. Thus, there is no basis for the Authority to consider that evidence in resolving the Agency's exceptions. *Cf. U.S. Dep't of Transp., FAA*, 66 FLRA 441, 445 (2012) (finding no basis to permit party to make argument to Authority where arbitrator found party was barred from presenting that argument at arbitration). And the Agency provides no other basis for finding that the Arbitrator erred in implicitly finding that the Agency did not act in good faith or with a reasonable basis prior to the issuance of the March 2010 letter. Thus, the Agency provides no basis for finding that the award of liquidated damages is contrary to 29 U.S.C. § 260. Consequently, the Agency's argument that the award violates the doctrine of sovereign immunity – which is premised on its claim that the FLSA does not support liquidated damages – also provides no basis for finding the award deficient. Accordingly, we deny the exceptions.

VI. Decision

For the foregoing reasons, the Agency's exceptions are denied.