

67 FLRA No. 76

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 331
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
PERRY POINT, MARYLAND
(Agency)

0-AR-4932

DECISION

March 5, 2014

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

I. Statement of the Case

Arbitrator Rochelle K. Kaplan found that the Agency did not violate the Fair Labor Standards Act (FLSA) or its implementing regulations by declining to compensate bargaining-unit police officers (officers) for certain work-related activities before and after their scheduled shifts (the disputed activities). The Union challenges the award's consistency with law.

Several Union arguments challenge the Arbitrator's factual findings and the weight that she accorded to the evidence. As such challenges cannot establish an error of law, they do not demonstrate that the award is contrary to law. The Union's remaining argument challenges the Arbitrator's failure to aggregate the amount of time that officers spent performing the disputed activities over an entire "pay period or year,"¹ in order to determine whether that time was substantial enough to merit compensation. Because the Arbitrator's determination to evaluate how many minutes the officers spent performing the disputed activities each workday – rather than each pay period or year – is consistent with an FLSA implementing regulation, this argument likewise does not establish that the award is contrary to law. Thus, and as explained further below, we deny the Union's contrary-to-law exception.

¹ Exception at 4.

II. Background and Arbitrator's Award

After arriving at their worksite, but before beginning their scheduled shifts, the officers retrieve certain equipment, including a belt and firearm. And after their shifts end, they return that equipment. The Union filed a grievance alleging that the Agency unlawfully failed to compensate the officers for the time they spent in these disputed activities. The grievance was unresolved and proceeded to arbitration, and as relevant here, the Arbitrator framed the issues as whether the disputed "activities . . . are compensable activities under" 5 C.F.R. § 551.412, and if they are compensable, whether they "took more than a de minimis amount of time to accomplish[.]"²

The Arbitrator noted that § 551.412 implements the FLSA, and it generally requires the Agency to compensate employees for "preparatory or concluding" activities that are "closely related to," and "indispensable to the performance of," the employees' "principal activities."³ But the Arbitrator also noted that § 551.412 contains a de minimis exception, under which the Agency need only compensate employees for preparatory or concluding activities that require a "total time" of "more than [ten] minutes per workday."⁴ The Arbitrator determined that, under § 551.412, the Union had the burden to establish not only that the disputed activities were compensable, but also that they required more than ten minutes per workday.

The Arbitrator found that the disputed activities of donning and doffing equipment belts and drawing and returning firearms were potentially compensable, but that the "amount of time it takes to perform these activities [was] hotly disputed."⁵ Concerning that dispute, the Arbitrator found that the Union witnesses' testimony provided "only . . . estimates,"⁶ and those estimates were inconsistent with one another. The Arbitrator also reviewed an Agency-produced video of a manager performing the compensable tasks and found that the manager "did not appear to be rushing."⁷ Relying on the video, the Arbitrator determined that the pre-shift compensable activities and the post-shift compensable activities each took "less than five minutes" per workday, respectively.⁸ Thus, the Arbitrator concluded that the disputed activities did not take "more than [ten] minutes per workday," as required for compensation under § 551.412.⁹

² Award at 6.

³ *Id.* at 7 (quoting 5 C.F.R. § 551.412(a)(1)).

⁴ *Id.* (quoting 5 C.F.R. § 551.412(a)(1)); *see also id.* at 19.

⁵ *Id.* at 24.

⁶ *Id.* at 28.

⁷ *Id.* at 29.

⁸ *Id.*

⁹ *Id.* at 7 (quoting 5 C.F.R. § 551.412(a)(1)).

In reaching that conclusion, the Arbitrator rejected the Union's argument that the total time for the disputed activities would have exceeded ten minutes if the manager in the video had properly verified an armory logbook. In that regard, the Arbitrator found that the logbook activity would add only a few seconds to the total time, which would still not exceed ten minutes. And because of "[in]sufficient evidence . . . that officers must participate in before[-]shift meetings,"¹⁰ the Arbitrator also rejected the Union's argument that the video failed to account for a required "turnover discussion"¹¹ between officers as they changed shifts. As the Arbitrator found that the Union had not established the officers' entitlement to compensation, she denied the grievance.

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

III. Analysis and Conclusion: The award is not contrary to law.

The Union argues that the award is 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 award de novo.¹² 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.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings,¹⁴ unless a party demonstrates that the findings are nonfacts.¹⁵ Absent a nonfact, challenges to an arbitrator's factual findings cannot demonstrate that an award is contrary to law.¹⁶ In addition, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award is contrary to law.¹⁷

The Union does not assert that the award is based on nonfacts, but rather, it makes the following arguments to support its contrary-to-law exception: (1) the Arbitrator ignored "plain evidence"¹⁸ showing the

officers' entitlement to compensation; (2) there is "no dispute . . . based on the testimony of the [U]nion witnesses"¹⁹ that pre-shift compensable activities require fifteen to twenty minutes each workday; (3) the manager in the video "plain[ly]" moved more quickly than normal²⁰ in performing his tasks; (4) the Arbitrator failed to account for the time that officers spent assisting others at the armory; (5) the award does not account for the time officers spent properly completing and checking the armory logbook, or participating in a "required turnover discussion"²¹ when shifts change; and (6) the "Arbitrator fail[ed] to add the times together to determine how much uncompensated time"²² the officers spent performing the disputed activities. As these arguments merely challenge the Arbitrator's weighing of the evidence and her factual determinations – and the Union does not claim that those determinations are nonfacts – they provide no basis for finding the award contrary to law.²³

The Union also states that "[w]hile the particular time [for disputed activities] . . . on a given day may seem relatively low, even a few minutes is sufficient to create [an FLSA] violation[,] given that the time adds up considerably over the course of a pay period or year."²⁴ To the extent that the Union is arguing that the Arbitrator legally erred in failing to aggregate the amount of time that the officers spent performing the disputed activities over an entire pay period or year, § 551.412 does not support this argument. As the Authority has previously recognized,²⁵ an agency need not compensate employees for preparatory or concluding activities under § 551.412 unless those activities take "more than [ten] minutes *per workday*."²⁶ Thus, the Union fails to establish that the award is contrary to law.

IV. Decision

We deny the Union's exception.

¹⁰ *Id.* at 29-30.

¹¹ *Id.* at 9.

¹² *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)).

¹³ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*).

¹⁴ *Id.*; *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

¹⁵ *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).

¹⁶ See *AFGE, Local 1547*, 65 FLRA 624, 626 (2011) (*AFGE*).

¹⁷ E.g., *U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (*DHS*) (citing *AFGE, Local 4044*, 65 FLRA 264, 266 (2010)); see also *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997).

¹⁸ Exception at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 6.

²¹ *Id.* at 5.

²² *Id.* at 6.

²³ *AFGE*, 65 FLRA at 626; *DHS*, 65 FLRA at 362; *DOD*, 55 FLRA at 40.

²⁴ Exception at 4.

²⁵ E.g., *U.S. DOJ, BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 625 (2009).

²⁶ 5 C.F.R. § 551.412(a)(1) (emphasis added).