68 FLRA No. 14

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS COMPLEX
ROBINS AIR FORCE BASE, GEORGIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

0-AR-5010

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DECISION

November 21, 2014

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

I. Statement of the Case

Arbitrator Samuel J. Nicholas, Jr. found that the Agency violated the Fair Labor Standards Act (FLSA) when it underpaid an employee (the grievant) for unused compensatory time (aged comp time) that the grievant had accrued in place of overtime pay. The Arbitrator directed the Agency to pay the grievant backpay for each instance of underpaid aged comp time that occurred during the three-year period prior to the filing of the grievance. The Arbitrator also directed the Agency to pay the grievant liquidated damages, finding that the Agency's FLSA violation was willful because the Agency had sought, but disregarded, guidance from the Office of Personnel Management (the OPM guidance) regarding how to properly calculate overtime for employees entitled to a night-shift differential. There are two questions before us.

The first question is whether the award is contrary to law, rule, or regulation because it requires the Agency to calculate the grievant's aged-comp-time payments the same way that his overtime compensation was being calculated when he originally worked overtime (the immediate-overtime payments), including a night-shift differential. The calculation of immediate-overtime payments was based on the OPM guidance, which is entitled to deference in this case. Accordingly, we find that the award is not contrary to law, rule, or regulation.

The second question is whether the award fails to draw its essence from the parties' collective-bargaining agreement because, according to the Agency, the agreement allows only a twenty-day recovery period. Because the award is based on a violation of the FLSA – and, therefore, the FLSA, not the parties' agreement, controls the recovery period – we find that the award is not deficient on essence grounds.

II. Background and Arbitrator's Award

This case is not the first regarding grievances over the Agency's underpayment of aged comp time. In (at least) two prior cases, the Agency disputed its liability for aged-comp-time underpayments. But in the prior cases, the Agency did not dispute that it actually underpaid employees, nor did it contend that the method for calculating overtime was contrary to law. Rather, the Agency previously claimed that a separate Department of Defense component, the Defense Finance and Accounting Service (the Service), was liable for underpayments because the Service was responsible for calculating and processing the payments. The Authority rejected that claim in *AFGE, Local 987* (*Local 987*).[1]

Following the Authority's decision in *Local 987*, the Agency obtained the OPM guidance regarding how to properly calculate FLSA overtime for prevailing-rate employees who are entitled to a night-shift differential. The OPM guidance explains that the Agency must calculate FLSA overtime using the formula found in 5 C.F.R. § 551.512, but that "an amount attributable to" the night-shift differential for overtime hours must be included separately as part of an employee's pay.[2] The amount attributable to the night-shift differential is based on 5 U.S.C. § 5343(f), which provides that, for a prevailing-rate employee, a night-shift differential is a part of the employee's "basic pay."[3]

The OPM guidance provides specific examples to illustrate how to calculate the overtime for a prevailing-rate employee entitled to a night-shift differential. The examples in the OPM guidance employ a formula that is essentially the same as that included in Example 5 in the 1974 "[Federal Personnel Manual] Letter 551-1" (the FPM letter).[4] As OPM explains, when it issued the regulations at issue in this case, it stated that "[t]he more comprehensive instructions and examples contained in FPM letters in the 551 series provide

[1] 66 FLRA 143 (2011).
[2] Exceptions, Attach. 1 at 1 (OPM Guidance) (citing Federal Personnel Manual Letter 551-1 (May 15, 1974)).
[3] 5 U.S.C. § 5343(f).
[4] OPM Guidance at 4-5.

supplemental instructions and continue in effect," with one exception not relevant here.[5] According to the OPM guidance, Example 5 from the FPM letter "was consistent with the FLSA regulations"[6] and, therefore, remained in effect. Specifically, OPM states that its approach "does not conflict with the formula in 5 C.F.R. § 551.512" and "is a reasonable and equitable way of dealing with the complex integration of [T]itle 5 and FLSA concepts in a special set of circumstances."[7]

After receiving the OPM guidance, the Agency continued to pay immediate-overtime payments at a higher rate than aged comp time, which led to this case.

Here, the grievant – who was entitled to a night-shift differential based on his hours of work – opted, on certain occasions, to earn compensatory (comp) time in place of receiving immediate-overtime payments for his overtime work. When the grievant did not use that comp time within the required time period, it became aged comp time, and the Agency liquidated it by converting it into a cash payment. The grievant received less for the aged-comp-time payments than he would have received if he had taken immediate-overtime payments. The Union filed a grievance alleging that the Agency violated the FLSA by underpaying the grievant for his aged comp time. The grievance went to arbitration.

Because the parties did not stipulate any issues, the Arbitrator framed the issues as: (1) "[W]as the method in which the [g]rievant was compensated for aged [comp] time made in proper accordance with the parties' past practice and external governing law?"; and (2) "If it is determined that the [g]rievant was not properly compensated, what shall be the appropriate remedy?"[8]

The Arbitrator found, in relevant part, that the grievant was due aged comp time "in accordance with 5 C.F.R. § 551.531[](g),"[9] which provides that "[t]he dollar value of compensatory time off when it is liquidated is the amount of overtime pay [that] the employee otherwise would have received for hours of the pay period during which compensatory time off was earned by performing overtime work."[10] The Arbitrator found that the Agency "acknowledg[ed] that the [g]rievant was not compensated in such [a] fashion"[11] because the Agency "inherently disagrees with the advice and policy regarding the method in which overtime is calculated for night[-]shift employees that has been adopted by [OPM]."[12] The Arbitrator found that the underpayment to the grievant was a willful violation of the FLSA because the Agency had requested and received the OPM guidance regarding how to calculate the grievant's overtime, but had not corrected the problem. Consequently, the Arbitrator found that the Agency owed the grievant three years' worth of backpay for the underpaid aged comp time plus liquidated damages under 29 U.S.C. § 255(a).

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

III. Analysis and Conclusions

A. The award is not contrary to law, rule, or regulation.

Rebuffed in its prior attempts to disclaim responsibility for underpayments of aged comp time, the Agency now challenges whether the aged comp time was actually underpaid. The Agency alleges that the aged-comp-time payments were not underpaid, but, rather, that the immediate-overtime payments, which were calculated according to the OPM guidance, were overpaid.[13] The Agency argues that the award permits payment of a night-shift differential for overtime hours, and that such a payment is not permitted under the FLSA regulations.[14] The Agency makes three arguments that the award is contrary to law.

Where an exception involves an award's consistency with law, the Authority reviews the questions of law raised by the Arbitrator's award and the exception de novo.[15] Applying the de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[16] The Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[17]

In its first contrary-to-law argument, the Agency contends that the OPM guidance is contrary to the plain wording of 5 U.S.C. § 5343(f) and 5 C.F.R. § 551.512.[18] Specifically, the Agency focuses on the addition of the "amount attributable" to the night-shift differential that

[5] *Id.* (quoting Federal Pay Administration Under the Fair Labor Standards Act, 45 Fed. Reg. 85,659, 85,660 (Dec. 30, 1980)).
[6] *Id.*
[7] *Id.* at 3.
[8] Award at 3.
[9] *Id.* at 9.
[10] 5 C.F.R. § 551.531(g).
[11] Award at 9.
[12] *Id.* at 7.
[13] Exceptions at 6 n.8.
[14] Award at 4-5.
[15] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[16] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[17] *Id.*
[18] Exceptions at 5.

the OPM guidance applies to the overtime hours,[19] claiming that §§ 5343(f) and 551.512 prohibit that addition.[20] Consequently, the Agency argues, neither the Arbitrator nor the Authority should defer to the OPM guidance.[21]

An agency's interpretation of the statute that it is charged with administering is entitled to deference if that interpretation is "based on a 'permissible construction of the statute[].'"[22] As the Supreme Court noted, "the principle of deference to administrative interpretations has been consistently followed . . . whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[23] Additionally, "[d]eference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own."[24] It is well settled that "an agency's interpretation of its own regulations is entitled to broad deference,"[25] particularly if that interpretation has been consistent over time.[26] The Authority follows the federal courts and finds that an agency's interpretation of its own regulations is controlling so long as that interpretation is not "plainly erroneous or inconsistent with the regulation," and was "publicly articulated prior to 'litigation.'"[27]

The OPM regulations implementing the FLSA are set forth in 5 C.F.R. part 551. According to those regulations, the FLSA provides "minimum standards" for "overtime entitlements."[28] The regulations further state that part 551 "supplements and implements the [FLSA], and must be read in conjunction with it."[29] OPM's explanation regarding the integration of Title 5 and the FLSA follows policy articulated approximately forty years ago in the FPM letter – not policy articulated for the first time in the litigation of this case (to which OPM is not a party, in any event). As we explain below, OPM's guidance is not plainly erroneous or inconsistent with the overall regulatory scheme of the FLSA.

As discussed previously, under 5 U.S.C. § 5343(f), "[a] prevailing[-]rate employee is entitled to pay at his scheduled rate plus a night[-shift] differential," and the night-shift differential is included as part of that employee's "basic pay."[30] The OPM guidance explains that because 5 U.S.C. § 5343(f) specifically included a night-shift differential as part of "basic pay," the night-shift differential, when applicable, is added to an employee's scheduled rate when determining overtime payments.[31] OPM's interpretation of § 5343(f) is a plausible interpretation of the statute, and is therefore entitled to deference.

Under 5 C.F.R. § 551.512, an employee's FLSA overtime is calculated as: "[t]he straight[-]time rate of pay times all overtime hours worked; plus . . . [o]ne-half times the employee's hourly regular rate of pay times all overtime hours worked."[32] "[S]traight time," as defined in § 551.512(b), is "equal to the employee's rate of pay for his or her position"[33] – in other words, the employee's scheduled rate. Unlike 5 U.S.C. § 5343(f), the regulation states that the scheduled rate – the "straight[-]time rate" – used in the calculation is "exclusive of any . . . differentials."[34] The regulations do not define "regular rate." But the FLSA defines that term as "*all* remuneration for employment paid to . . . the employee," including a night-shift differential, if applicable.[35]

As the examples found in the OPM guidance illustrate, when applying the formula found in 5 C.F.R. § 551.512, the night-shift differential is included, as required by the FLSA, when determining "total remuneration," for the purpose of calculating the employee's "regular rate."[36] But the night-shift differential is *not* included in the employee's "straight

[19] OPM Guidance at 1 (citing the FPM Letter).
[20] Exceptions at 5.
[21] *Id.* at 5-6.
[22] *U.S. Dep't of VA, Veterans Health Admin.*, 64 FLRA 961, 964 (2010) (citing *U.S. Dep't of the Interior, Nat'l Park Serv., Pictured Rocks Nat'l Lakeshore, Munising, Mich.*, 61 FLRA 404, 407 (2005) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*))).
[23] *Chevron*, 467 U.S. at 844 (internal citations and quotation marks omitted).
[24] *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005) (*Cathedral*) (citing *Am. Express Co. v. United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001)).
[25] *Id.* at 1363-64 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)).
[26] *Bevevino v. United States*, 99 Fed. Cl. 461, 471 (2011) (citing *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006) ("Deference is particularly appropriate when the agency interpretation has been consistently applied.")).
[27] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 197 (2014) (citations omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Cathedral*, 400 F.3d at 1364 (citations omitted).
[28] 5 C.F.R. § 551.101(a).
[29] *Id.* § 551.101(b); *see also U.S. Dep't of HHS, SSA, Balt., Md.*, 44 FLRA 773, 774 (1992).
[30] 5 U.S.C. § 5343(f).
[31] OPM Guidance at 2.
[32] 5 C.F.R. § 551.512(a).
[33] *Id.* § 551.512(b).
[34] *Id.*
[35] 29 U.S.C. § 207(e) (emphasis added).
[36] OPM Guidance at 5.

time" when the FLSA overtime pay is calculated.[37] Thus, in regard to the FLSA overtime calculation, the OPM guidance is not inconsistent with, or contrary to, the plain wording of 5 C.F.R. § 551.512. Accordingly, under the standard described above, the OPM guidance is entitled to deference in regard to its calculation of FLSA overtime.

The OPM guidance is also entitled to deference insofar as it instructs that the "amount attributable" to the night-shift differential must be added separately to an employee's overtime hours.[38] The OPM guidance explains that the "amount attributable" to the night-shift differential is added to an employee's overtime hours in an attempt to reconcile the apparent conflict between the varying treatment of the night-shift differential found in 5 U.S.C. § 5343(f) and 5 C.F.R. § 551.512.[39] The apparent conflict results in a "gap"[40] between what an employee is entitled to under the FLSA and Title 5, because under Title 5, overtime is simply calculated as one-and-one-half times an employee's "basic hourly rate" (which includes a night-shift differential[41]) multiplied by the number of overtime hours worked.[42] OPM is empowered to address such gaps,[43] and uses its guidance as a means to do so.[44] Adding an amount equal to the night-shift differential to the employee's overtime hours, as the OPM guidance instructs, guarantees that an employee entitled to a night-shift differential receives his or her total basic pay for any overtime hours worked.[45]

Further, the inclusion of the amount attributable to the night-shift differential is consistent not only with "longstanding OPM guidance,"[46] but also with another FLSA regulation – 5 C.F.R. § 551.513. Section 551.513 provides that FLSA overtime pay "shall be paid in addition to all pay" to which an employee may be entitled to under Title 5, so long as that pay is not included as "overtime pay."[47] The OPM guidance ensures that the grievant receives the night-shift differential separate from the "overtime pay" by including it in the calculation for his total pay during the week the overtime was worked.[48]

The OPM guidance is also consistent with congressional intent and the holdings of the federal courts. Congress provided that "[OPM] shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours . . . so as to ensure that no [FLSA-nonexempt] employee receives less pay"[49] than the employee would have received prior to a 1990 statute that amended employee-compensation rules.[50] The federal courts have interpreted this provision – which explicitly applies to prevailing-rate employees[51] – to mean that Congress intended for OPM to have "general discretion to ensure that federal employees would not receive less under the FLSA computation of overtime"[52] than under Title 5.[53]

For all of the foregoing reasons, we find that the OPM guidance is entitled to deference. And because the immediate-overtime payments were calculated in accordance with the OPM guidance, and the award directs the Agency to pay the grievant's aged-comp-time payments the same as the immediate-overtime payments – as required by 5 C.F.R. § 551.531(g) – we further find that the Agency's first contrary-to-law argument provides no basis for finding the award deficient.

In its second contrary-to-law argument, the Agency contends that the award "exceeds the limitations of comp[-]time pay established in 5 [C.F.R.] § 551.531(g),"[54] and that the grievant is not entitled to backpay under 29 U.S.C. § 255(a).[55] The Agency does not contest the Arbitrator's finding of a willful violation, but argues that "there is no basis to apply [the] three[-]year statute of limitations" found in 29 U.S.C. § 255 because, it alleges, the FLSA does not permit the payment directed by the award.[56] As stated previously, § 551.531(g) requires that aged comp time be paid at the same rate as immediate-overtime payments.[57] The Agency's arguments are premised on the claim that the formula used to calculate the immediate-overtime

[37] 5 C.F.R. § 551.512; OPM Guidance at 5.
[38] OPM Guidance at 1.
[39] *Id.* at 1-2.
[40] *Id.* at 3 (stating that because "FLSA regulations do not address all specific scenarios and types of payments[,] OPM necessarily issues guidance and examples to fill in any policy gaps").
[41] 5 U.S.C. § 5343(f).
[42] *Id.* § 5544(a); *see also* OPM Guidance at 2.
[43] *See Chevron*, 467 U.S. at 843-44 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).
[44] OPM Guidance at 3.
[45] *Id.*
[46] *Id.* at 1 (citing the FPM Letter).
[47] 5 C.F.R. § 551.513.
[48] OPM Guidance at 5 (number 6 in the example); *id.* at 1 (explaining that "an amount attributable to (but not payable as) night[-]shift differential must be paid" for overtime hours).
[49] Technical & Miscellaneous Civil Service Amendments Act of 1992, Pub. L. No. 102-378, 106 Stat. 1346 (1992).
[50] Federal Employees Pay Comparability Act of 1990, 5 U.S.C. § 5542(c).
[51] *Id.* § 5544(c).
[52] *Christofferson v. United States*, 64 Fed. Cl. 316, 320 (2005) (quoting *Aaron v. United States*, 56 Fed. Cl. 98, 100 (2003)).
[53] *Id.* at 322.
[54] Exceptions at 5.
[55] *Id.* at 11-13.
[56] *Id.* at 10.
[57] 5 C.F.R. § 551.531(g).

payments is contrary to the FLSA. Because we defer to the OPM guidance and find that the formula is not contrary to the FLSA, we also find that the award is not contrary to 5 C.F.R. § 551.531(g) or 29 U.S.C. § 255(a).

Finally, the Agency's third contrary-to-law argument contends[58] that the Back Pay Act (the BPA)[59] does not authorize the award. But the award is based on the violation of 5 C.F.R. § 551.531(g), and the FLSA permits recovery of backpay. Thus, there is no need for an independent statutory basis for recovery, such as the BPA.[60] Accordingly, we reject the Agency's argument.

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

The Agency argues that the award fails to draw its essence from Article 6, Section 6.08 of the parties' agreement.[61] Article 6, Section 6.08 states that a grievance must be filed with the Agency within twenty calendar days "of the date of the management action giving rise to the grievance or reasonable awareness of such action."[62] According to the Agency, that provision limits recovery of backpay for continuing violations to the twenty days preceding the grievance.[63] Also, according to the Agency, prior arbitration awards support its argument.[64]

The Authority has consistently held that a provision in a collective-bargaining agreement establishing a time period for filing a grievance does not control the recovery period under the FLSA.[65] And because arbitration awards are not precedential, the Agency's reliance on prior arbitration awards – which an arbitrator is not bound to follow even if they involve the interpretation of the same or similar contract provisions – provides no basis for finding the present award deficient.[66] Moreover, the prior arbitration awards relied upon by the Agency involved claims under the BPA, not the FLSA. Consequently, because the Arbitrator found a violation of the FLSA, that act, rather than the parties' agreement, governs the recovery period in this case.

Therefore, we conclude that the Agency's essence exception provides no basis for finding the award deficient.

IV. Decision

We deny the Agency's exceptions.

[58] Exceptions at 11-13.
[59] 5 U.S.C. § 5596.
[60] *See, e.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 23 (2012).
[61] Exceptions at 10, 13.
[62] *Id.*, Attach. 11 at 3.
[63] Exceptions at 10.
[64] *Id.* at 13; *id.*, Attachs. 10-12.
[65] *See, e.g., AFGE, Local 1741*, 62 FLRA 113, 117 (2007) (citations omitted) (explaining that where parties have not agreed contractually to backpay periods different from those in § 255(a), the statutory period controls).
[66] *AFGE, Council of Prison Locals C-33, Local 720*, 67 FLRA 157, 159 (2013).