65 FLRA No. 98

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2006
(Union)

and

SOCIAL SECURITY ADMINISTRATION
REGION III
(Agency)

0-AR-4675

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DECISION

January 31, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Thomas Phelan filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the grievants were not eligible for overtime under Title 5, the Fair Labor Standards Act (FLSA), or the parties' National Agreement (Agreement) and that, as a result, the Union's information request was moot. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievants are employees of the Mid-Atlantic Processing Center (the Center). Award at 6. All of the grievants work a flexible schedule. *Id.* All overtime at the Center is voluntary, and must be authorized and approved in advance. *Id.* at 7. To facilitate the requirement for authorization and approval, the Center uses a pre-approval process. Under this process, an employee informs a supervisor that he or she would like to work overtime and is listed on a pre-approved register. A second line supervisor then approves the listed employees in writing, except in emergencies. *Id.*

Employees are notified regarding available overtime opportunities by an electronic bulletin board. The board includes a reminder regarding the Agency's overtime policy, stating that "overtime is offered, authorized and approve[d] under the following parameters: Overtime must be worked in minimum 1-hour increments on weekdays and 3-hour increments on weekend days[;] Overtime worked in excess of the minimum must be in fifteen-minute increments up to the maximum scheduled[.]" *Id.* at 7-8. Employees who are authorized and approved to work overtime must record their time in, time out, and hours worked. *Id.* at 8.

The Union presented a grievance challenging, among other things, the Agency's policy requiring the grievants to work a minimum of one hour of overtime on weekdays and three hours of overtime on weekends (Minimum Overtime Policy). *Id.* at 3. The grievance also alleged that the Agency's policy of failing to pay the grievants for working "odd" minutes (i.e., less than 15 minute intervals) violated Title 5, the FLSA, and Article 10, Section 3 of the Agreement (Odd Minute Overtime Policy).[1] *Id.*

The matter was not resolved and was submitted to arbitration. As a preliminary matter, the Union filed a motion to compel information that it had requested as part of the grievance and the Agency had not provided. *Id.* at 6. The Arbitrator found that, because the information "was needed to identify the employees who had allegedly been damaged by the application of the Agency's overtime policy and the extent of the damages[,]" the information was not

1. Article 10, Section 3(B) provides that:

> When an employee, whether covered by the Fair Labor Standards Act or exempt, works regular overtime, such overtime will be scheduled and paid in increments of 15 minutes. When an employee, whether covered by the Fair Labor Standards Act or exempt, works irregular overtime, such overtime will be paid in increments of 15 minutes. Daily increments of less than 15 minutes, if such occur, will be accumulated during the workweek. At the end of the workweek, any increments of 7 minutes or fewer will be rounded down and any increments of 8 minutes or more will be rounded up to the next 15 minute interval.

Exceptions, Attach. 8, Union Statement of Issues at 6.

necessary unless the Union prevailed on the merits of its claims. *Id.* Accordingly, the Arbitrator bifurcated the case into two hearings – one on the merits and the other on damages, which was to be held at a later date if necessary. *Id.* The Arbitrator also denied the Union's motion to postpone the hearing. Exceptions at 6.

As relevant here, the issues before the Arbitrator were whether the Agency's Minimum Overtime Policy or Odd Minute Overtime Policy violated Title 5, the FLSA, or the Agreement.[2] *See* Award at 2; Exceptions at 3; Opp'n at 8.

The Arbitrator concluded that the Agency's Minimum Overtime Policy did not violate Title 5, the FLSA, or the Agreement. Award at 27. The Arbitrator noted that, while Title 5 and the FLSA require premium payment for overtime worked, the Agency has the right to establish policies for scheduling that overtime. *Id.* Accordingly, the Arbitrator found that the required one-hour and three-hour minimums did not violate Title 5, the FLSA, or the Agreement. *Id.* at 27-28.

The Arbitrator also concluded that the Agency's Odd Minute Overtime Policy did not violate Title 5 or the Agreement. The Arbitrator found that the requirement in Article 10, Section 3 of the Agreement – that odd minutes of overtime be accumulated at the end of each week – must be read in conjunction with the definitions of overtime provided in 5 U.S.C. § 6121(6) and Article 10, Section 2(D) of the Agreement, both of which require that overtime be officially ordered or approved.[3] *Id.* at 28-29. The Arbitrator noted that "it was uncontested" that employees who worked odd minutes of overtime did so without informing their supervisors and that the Agency's sign-in, sign-out system for recording overtime did not take those minutes into account. *Id*. Therefore, according to the Arbitrator, under both Title 5 and the Agreement, any odd minutes of overtime worked outside of a fifteen-minute interval were not overtime because they were not ordered or approved in advance by the Agency. *Id.*

Finally, the Arbitrator rejected the Union's argument that the odd minutes of overtime were required to be accounted for and compensated as "suffered or permitted" overtime under the FLSA.[4] *Id*. at 32. In this regard, the Arbitrator found that the Agency's Personnel Policy Manual (Manual) provides that flexible schedule employees are not able to earn "suffered or permitted" overtime. *Id.* at 30-31 (citing Section 3.1.1 of the Manual). The Arbitrator noted that the Manual is consistent with the Office of Personnel Management's (OPM's) Handbook on Alternative Work Schedules (AWS Handbook), which also excludes flexible schedule employees from earning "suffered or permitted" overtime. *Id.* at 31.

Therefore, the Arbitrator denied the Union's grievance. *Id.* at 33. Additionally, because he denied the grievance on the merits, the Arbitrator found that the information requested was unnecessary under § 7114(b)(4) of the Statute and denied the Union's information request. *Id.* at 33-34.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's preliminary determinations are contrary to law, rule, or regulation. Exceptions at 4. The Union claims that the Arbitrator's bifurcation of the proceedings severely prejudiced the Union. *Id.* at 6. Citing *United States Department of Health & Human Services*, 33 FLRA 340, 341 (1988) (*DHHS*), the Union contends that an arbitrator may not unilaterally bifurcate an arbitration hearing without the agreement of both parties. *Id*. at 7. According to the Union, because it did not agree to bifurcation, the Arbitrator's decision was contrary to Authority precedent. *Id.* at 6. The Union also contends that the Arbitrator prejudiced the Union by refusing to postpone the hearing. The Union claims to have

2. The Arbitrator also addressed whether the grievance was timely and whether the Agency bypassed the Union in enforcing an unwritten overtime policy. Award at 24-26. Because no exceptions were filed to the Arbitrator's resolution of these issues, they are not before us.

3. 5 U.S.C. § 6121(6) defines overtime hours as "all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance[.]" Article 10, Section 2(D) defines overtime as "work that is performed by an employee in excess of eight hours in a day or in excess of 40 hours in an administrative workweek and that is officially ordered or approved by the Agency." Exceptions, Attach. 8, Union Statement of Issues at 4.

4. As defined in the FLSA, "suffered or permitted" work is "work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed." 5 C.F.R. § 551.104.

received notice of the nature of the arbitration hearing only a few days before the hearing. *Id.* at 6-7.

The Union argues that the Arbitrator's award finding that the overtime was not ordered and approved is contrary to law because "the overtime work was officially ordered and approved[.]" *Id.* at 18-19. Relying on *Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516 (2d. Cir. 1998) (*Holzapfel*), the Union also asserts that the Agency's Minimum Overtime Policy violates the FLSA. *Id.* at 20-21. Moreover, the Union claims that the Arbitrator "misapplied the law" as it applies to flexible schedule employees and in denying the grievants' claim for "suffer or permit" overtime. *Id.* at 22. The Union also contends that the Agency's Odd Minute Overtime Policy conflicts with the Agreement. *Id.* at 21.

Finally, the Union claims that the Arbitrator's denial of its motion to compel was contrary to § 7114(b)(4) because its information request imposed a statutory requirement on the Agency "separate from the Agency's obligations in processing a [g]rievance." *Id.* at 5. The Union contends that the information is normally maintained by the Agency, is reasonably available, and is not unduly burdensome for the Agency to produce. *Id.* at 9-12. The Union further argues that it has shown the information is necessary and has stated a particularized need for the information. *Id.* at 12-17.

B. Agency's Opposition

The Agency argues that the Union's arguments do not show that the Arbitrator's award was contrary to law, but, rather, constitute a mere disagreement with the Arbitrator's conclusions. Opp'n at 7. Additionally, the Agency claims that the Union's arguments are unsupported assertions. *Id.*

With respect to the Union's exceptions relating to the motion to compel and motion to postpone, the Agency asserts that the exceptions are not properly before the Authority because they were not included in the framed issues. *Id.* at 8. Alternatively, the Agency argues that the motions are procedural matters, which the Arbitrator has "considerable latitude" to decide. *Id.* at 9-12 (citing *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 629-30 (1988)).

The Agency argues that the Arbitrator's decision that the Agency has the right to schedule overtime should be entitled to deference and that the Union's analogy to *Holzapfel* is inapposite. *Id.* at 21-22. Further, the Agency contends that the Arbitrator's conclusion that the Agency's Odd Minute Overtime Policy does not conflict with the Agreement is entitled to deference. *Id.* at 22-23.

The Agency claims that the Arbitrator's factual finding that the overtime allegedly worked by the grievants was not ordered or approved in advance is entitled to deference. *Id.* at 13-14. Additionally, the Agency contends that the Arbitrator was correct in holding that employees who work flexible schedules are ineligible for "suffer or permit" overtime as a matter of law because OPM regulations concerning overtime are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Id.* at 14-16.

Moreover, the Agency argues, even if, as a matter of law, Center employees are eligible for "suffer or permit" overtime, the Union cannot show that the grievants would meet the other requirements for such overtime. *Id.* at 17. The Agency claims that the Arbitrator found that the supervisors were not aware that employees were working unapproved overtime minutes. *Id.* at 19. Additionally, the Agency asserts that management acted reasonably to prevent employees from working unauthorized overtime. *Id.* at 20-21.

Finally, the Agency claims that the Arbitrator properly denied the Union's information request. *Id.* at 12. According to the Agency, because the Arbitrator determined that the grievants were not entitled to overtime, the information requested by the Union was no longer necessary. *Id.* at 13.

IV. Analysis and Conclusions

A. The Arbitrator did not fail to conduct a fair hearing.

The Union contends that the Arbitrator erred in: (1) denying the Union's motion to postpone the hearing and (2) bifurcating the proceeding. We construe these arguments as claims that the Arbitrator failed to conduct a fair hearing. *See AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006).

An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused

to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). It is well established that an arbitrator has considerable latitude in conducting a hearing and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996).

The Union argues that the Arbitrator failed to conduct a fair hearing by failing to grant its motion to postpone the hearing. The Union argues that it was prejudiced because it was under the impression that an informal mediation would be taking place, and only received notice that it would be an arbitration hearing twelve days beforehand. Exceptions at 4-7. However, the Union has not provided any evidence that it had a reasonable belief there would be an informal mediation or that twelve days' notice was inadequate. The Union further argues that the Arbitrator's denial was prejudicial because of the failure to receive the requested documents. *Id.* at 7. However, as discussed below, the Union was not entitled to the information pursuant to § 7114(b)(4). Therefore, as the Union has not shown how the alleged lack of notice prejudiced the Union and because the Arbitrator has considerable latitude in conducting a hearing, we deny this exception. *See AFGE, Local 1917*, 52 FLRA 658, 662 (1996) (finding that denial of a thirty-day postponement did not deny the union a fair hearing).

Additionally, the Union argues that the Arbitrator failed to conduct a fair hearing because he bifurcated the proceeding into separate hearings on liability and damages. The Union contends that bifurcation must be agreed to by both parties, relying solely on the Authority's decision in *DHHS*. Exceptions at 7. However, *DHHS* provides no support for this contention. In that decision, the Authority merely noted that the arbitrator had decided not to bifurcate the proceedings because the parties had not agreed to bifurcation, a decision which the Authority did not review or discuss further. *DHHS*, 33 FLRA at 341. The Arbitrator here exercised his considerable latitude in concluding that it was appropriate to bifurcate the proceedings, and the Union has not shown that the decision prejudiced the hearing as a whole. *See NAGE, Fed. Union of Scientists & Eng'rs, Local R12-198*, 63 FLRA 7, 7 n.* (2008) (denying an exception arguing that the arbitrator improperly bifurcated the proceedings). Therefore, we deny this exception.

B. The Agency's Minimum Overtime Policy and Odd Minute Overtime Policy are not contrary to Title 5 or the FLSA.

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. *See id.*

1. Title 5

The Union argues that the Arbitrator erred in finding "that the overtour hours of work that failed to exceed the minimum hour and fifteen minute policies instituted by the Agency were not ordered and approved." Exceptions at 19. According to the Union, the grievants "are entitled to overtime pay under specific conditions," which, under Title 5, means work "in excess of 8 hours in a day or 40 hours in a week" if it is officially ordered in advance. *Id.* (citing 5 U.S.C. § 6121(6)). However, the Arbitrator's finding that the Agency did not officially order or approve the overtime is a factual finding that is not alleged to be a nonfact and to which the Authority must defer. *See AFGE, Local 607, Council of Prison Locals*, 61 FLRA 707, 710 (2006) (finding that the arbitrator's conclusions were not contrary to Title 5 where the arbitrator's factual findings were entitled to deference). Because the Arbitrator found that none of the work performed was ordered and approved, we find that neither the Minimum Overtime Policy nor the Odd Minute Overtime Policy is contrary to Title 5.

2. FLSA

Relying on *Holzapfel*, the Union argues that the Agency's Minimum Overtime Policy is contrary to the FLSA. However, in *Holzapfel*, the Second Circuit found that the employer's policy violated the FLSA because the employee was being forced to work unpaid overtime to care for his police dog. *Holzapfel*, 145 F.3d at 524-25. In contrast, the Agency's Minimum Overtime Policy does not force employees to work overtime or to work fewer hours than the required minimums. The Union has not identified any provision of the FLSA with which the Agency's Minimum Overtime Policy conflicts. Therefore, we find that the Agency's Minimum Overtime Policy is not contrary to the FLSA.

The Union also argues that the Arbitrator "misapplied the law" relating to "suffer or permit" overtime. Exceptions at 22. The Arbitrator rejected the Union's claim that the grievants were entitled to "suffer or permit" overtime because the Agency's Manual and the OPM AWS Handbook exclude flexible schedule employees from the ability to earn "suffered or permitted" overtime.[5] Award at 30-31. In reaching this conclusion, the Arbitrator deferred to the OPM AWS Handbook because he found it to be consistent with the FLSA. *Id.* at 31-32.

The Authority normally defers to OPM regulations on statutory matters OPM has been given authority to interpret as long as the regulations constitute a reasonable interpretation of the statutory language. *See NTEU, Chapter 41*, 57 FLRA 640, 644 (2001) (*NTEU*). However, the Authority only defers to other OPM guidance, such as opinion letters and manuals, to the extent that they have the power to persuade. *Id.* In a situation in which the OPM AWS Handbook was found to be consistent with the FLSA statutes and regulations, the Authority found it to carry persuasive weight. *See id.* at 644-45.

FLSA regulations provide that an employee is not entitled to overtime compensation under the FLSA for "hours of work that are not 'overtime hours,' as defined in 5 U.S.C. § 6121, for employees under flexible or compressed work schedules[.]" 5 C.F.R. § 551.501(a)(6). Section 6121 defines overtime hours as "all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance." 5 U.S.C. § 6121. In other words, an employee covered by the FLSA who is on a flexible work schedule may not receive overtime unless ordered in advance. We find that the OPM AWS Handbook is consistent with these statutory and regulatory provisions and, therefore, carries persuasive weight. *See NTEU*, 57 FLRA at 644-45.

The Union also contends that the "legal reasoning and justification" behind denying "suffer or permit" overtime to flexible schedule employees diminishes as it applies to weekend work. Exceptions at 22. However, neither the FLSA nor the OPM AWS Handbook makes a distinction between weekday and weekend work in the context of being "suffered or permitted" to work.

The Union has not shown that the Arbitrator's decision relating to "suffer or permit" overtime is contrary to law. For the foregoing reasons, we deny the Union's exception.[6]

C. The award relating to the Odd Minute Overtime Policy draws its essence from the Agreement.

The Union argues that the Arbitrator's conclusion that the odd minutes of overtime were not compensable "is in conflict and superseded by the . . . Agreement[.]" Exceptions at 21. We construe this assertion as an argument that the award fails to draw its essence from the Agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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 agreement as to manifest an

5. Section (d)(1) of the OPM AWS Handbook provides, in relevant part: "Employees on flexible work schedules may not earn overtime pay as a result of including 'suffered or permitted' hours (under the FLSA) as hours of work." *See* Award at 31.

6. The Union asserts that the Arbitrator's award "ignored the advent of credit hours and compensatory time[.]" Exceptions at 22. However, because the issues before the Arbitrator solely related to overtime, the award has no bearing on the grievants' ability to earn credit hours or compensatory time. *See* 5 U.S.C. § 6121.

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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union argues that, because the Arbitrator determined that the odd minutes worked during the week were not compensable as overtime, his award conflicts with Article 10, Section 3(B) of the Agreement providing that odd minutes of overtime are to be accumulated at the end of each workweek. Exceptions at 21. The Arbitrator found that, because the additional minutes worked were not ordered or approved by the Agency, they did not meet the definition of overtime in Article 10, Section 2(D) and, therefore, were not compensable under Article 10, Section 3(B). Award at 29. The Arbitrator's conclusion is not unfounded, implausible, irrational, or in manifest disregard of the Agreement. *See U.S. Dep't of Veterans Affairs, Conn. Healthcare Sys., Newington, Conn.*, 57 FLRA 47, 49 (2001) (denying the agency's essence exception where the arbitrator interpreted the contractual definition of "facility"). Therefore, we find that the award draws its essence from the Agreement and deny this exception.

D. The award is not contrary to § 7114(b)(4).

Under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if that information is: (1) "normally maintained by the agency in the regular course of business;" (2) "reasonably available[;]" (3) "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining;" and (4) not "guidance, advice, counsel, or training[.]" 5 U.S.C. § 7114(b)(4).

In order to demonstrate that requested information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under § 7114(b)(4) of the Statute, a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute." *IRS, Wash., D.C.*, 50 FLRA 661, 669 (1995).

The Union contends that the Arbitrator erred in denying its information request and motion to compel. According to the Arbitrator, because the odd minutes of overtime that the grievants may have worked were not compensable, the Union no longer required the requested information. Award at 33-34. The Union argues that the information is necessary, however, "to prove that bargaining unit employees worked outside their tour of duty hours on weekends and were not properly compensated for that time under the CBA, or federal law, rules and regulations." Exceptions at 13. The Union also argues that the information is necessary to prove that the Agency had knowledge that the Center employees were working overtime without being compensated for the time. *Id.* at 13-14.

As the Arbitrator correctly determined, because he denied the grievance on the merits, the Union's needs no longer exist. *See U.S. Dep't of Labor*, 63 FLRA 216, 218 (2009) (finding the fact that the grievance was barred mooted the information request where it was requested to help process a grievance). Because the Arbitrator found the minutes were not ordered or approved and could not be compensated as "suffer or permit" overtime, the information is not needed to prove whether the Center employees were working extra minutes, or whether the Agency had knowledge of it. Therefore, we find that the Arbitrator's decision denying the information request is not contrary to § 7114(b) and deny this exception.

V. Decision

The Union's exceptions are denied.