65 FLRA No. 202

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL MEDICAL CENTER
CARSWELL, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1006
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

0-AR-4641

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DECISION

June 29, 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 awards of Arbitrator Samuel J. Nicholas, Jr. 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. The Union filed an opposition to the Agency's exceptions.

In a series of awards, the Arbitrator found that the Agency violated the overtime compensation provisions of the Fair Labor Standards Act (FLSA), and he awarded backpay, liquidated damages, attorney fees, and costs.

For the reasons that follow, we dismiss the exceptions in part, deny the exceptions in part, set aside the awards in part, and remand the awards in part.

II. Background and Arbitrator's Awards

This case concerns an Agency medical center that is both a prison and a hospital. The Union filed a grievance alleging that the Agency was violating the FLSA by failing to compensate correctional officers and vocational nurses at the medical center for various pre-shift and post-shift activities. The grievance was not resolved and was submitted to arbitration.

The Arbitrator resolved the grievance in a series of six awards: two liability awards (Liability Awards Nos. 1 and 2); two damages awards (Damages Awards Nos. 1 and 2); and two attorney fees awards (Attorney Fees Awards Nos. 1 and 2).[1]

In an order prior to the hearing that resulted in Liability Award No. 1, the Arbitrator directed the Union to present evidence regarding nine of the posts and departments in dispute and directed the Agency to present its defenses. The Arbitrator stated that he would issue an award concerning any liability of the Agency with respect to those posts and departments. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 566 (2010) (order dismissing earlier Agency exceptions) (*Fed. Med. Ctr.*).

In accordance with the Arbitrator's direction, the Union maintained that, prior to beginning their shifts, employees at the nine posts and departments report to the medical center's control center. The Union asserted that employees who are not assigned to the control center visit the control center to pick up batteries for their body alarms and radios, and then travel to their assigned posts or departments. The Union further asserted that, at the end of their shifts, they return the batteries to the control center. In this connection, the Union alleged that a charged battery is necessary for the employees to perform their job responsibility of maintaining the safety and security of the medical center. Liability Award No. 1 at 9. The Union also asserted that employees who are assigned to the control center are required to work prior to the beginning of their shifts and after the end of their shifts in order to accomplish their duties. *Id.* at 5. According to the Union, the Agency suffered or permitted employees to perform the asserted pre-shift and post-shift activities, and, therefore, the activities are compensable. *Id.* at 7-8.

1. For further identification, Liability Award No. 1 is dated November 26, 2008; Liability Award No. 2 is dated December 18, 2009; Damages Award No. 1 is dated March 3, 2009; Damages Award No. 2 is dated March 3, 2010; Attorney Fees Award No. 1 is dated May 14, 2009; and Attorney Fees Award No. 2 is dated March 4, 2010.

In Liability Award No. 1, the Arbitrator concluded that the Union had met its burden of proving that the employees assigned to the nine posts and departments perform compensable pre-shift and post-shift activities. *Id.* at 12-13. In particular, he agreed with the Union's assertion that the grievants pick up batteries at the control center prior to proceeding to their assigned posts or departments and return the batteries to the control center at the end of their shifts. In addition, he determined that these activities are compensable because they are indispensable to the performance of the employees' principal work activity. *Id.* at 11. More specifically, he found that batteries are essential to operative radios and body alarms and that, without operative radios and body alarms, the grievants cannot perform their principal work activity effectively and safely both for themselves and the inmates for whose safety they are responsible. *Id.* Consequently, he concluded that picking up batteries starts the work day and returning batteries ends the work day. *Id.*

In addition, he rejected the Agency's claim that picking up batteries is not necessary because charged batteries are already in place or can be delivered to employees at their posts. In this connection, he found that, because of safety concerns pertaining to operative radios and body alarms, employees cannot rely on the batteries in place or risk that the batteries might not be delivered to their posts. *Id.* With respect to the issue of whether the Agency "suffered or permitted" the disputed activities, the Arbitrator found that "management knew that correctional officers were picking up batteries at the control center and it never directed them to refrain from doing so." *Id.* at 12.

For these reasons, the Arbitrator sustained the grievance and directed the parties "to file a stipulation on the number of hours to be compensated and the monetary rate for quantifying the [a]ward relative to the total sum due." *Id.* He further directed that "[s]hould the parties fail to do so, the Arbitrator will make the calculations upon receiving advice of the parties." *Id.*

The parties were unable to stipulate the number of hours or the monetary rates at which the hours were to be compensated, and, accordingly, they filed statements of position with the Arbitrator. In its statement of position, the Union alleged that the employees assigned to the specified posts and departments worked, on average, twenty-two minutes of overtime each shift during the recovery period. Opp'n, Ex. Vol. II-6 at 5. For employees who are not assigned to the control center, the Union based this on the Arbitrator's finding that picking up and returning batteries started and ended the compensable work day. *Id.* at 3 (citing Liability Award No. 1 at 11). For employees assigned to the control center, the Union based this on the work they allegedly were required to perform before and after their shifts. *Id.* at 3-4. In addition, the Union proposed that the overtime be compensated on the basis of the average pay rates in the Agency of the correctional officer position (General Schedule (GS) grade 8, step 4) and vocational nurse position (GS-7, step 5) involved in the grievance (the disputed positions). *Id.* at 5.

In its statement of position, the Agency disagreed with the Union's allegation of twenty-two minutes of overtime each day. The Agency alleged that the testimony showed that the amount of time spent on pre-shift and post-shift activities was no more than ten minutes per shift and that, consequently, the amount of time was de minimis and not compensable.[2] Exceptions, Attach. B, Agency's Response at 2-3. The Agency also disagreed with the Union's proposed use of average rates of pay and claimed that backpay must be based on each employee's individual rate of pay at the time of the violation. *Id.* at 2.

In Damages Award No. 1, the Arbitrator adopted the Union's calculation of damages and awarded the grievants twenty-two minutes of overtime compensation for each shift at the Agency's average rates of pay of the disputed positions. Damages Award No. 1 at 13. He also awarded liquidated damages, found that the violation was willful, and calculated damages beginning three years before the grievance was filed.[3] *Id.*

Subsequently, the Union petitioned for an award of attorney fees under the FLSA, 29 U.S.C. § 216(b) (§ 216(b)).[4] In response, the Agency contended that the number of hours for which fees were requested was not reasonable. Exceptions, Attach. B, Agency's

2. As noted *infra* note 8, total time per workday must be more than ten minutes to be compensable.

3. The Agency filed exceptions to Liability Award No. 1 and Damages Award No. 1, and the Authority issued an order to show cause why the exceptions should not be dismissed as interlocutory. When the Agency did not respond, the Authority dismissed the exceptions without prejudice. *Fed. Med. Ctr.*, 64 FLRA at 566.

4. Section 216(b) provides that courts "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Response to Union's Petition for Attorneys Fees at 3. In addition, the Agency attached a copy of the Union's statement of services provided and objected to specified entries. *Id.* at 4. The Agency also contended that costs could not be awarded because the parties' collective bargaining agreement requires such costs to be shared. *Id.* The Union filed a reply to the Agency's response.

In Attorney Fees Award No. 1, the Arbitrator found that the number of hours claimed was reasonable and that the requested hourly rates were based on the "updated" *Laffey* matrix (adjusted *Laffey* matrix)[5] and were, therefore, appropriate. Exceptions at 6 (citing Attorney Fees Award No. 1 at 4). He also found that the Union was entitled to recover costs.[6] *Id.*

In Liability Award No. 2, the Arbitrator addressed the same activities of picking up and returning batteries for employees assigned to disputed posts and departments that had not been addressed in Liability Award No. 1. For the reasons set forth in Liability Award No. 1, he determined that these activities are compensable. Liability Award No. 2 at 1, 3. Consequently, he directed the parties to file a stipulation on number of hours and hourly rates and stated that, if they were unable to do so, then he would make the necessary calculations after receiving their advice. *Id.*

The parties were unable to stipulate the number of hours and hourly rates, and they filed statements of position with the Arbitrator. The Union alleged that the employees assigned to the posts or departments in dispute worked from fifteen to twenty-five minutes of overtime per shift depending on the post or department.[7] The Union again proposed that the overtime be compensated on the basis of the average rates of pay of the disputed positions. Opp'n, Ex. Vol. III-22 at 9-10. The Agency again claimed that the compensable time of the grievants assigned to the disputed posts and departments was no more than de minimis and also incorporated its arguments from its first statement of position. Exceptions, Attach. B, Agency's Response to Remedy after Final Hearing at 2-3.

In Damages Award No. 2, the Arbitrator adopted the Union's calculation of damages and awarded the grievants the amount of backpay proposed by the Union. Damages Award No. 2 at 2. The Arbitrator stated that the amount was calculated on the basis of "twenty minutes overtime at the pay rate of GS[]8-4, this rate being the average pay rate for correctional officers[.]" *Id.* He also awarded liquidated damages and calculated damages beginning three years before the grievance was filed. *Id.*

The Union petitioned for an additional award of attorney fees, and the Agency did not file a response. In Attorney Fees Award No. 2, the Arbitrator awarded fees for the number of hours requested at the rates set forth in the adjusted *Laffey* matrix. Attorney Fees Award No. 2 at 2. He also awarded the Union its costs for this portion of the grievance. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that Damages Awards Nos. 1 and 2 are contrary to the FLSA. Exceptions at 7. The Agency argues that picking up and returning batteries at the control center are not indispensable to the primary activity of the grievants, as required by

5. The *Laffey* matrix sets forth a method for determining the appropriate hourly rates for attorneys in the Washington, D.C. area. *AFGE, Local 2608*, 63 FLRA 486, 487 n.2 (2009). As the Authority has recognized, there are two versions of the matrix. *U.S. Dep't of the Army, U.S. Army Dental Activity, Fort Bragg, N.C.*, 65 FLRA 54, 55 n.4 (2010) (*Army Dental Activity*). One version is maintained by the Civil Division of the Office of the United States Attorney, which calculates the matrix rate for each year by adding the change in the overall cost of living as reflected in the United States consumer price index (CPI) for the Washington, D.C. area for the prior year and rounding that rate to the nearest multiple of $ 5. That version is commonly referred to as the *Laffey* matrix. By contrast, the so-called "adjusted" *Laffey* matrix calculates the matrix rates for each year by using the legal services component of the CPI rather than the general CPI. *Id.* As the matrix used by the Arbitrator is commonly referred to as the adjusted *Laffey* matrix, rather than the updated *Laffey* matrix, we will use the common reference hereafter.

6. The Agency filed exceptions to Attorney Fees Award No. 1 and incorporated its previously noted exceptions to Liability Award No. 1 and Damages Award No. 1. The Authority dismissed the exceptions as interlocutory because the awards did not constitute a complete resolution of all issues submitted to arbitration. *Fed. Med. Ctr.*, 64 FLRA at 568.

7. Specifically, the Union contended that employees were entitled to the following amounts of overtime for each shift during the recovery period based on their assigned post or department: special housing unit #2 --twenty-two minutes; administrative unit #2 -- twenty-five minutes; compound #1 and #2 -- fifteen minutes; and the remaining posts or departments -- 17.5 minutes. Opp'n, Ex. Vol. III-22 at 9.

5 C.F.R. § 551.412 (§ 551.412).[8] *Id.* at 11. In this connection, the Agency maintains that "fully-charged batteries and phones are already available at every single post where they are needed when an officer arrives at the post[,]" and that "every correctional officer can call the compound officer and request an additional battery as needed [and] one will be delivered to them at their post." *Id.* at 10. Additionally, the Agency argues that officers were never "told or requested to pick up batteries at the control center[,]" that they "did so by their own choosing[,]" and that the Agency should not be found to have "constructive knowledge that this was constantly a practice." *Id.* at 10 & n.9. In regard to employees who worked "the Control Center # 1 post[,]" *id.* at 14, the Agency contends that the award of overtime is deficient because "they are not required to pick up any equipment prior to getting to their post and they are not required to return any equipment prior to completing their shift[,]" *id.* at 16.

In addition, the Agency asserts that in Damages Awards Nos. 1 and 2 the Arbitrator directed that overtime be paid "based on an average amount of minutes worked[.]" *Id.* at 17. The Agency argues that the posts at issue are located at different places throughout the medical center and are at varying distances from the control center. *Id.* at 18. The Agency alleges that, under Authority precedent, the awards are deficient because the Arbitrator fails to identify "the actual amount of time it takes for employees to get to individual posts[.]" *Id.* at 17 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620 (2009) (*FCI, Terminal Island*)). In addition, the Agency contends that the Arbitrator's calculation of backpay on the basis of average rates of pay is also contrary to law because "[n]othing in the FLSA provides for employees to be paid an 'average' amount of a class of employees." *Id.* at 20.

The Agency further contends that Attorney Fees Award No. 1 is deficient because it "is impossible" that the number of hours claimed by the Union is reasonable. *Id.* at 22. The Agency also argues that the Arbitrator failed to "provide any independent analysis or discussion of the Union's fee request, despite the fact that the Agency specifically argued in its post-hearing brief that much of the Union's fee request was duplicative and redundant." *Id.* The Agency additionally contends that the Arbitrator's use of the adjusted *Laffey* matrix rather than the more commonly used *Laffey* matrix is deficient because the adjusted *Laffey* matrix is not reasonable. *Id.* at 23-24.

Finally, the Agency contends that the awards of costs in Attorney Fees Awards Nos. 1 and 2 fail to draw their essence from Article 32, Section d (Section d) of the agreement.[9] *Id.* at 25-27. In this regard, the Agency argues that the language of Section d "indicates that the parties have agreed that in all arbitrations between the parties, that all fees and expenses of the arbitration will be shared by the parties." *Id.* at 27. The Agency also argues that the award is deficient despite entitlement to costs under the FLSA because the Union "agreed to waive its right to seek" reimbursement of costs under the FLSA. *Id.* at 28.

B. Union's Opposition

The Union contends that the Arbitrator's findings that picking up batteries starts the compensable workday and that returning batteries ends the compensable workday are not contrary to the FLSA or § 551.412. Opp'n at 10. In addition, the Union claims that the Arbitrator's factual findings support a determination that the Agency suffered or permitted the disputed activities. *Id.* at 25. The Union also disagrees with the Agency's claims that batteries are available at the disputed posts or that they could be delivered. *Id.* at 15. The Union asserts that the testimony was to the contrary and that the Arbitrator factually determined that, for safety, it was necessary for the grievants to pick up the batteries at the control center. *Id.* at 14-15.

The Union agrees with the Agency that the control center officers do not pick up or return batteries, but contends that control center officers were properly awarded compensation because they are required to work before and after their scheduled shifts. *Id.* at 32, 35.

8. Section 551.412(a)(1) provides: "If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than [ten] minutes per workday, the agency shall credit all of the time spent in that activity . . . as hours of work." Section 551.412(b) defines "preliminary" and "postliminary" activities as "preparatory or concluding activity that is not closely related to the performance of the principal activities" and provides that time spent on such activities "is excluded from hours of work and is not compensable[.]"

9. Section d provides: "The arbitrator's fees and all expenses of the arbitration . . . shall be borne equally by the Employer and the Union." Exceptions at 26 (quoting Section d).

In regard to the Arbitrator's use of averages, the Union asserts that the Agency refused to stipulate to the number of hours and the pay rates and ignored the Union's request for documents that reflect when employees assume duty and are relieved of duty. *Id.* at 36-37. In addition, the Union maintains that it submitted a brief to the Arbitrator providing its advice on calculating damages, but that the Agency's brief to the Arbitrator offered no advice on calculating damages. The Union contends that the Agency challenges the calculation of damages for the first time in its exceptions. *Id.* at 48.

Alternatively, the Union contends that the Arbitrator's use of averages is consistent with court and Authority precedent. *Id.* at 38. In this connection, the Union argues that the Agency's failure to keep accurate and complete records authorized the Arbitrator to determine backpay by a "just and reasonable" inference. *Id.* at 38, 41 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); citing *AFGE, Local 1741*, 62 FLRA 113, 119-20 (2007)). Further, the Union asserts that the Agency's reliance on *FCI, Terminal Island* is misplaced because this case is distinguishable from the "blanket award of [thirty] minutes for every shift, for every correctional officer regardless of testimony" in *FCI, Terminal Island*. *Id.* at 47. In particular, with respect to Damages Award No. 2, the Union maintains that the Arbitrator adopted the Union's calculation of damages, which was based on the posts or departments to which the grievants were assigned with the amounts of overtime requested varying from fifteen to twenty-five minutes. *Id.* at 44-45.

In regard to Attorney Fees Award No. 1, the Union contends that the Agency fails to establish that the number of hours awarded by the Arbitrator is deficient. The Union argues that the Arbitrator appropriately addressed the details of the Union's position and the Agency's objections in his award of fees. *Id.* at 52. Further, the Union contends that the Arbitrator's use of the adjusted *Laffey* matrix is not deficient. *Id.* at 54-56.

In regard to the Agency's essence exception, the Union contends that language of Section d does not address costs to which the Union is legally entitled. *Id.* at 58. The Union also argues that its entitlement to costs pursuant to the FLSA is a substantive right that overrides any conflicting agreement provision and that the Agency provides no support for its argument that the Union waived its right to seek reimbursement of costs under the FLSA. *Id.* at 60, 64.

IV. Preliminary Issue

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[10] The Union contends that the Agency offered no advice to the Arbitrator on calculating damages and that the Agency challenges the calculation of damages for the first time in its exceptions. However, contrary to the Union's claim, in its statement of position to the Arbitrator in response to Liability Award No. 1, the Agency specifically disagreed with the Union's allegation of twenty-two minutes of overtime each day and alleged as to each post or department in dispute that the amount of time spent on pre-shift and post-shift activities was no more than de minimis. Exceptions, Attach. B, Agency's Response at 2. The Agency also specifically disagreed with the use of average rates of pay. *Id.* To the extent that the Union is also claiming that these issues are barred with respect to Damages Award No. 2, in its statement of position, the Agency alleged as to each post or department that the time spent on pre-shift and post-shift activities was no more than de minimis and incorporated by reference its earlier disagreement with the use of average rates of pay. *Id.*, Agency's Response to Remedy after Final Hearing at 2-3. Accordingly, we conclude that the Agency presented these issues to the Arbitrator and that the issues are not barred.

In regard to Attorney Fees Award No. 1, in its response to the Union's petition for fees, the Agency contended that costs could not be awarded because Section d requires that costs be shared. *Id.*, Agency's Response to Union's Petition for Attorney Fees at 4. However, the Agency did not acknowledge that the § 216(b) entitles the Union to reimbursement of its costs of bringing the case. The Agency also did not argue, as it does in its exception, that Section d supplants or waives the Union's entitlement to costs under that statutory provision. Accordingly, we conclude that the Agency may not argue, for the first time in exceptions, that Section d waives the Union's entitlement to costs under § 216(b).

10. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

In regard to Attorney Fees Award No. 2, as the Agency did not file a response as it did in regard to Attorney Fees Award No. 1, the Agency did not argue that Section d precluded an award of costs. Accordingly, we conclude that the Agency's essence exception as to Attorney Fees Award No. 2 is barred.

V. Analysis and Conclusions

A. The Agency's contrary-to-law exceptions are granted in part and denied in part, and the awards are remanded in part.

When an exception involves an award's consistency with law, the Authority reviews de novo any questions of law raised by the exception and the award. *E.g., FCI, Terminal Island*, 63 FLRA at 623. 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. *Id.* In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. The awards are remanded for clarification of the basis for the award of overtime to the grievants at the control center post who do not pick up and return batteries; the remaining exceptions regarding entitlement to overtime compensation are denied.

Section 551.412(a)(1) provides that preparatory and concluding activities that are closely related to, and indispensable to the performance of, an employee's principal activities constitute hours of work and are compensable when the time spent in the activities exceeds ten minutes per workday. Section 551.412(b) defines preliminary and postliminary activities as preparatory or concluding activities that are not closely related to the performance of the principal activities and provides that the time spent in such activities is not compensable.

Here, the Arbitrator found that picking up and returning batteries at the control center are activities indispensable to the performance of the employees' principal work activity because the batteries are essential to operative radios and body alarms and that, without operative radios and body alarms, the grievants cannot perform their principal work activities effectively and safely both for themselves and the inmates for whose safety they are responsible. The Agency does not dispute that fully charged batteries are indispensable to the performance of the grievants' principal activities. Instead, the Agency argues that picking up batteries at the control center is not necessary because charged batteries are already in place or can be delivered to employees at their posts or departments. However, the Arbitrator rejected this argument. He specifically found that picking up batteries was necessary because of safety concerns with relying on batteries being available at the post or by delivery. The Agency does not address in its exception the safety concerns on which the Arbitrator relied, or otherwise provide a basis for concluding that the Arbitrator erred in finding that picking up and returning batteries at the control center are compensable as activities that are indispensable to the performance of the grievants' principal work activity. Accordingly, we deny the Agency's argument that this finding is contrary to law.

In regard to the Agency's argument that the activities are not compensable because the Agency did not suffer or permit their performance, "suffered or permitted work" is defined as "any 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. Here, the Arbitrator specifically found that "management knew that correctional officers were picking up batteries at the control center and it never directed them to refrain from doing so[,]" Liability Award No. 1 at 12, and the Agency does not contend that the award is based on a nonfact. Accordingly, we defer to the Arbitrator's factual findings and deny the Agency's argument that this finding is contrary to law.

The Agency also contends that Damages Award No. 1 is deficient because it awards overtime to the grievants assigned to the control center post who do not pick up and return batteries. In Damages Award No. 1, the Arbitrator awarded the grievants assigned to the control center twenty-two minutes of overtime per shift. Damages Award No. 1 at 13. It is not disputed that the grievants assigned to the control center do not pick up and return batteries. Although the Union argued that the employees assigned to the control center were required to work prior to the beginning of their shift and after the end of their shift to accomplish their duties, in Liability Award No. 1, the Arbitrator specifically addressed only the activities of picking up and returning batteries and made no findings regarding the overtime allegedly performed by the grievants assigned to the control center. Consequently, it is not clear on this record what the Arbitrator's basis was for awarding these

grievants twenty-two minutes of overtime for each shift in the control center. As a result, the record does not enable the Authority to determine whether the award is deficient as alleged by the Agency. Where the Authority is unable to determine whether an award is deficient, the Authority's practice is to remand the case to the parties for resubmission to the arbitrator, absent settlement, for a clarification of the basis for the award. *E.g., U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 544, 547 (2000). Accordingly, we remand to have the Arbitrator clarify the basis for compensating the grievants assigned to the control center.

2. The awards are remanded for further findings regarding varying pay rates of individual grievants, and Damages Award No. 1 is remanded for further findings regarding the amount of time that the grievants spent in overtime; the exception regarding the amount of time that the grievants in Damages Award No. 2 spent in overtime is denied.

In Damages Award No. 1, the Arbitrator awarded the grievants twenty-two minutes of overtime compensation for each shift at the average rates of pay of the disputed positions. Damages Award No. 1 at 13. The Authority has specifically rejected an arbitrator's use of an "average amount of time expended per day per correctional officer" in calculating an award of backpay under the FLSA. *FCI, Terminal Island*, 63 FLRA at 624-25 (quoting arbitrator's award). As it was not disputed in *FCI, Terminal Island* that the time spent by correctional officers performing pre-shift and post-shift activities varied, in part on the basis of the length of time it takes correctional officers to travel between the control center and their assigned posts, the Authority held that the award did not correctly compensate the officers because the varying amounts of time must be taken into account under the FLSA. Accordingly, the Authority concluded that the award was contrary to the FLSA and set it aside. As the record did not provide sufficient information for the Authority to determine the amount of time that the correctional officers engaged in compensable activities, the Authority remanded the award to have the arbitrator account for the variations. *Id.* at 625.

As in *FCI, Terminal Island*, it is also not disputed in this case that the time spent by the grievants performing compensable activities varied. Thus, consistent with *FCI, Terminal Island*, we find that the Arbitrator's use of an average amount of overtime is contrary to the FLSA. As the record in this case does not provide sufficient information to determine the amount of time that the grievants engaged in compensable activities, based on the foregoing, we remand to have the Arbitrator take into account these varying amounts.

In Damages Award No. 1, the Arbitrator also used average pay rates within the Agency. The principle underlying the Authority's decision in *FCI, Terminal Island* applies equally to the use of average pay rates. There is no distinction apparent between an arbitrator's use of average amount of overtime and average pay rates. With the Authority having rejected in *FCI, Terminal Island* the use of average amount of overtime as contrary to the FLSA when the amount of time varied, there is no basis for permitting under the FLSA the use of average pay rates when the pay rates of the grievants concededly vary. Accordingly, we apply *FCI, Terminal Island* to the Arbitrator's use of average pay rates in Damages Award No. 1, and find that their use is contrary to the FLSA. As the record in this case does not provide sufficient information to determine the pay rates of the grievants, we remand to have the Arbitrator take into account the varying rates of pay of the grievants.

The Agency argues that Damages Award No. 2 is likewise deficient because it is based on an average amount of overtime of twenty minutes at average rates of pay. In Damages Award No. 2, the Arbitrator adopted precisely the total amount of backpay proposed by the Union and stated that the amount of backpay was calculated on the basis of twenty minutes of overtime at the average pay rate of correctional officers. Damages Award No. 2 at 2. In its opposition to the Agency's exceptions, the Union maintains that the Arbitrator adopted its exact calculation of damages and that the calculation was based on the individual posts or departments to which the grievants were assigned, with the amounts of overtime requested varying from fifteen to twenty-five minutes per shift. Opp'n at 44-45.

The Authority has repeatedly stated that when it resolves exceptions to an arbitration award, it considers the award and the record as a whole. In particular, the Authority interprets an award in context without undue focus on isolated statements. *E.g., Soc. Sec. Admin., Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 336 (2010). Although the Arbitrator stated that the amount of backpay was calculated on the basis of twenty minutes of overtime at the average pay rate of correctional officers, he awarded the total precise amount proposed by the Union in its statement of

position filed with the Arbitrator. Opp'n, Ex. Vol. III-22 at 9-10. As stated previously, the Union specifically contended in its statement that the grievants were entitled to the following amounts of overtime for each shift during the recovery period based on their assigned posts or departments: special housing unit #2 --twenty-two minutes; administrative unit #2 -- twenty-five minutes; compound #1 and #2 -- fifteen minutes; and the remaining posts or departments -- 17.5 minutes. *Id.* at 9. Thus, the Union's statement calculated backpay based on the varying amounts of time spent on pre-shift and post-shift activities, rather than on an average amount of overtime. Based on the record as a whole, we construe the backpay as calculated on the basis of varying amounts of overtime, and on the basis of the average rates of pay of the disputed positions and not solely the correctional officer position, as stated by the Arbitrator. As so construed, we deny the exception to Damages Award No. 2, as it pertains to the amount of overtime performed by the grievants per shift. However, for the reasons stated above in connection with Damages Award No. 1, the Arbitrator's use of average pay rates in Damages Award No. 2 is contrary to the FLSA. Accordingly, we set aside the Arbitrator's use of average pay rates in Damages Award No. 2. As with Damages Award No. 1, the record in this case does not provide sufficient information to determine the pay rates of the grievants. Accordingly, we remand to have the Arbitrator take into account the varying rates of pay of the grievants.

3. Attorney Fees Award No. 1 is remanded for further findings regarding the number of hours reasonably expended; the Agency's exception regarding the use of the adjusted *Laffey* matrix is denied.

With regard to the rates that the Arbitrator found appropriate, the Authority has held that arbitrators are not precluded, as a matter of law, from applying the adjusted *Laffey* matrix. *Army Dental Activity*, 65 FLRA at 58. Consistent with *Army Dental Activity*, we conclude that the Arbitrator's use of the adjusted *Laffey* matrix provides no basis for finding Attorney Fees Award No. 1 deficient.

In resolving whether an award of attorney fees is reasonable as required by the Back Pay Act, the Authority has taken into account court decisions applying other federal fee-shifting statutes with a similar requirement. *E.g., U.S. Dep't of Def., Def. Fin. & Accounting Serv.*, 60 FLRA 281, 286 (2004) (applying *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (*Hensley*)). In particular, consistent with *Hensley*, the Authority reviews contested awards of attorney fees for the number of hours requested to ensure that the number of hours expended was reasonable. *Id.* When arbitrators have not made specific factual findings to support their conclusions that the number of hours expended is reasonable, the Authority has remanded to the parties for resubmission to the arbitrator for further findings. *E.g., U.S. Dep't of Veterans Affairs Med. Ctr., Detroit, Mich.*, 64 FLRA 794, 797 (2010) (*VAMC*). In this regard, remands are appropriate because the arbitrator, as the fact-finder, is in the best position to make determinations as to the reasonableness of the number of hours expended. *Id.*

As the foregoing precedent is expressly based on not only the Back Pay Act, but also other federal fee-shifting statutes, we apply this approach in this case involving an award of fees under the FLSA. Here, in view of the Agency's multiple challenges to specific expenditures of time of the Union's attorneys, the Arbitrator failed to set forth sufficient factual findings to support Attorney Fees Award No. 1. Accordingly, we remand the matter of the number of hours reasonably expended in relation to Attorney Fees Award No. 1 for specific findings by the Arbitrator.[11]

B. Attorney Fees Award No. 1 does not fail to draw its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the agreement, it must be established 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 agreement as to manifest an 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. *E.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Greenville, Ill.*, 65 FLRA 607, 608 (2011) (*FCI, Greenville*).

In accordance with our dismissal under § 2429.5, the Agency's argument under this exception is limited to the claim that Section d requires costs be shared by the parties. In *FCI, Greenville*, the arbitrator awarded costs under §216(b), and the Agency made the same argument as it does here. The

11. We note that we have dismissed pursuant to § 2429.5 of the Authority's Regulations this exception as it pertains to Attorney Fees Award No. 2.

Authority found that, in making this argument, the Agency did not dispute that, pursuant to § 216(b), a prevailing party in an FLSA action is entitled to reimbursement of the costs of bringing the FLSA case and did not allege that Section d was intended to supplant the cost provisions of § 216(b). *Id.* at 609. As a result, the Authority concluded that the Agency did not demonstrate that the award of costs under § 216(b) manifestly disregarded Section d or was implausible, irrational, or unfounded. *Id.*

Here, the Agency also does not dispute that, pursuant to § 216(b), a prevailing party in an FLSA action is entitled to reimbursement of the costs of bringing the FLSA case, and the Agency has not timely argued that Section d supplants or waives § 216(b). Consequently, consistent with *FCI, Greenville*, the Agency's essence argument does not provide a basis for finding the award of costs deficient. Accordingly, we deny this exception.

VI. Decision

The awards are remanded in part for clarification of the basis for the award of overtime to the grievants at the control center post who do not pick up and return batteries, and for further findings regarding varying pay rates of individual grievants. Damages Award No. 1 is remanded for further findings regarding the amount of time that grievants spent in overtime, and Attorney Fees Award No. 1 is remanded for further findings regarding the number of hours reasonably expended. The Agency's remaining exceptions are dismissed in part and denied in part.