68 FLRA No. 130

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5101

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DECISION

August 13, 2015

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

I. Statement of the Case

As part of their training to become customs and border protection officers (CBPOs), the employees at issue in this case (the trainees) attended an eighteen-week training program. A few weeks into the program, the trainees voted to arrive early to class so that they could march to class together, in formation. After learning about the trainees' early arrival, the Union filed a grievance seeking overtime for the time that the trainees arrived early to get in formation and march to class. Arbitrator James W. Mastriani issued an award finding that the trainees were not entitled to overtime.

We must decide whether the Arbitrator's determination that the trainees were not entitled to overtime is contrary to law. Specifically, we must determine whether the Arbitrator erred in concluding that arriving early to "form up" is not "work performed for the benefit of [the A]gency."[1] Because the Union has not established that arriving early to form up before class is necessary to accomplish the duties that the Agency hired the trainees to perform, it has not established that the Arbitrator erred as a matter of law in concluding that the trainees were not performing work within the meaning of the Fair Labor Standards Act (FLSA).[2] Moreover, because the Union's remaining exceptions all presuppose that the Arbitrator's finding that the trainees were not performing work is incorrect, it is unnecessary to address them.

II. Background and Arbitrator's Award

The Agency requires all newly hired CBPOs to complete an eighteen-week training. Each class of trainees is divided into sections, and each section is supervised by one of the Agency's instructors. The Agency also selects one trainee from each section to be the section leader. The section leaders are responsible for keeping their peers organized, but they have no authority to discipline other trainees.

As part of their training, the trainees received twenty-six hours of "drill and ceremony" training. Further, the Agency required trainees to march, in formation, while moving about the campus during duty hours, 7:30 a.m. to 4:30 p.m.

About one month after the training program began, the Agency's branch chief witnessed the trainees acting in a manner that he considered to be unprofessional while the trainees were getting off of a bus to go to their first class of the day. After witnessing this behavior, the branch chief spoke to several of the students, including one of the two section leaders for the trainees' class. As part of this discussion, the branch chief reminded the students that they were required to move in formation during duty hours.

After the first section leader spoke with her counterpart, the two section leaders decided to hold a class-wide vote on whether to arrive to class ten minutes before 7:30 a.m., the start of their duty day, and ten minutes before the end of their unpaid lunch break, so that the trainees could form up and march into class together. Although at least two trainees "strenuously objected," a majority of the trainees voted to arrive early.[3] Not all of the trainees consistently followed the early-arrival policy, and while the trainees were not disciplined for failing to arrive early, one of the section leaders "kept a diary of times that trainees showed up late."[4]

One of the trainees who objected contacted the Union, which subsequently filed a grievance, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Union argued, as relevant here, that arriving early to class during non-duty time and forming up constituted compensable work under the FLSA, and that the Agency knew or should have known that the trainees were arriving early to class to form up. Conversely, the Agency argued that time spent

[1] 5 C.F.R. § 551.104.
[2] 29 U.S.C. §§ 201-219.
[3] Award at 19.
[4] *Id.*

forming up was not compensable under either the Office of Personnel Management (OPM)'s training regulations[5] or as "suffered-or-permitted" overtime under the FLSA.[6] Likewise, the Agency argued that arriving before the start of the duty day was not "work" but, rather, was in the nature of time spent commuting.[7] Further, it argued that even if arriving to class before 7:30 a.m. to form up were compensable work, the Agency would have no way of knowing that it was occurring because a supervisor who observed trainees "standing in the parking lot waiting for their fellow classmates" would not realize that the trainees were performing work.[8] Finally, the Agency argued that even if arriving early to form up were work that the Agency should have prevented, the trainees spent only a de minimis amount of time engaged in that activity.

The Arbitrator agreed with the Agency. Noting that no trainees were ever disciplined for arriving late, the Arbitrator concluded that the Agency never directed the trainees to arrive to class before the start of their duty day. The Arbitrator also found that arriving early to "'wait, in formation, for the remaining trainees to arrive' and then march into their classroom," was analogous "to employees who reported [fifteen] minutes prior to their shift for their own convenience," which is not compensable.[9]

The Arbitrator also found that the Agency's instructors did not have reason to know that the trainees were performing work. The Arbitrator observed that the instructors denied knowledge of the trainees' vote, and found that even if they were aware of it, the Union had not established that "additional work in [drill and ceremony practice] was necessary to improve the [trainees'] performance of their duties."[10] Moreover, the Arbitrator found that, even if the instructors had observed the trainees waiting to form up, it would not have occurred to the instructors that what they witnessed was the performance of "work."[11] Accordingly, the Arbitrator found that the trainees were not entitled to compensation, and he denied the grievance.

The Union then filed these exceptions, to which the Agency filed an opposition.

[5] 5 C.F.R. § 551.423.

[6] *See* 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work."); *accord* 5 C.F.R. § 551.401(a)(2).

[7] *See* 5 C.F.R. § 551.422(b) ("An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal 'home to work' travel; such travel is not hours of work.").

[8] Award at 30.

[9] *Id.* at 41 (citing *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984)).

[10] *Id.* at 44.

[11] Award at 44-45 (internal quotation marks omitted).

III. Analysis and Conclusions

A. The Union has not established that the Arbitrator's conclusion that arriving early to form up is not work performed for the benefit of the Agency is contrary to 5 C.F.R. § 551.104.

The Union argues that the Arbitrator's conclusion that arriving early to class to form up is not work performed "for the benefit of [the A]gency"[12] is contrary to 5 C.F.R. § 551.104. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[14]

As relevant here, 5 C.F.R. § 551.104 provides:

> *Employ* . . . includ[es] any hours of work that are suffered or permitted.
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> . . . .
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> *Suffered or permitted work* means 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.

An activity need not benefit an employer exclusively to be compensable;[15] however, the activity must be "pursued necessarily and primarily for the benefit of the employer."[16] Further, the activity "must be necessary to the accomplishment of the employee's principal duties to

[12] 5 C.F.R. § 551.104.

[13] *E.g.*, *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)).

[14] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015).

[15] *See Sec'y of Labor v. E. R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir. 1974) ("[An] activity is employment under the [Fair Labor Standards] Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee.").

[16] *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (*Tenn. Coal*), *superseded by statute in part not relevant here*, Portal-to-Portal Act of 1947, Pub. L. No. 80–49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251–262), *as recognized in Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. ___, ___, 135 S. Ct. 513, 516-17 (2014).

the employer."[17] Principal activities are the activities that an employee is "employed to perform."[18]

Here, the Union argues that the Agency derived a benefit from the trainees' early arrival because arriving early to form up "improved the [trainees'] performance of drill and ceremony protocols, further instilled in them the value of following instructions, and contributed to the professionalism and *esprit de corps* that the Agency values."[19] Furthermore, the Arbitrator found that the Agency included drill-and-ceremony in its training program to teach the trainees to "work as a unit and instill a law enforcement mindset," "install[] habits of precision [and] obeying orders[,] and develop[] [employees'] ability to command[] junior officers,"[20] not to improve their drill-and-ceremony ability.

Even assuming that on-duty participation in drill and ceremony is something that the trainees will be called upon to do as CBPOs, there is no evidence that additional practice, in the form of early arrival and forming up, was "necessary to the accomplishment" of the drill-and-ceremony exercises that the trainees would perform. In this regard, the Arbitrator concluded that arriving early to form up was non-compensable because (among other reasons) "there was no evidence to support the [U]nion's assertion that additional work in this area was necessary to improve the [trainees'] performance of their duties."[21] The U.S. Court of Federal Claims similarly concluded that customs officers' "off-duty weapons training to improve marksmanship skill above the qualification threshold required"[22] was not compensable.[23]

Accordingly, the Union has not established that the Arbitrator erred when he concluded that arriving early to form up is not "work performed by an employee for the benefit of [the A]gency" under 5 C.F.R. § 551.104.

B. It is unnecessary to resolve the Union's remaining exceptions, as they provide no basis for finding the award deficient.

The Union filed a number of additional exceptions to the Arbitrator's determination that the trainees were not entitled to overtime pay.[24] When an arbitrator bases an award on multiple grounds, the excepting party must establish that all of the grounds are deficient in order for the Authority to find the award deficient.[25] When an excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[26]

Here, the Union challenges the following arbitral conclusions as either being nonfacts, contrary to law, or both: (1) that the instructors did not know, or have reason to know, that the trainees were performing work;[27] (2) that the instructors did not have the opportunity to prevent the trainees from performing work;[28] (3) that the work, even if otherwise compensable, was non-compensable because it occurred during the trainees' commute;[29] and (4) that, even if otherwise compensable, the amount of time spent performing the work was de minimis.[30] All of these exceptions depend upon us setting aside the Arbitrator's conclusion that the trainees were not performing work within the meaning of 5 C.F.R. § 551.104. As we have not set aside the Arbitrator's conclusion that the trainees were not performing work, it is unnecessary to address the Union's remaining exceptions.

IV. Decision

We deny the Union's exceptions.

[17] *Bull v. United States*, 68 Fed. Cl. 212, 223 (*Bull)* (citing *Tenn. Coal*, 321 U.S. at 599), *decision clarified*, 68 Fed. Cl. 276 (2005), *aff'd*, 479 F.3d 1365 (Fed. Cir. 2007).
[18] *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (quoting 5 C.F.R. § 550.112(a)).
[19] Exceptions at 24.
[20] Award at 13.
[21] Award at 43-44.
[22] *Bull*, 68 Fed. Cl. at 258 (citing *Dade Cnty., Fla. v. Alvarez*, 124 F.3d 1380, 1386 (11th Cir. 1997) (*Dade County*) (off-duty physical-fitness training for police officers not compensable)).
[23] *See id.* at 257 (finding additional practice non-compensable under 5 C.F.R. § 551.423); *id.* at 256 n.46 (citing *Dade County*, 124 F.3d at 1385) ("[E]ven if the court found that the OPM training regulations did not apply and reviewed plaintiffs' training-related claims under the more general FLSA analysis applicable to plaintiffs' non-training-related claims, the court's ruling would not change.").
[24] *See* Exceptions at 24-36.
[25] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 674-75 (2015) (citing *U.S. DHS, U.S. CBP*, 68 FLRA 184, 188 (2015) (*DHS*)).
[26] *Id.* (citing *DHS*, 68 FLRA at 188).
[27] Exceptions at 24-30.
[28] *Id.* at 30.
[29] *Id.* at 31-32.
[30] *Id.* at 32-36.