68 FLRA No. 154

UNITED STATES
DEPARTMENT OF INTERIOR
BUREAU OF RECLAMATION
GREAT PLAINS REGION
COLORADO/WYOMING AREA OFFICE
(Agency)

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
LOCAL 1759
(Union)

0-AR-5021

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DECISION

September 29, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to properly compensate three bargaining-unit employees (the grievants) for work the Agency required them to perform during rest periods. The parties' agreement allegedly entitled the grievants to rest periods after each grievant worked at least sixteen hours within a twenty-four hour period. Arbitrator Kathy L. Eisenmenger found a violation and, as a remedy, ordered the Agency to pay the grievants at an increased rate provided in the parties' agreement for time worked during these rest periods. There are four substantive questions before us.

The first question is whether the Arbitrator exceeded her authority because she failed to address an issue submitted to arbitration and resolved issues not submitted to arbitration by determining when the contractual rest periods begin, and the appropriate rate of pay during those rest periods. Because one of the Agency's claims is based on a misinterpretation of the award and, as to the other claims, because an arbitrator's interpretation of a stipulated issue is accorded substantial deference, the answer is no.

The second question is whether the award is based on nonfacts. Regarding the Agency's first nonfact claim, because the Agency challenges the Arbitrator's evaluation of the evidence – which does not provide a basis for finding an award deficient on nonfact grounds – the answer is no. Regarding the Agency's second nonfact claim, because a central fact underlying one part of the award is clearly erroneous, but for which the Arbitrator would have reached a different result regarding part of her remedy, the answer is yes.

The third question is whether the award fails to draw its essence from the parties' agreement. As the Arbitrator's interpretation of the agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The fourth question is whether the award is so incomplete and ambiguous as to make its implementation impossible. Because the Agency fails to show that it will be impossible to implement the award, the answer is no.

II. Background and Arbitrator's Award

The grievants work in the power-plant section of the Agency's hydroelectric plant. They work Monday through Thursday from 6:30 a.m. to 5:00 p.m. Because of an emergency at the plant, the grievants each worked extra time at the end of one of their work weeks – at least sixteen hours within a twenty-four hour period. Specifically, one grievant worked from 6:30 a.m. on Thursday to midnight. A second grievant worked from 6:30 a.m. to 5:00 p.m. on Thursday, returned to work at 10:00 p.m., and then worked until 9:00 a.m. on Friday. A third grievant worked his regular shift on Thursday, but returned to work on Friday at 6:30 a.m., working until 6:30 a.m. Saturday.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to properly compensate the grievants for work the Agency required them to perform during rest periods to which they were contractually entitled. The Union claimed that the grievants were entitled to the rest periods after working at least sixteen hours within a twenty-four hour period (16-in-24). The grievance was unresolved and the parties submitted the matter to arbitration. The parties stipulated to the following issues:

> Did the Agency violate Section 4.9(a) of the [parties' agreement] when it declined to pay three . . . [grievants] for a mandatory eight[-]hour rest period upon being released from duty after working sixteen . . . hours or more within a consecutive twenty-four[-]hour period outside of their normally

> scheduled tour of duty . . . [and, i]f so, what is the appropriate penalty?[1]

Section 4.9(a) provides, in relevant part:

> An employee who has worked sixteen . . . hours or more, consecutive or otherwise, in any twenty-four . . . consecutive hours shall upon release from duty, be entitled to an eight[-] . . . hour rest period before the employee returns to work. If the eight[-] . . . hour rest period extends into the regularly scheduled tour of duty, the employee shall be granted administrative leave for any portion thereof required to complete this rest period. If an employee is required to return or remain on duty to completion of the eight[-] . . . hour rest period, the rate of pay for work performed will be [two and one-half] times the basic rate until the eight[-hour] . . . rest period has elapsed.[2]

The Arbitrator interpreted Section 4.9(a) as entitling an employee to an eight-hour rest period (rest period) when the employee has worked 16-in-24, "consecutive or otherwise."[3] She also found that Section 4.9(a) provides for pay at "[two and one-half] times the employee's basic rate"[4] (penalty pay) when an employee has "earned" a rest period, but the Agency either requires the employee to remain on, or return to, duty during that rest period.[5] Specifically, the Arbitrator explained that penalty pay applies where the Agency requires an employee: (1) to work beyond sixteen consecutive hours in a twenty-four-hour period; or (2) to work less than sixteen consecutive hours, but then requires the employee to return to duty and "ultimately work[] more than sixteen" hours in a twenty-four-hour period.[6] In both situations, according to the Arbitrator, Section 4.9(a) requires the Agency to provide penalty pay for the portion of the rest period that the Agency requires the employee to work beyond 16-in-24.

The Arbitrator then considered when the contractual rest period begins. She found that Section 4.9(a) triggers a "right" to a rest period when an employee works 16-in-24.[7] She found that the rest period begins at the sixteenth consecutive or non-consecutive hour that an employee works within a twenty-four hour period. The Arbitrator rejected the Agency's argument that Section 4.9(a)'s wording – "upon release from duty" – means that the rest period *begins* only when an employee has *ended* duty after working 16-in-24.[8] The Arbitrator concluded that when the rest period begins, Section 4.9(a) provides penalty pay for the portion of the rest period that the employee was unable to take at the time the employee is released from duty.

On this basis, the Arbitrator found that the Agency violated the parties' agreement when it failed to compensate the grievants "for their work time that occurred during their contractual rest period[s]."[9] The Arbitrator awarded penalty pay for the number of rest-period hours that overlapped with the hours each grievant worked beyond 16-in-24, but stated that "[n]o further remedy is granted."[10] In particular, the Arbitrator found that the grievants were not entitled to compensation for the portion of their rest periods that they were in a non-duty status.

The Agency filed exceptions to the Arbitrator's award. The Union did not file an opposition.

III. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by failing to resolve an issue submitted to arbitration, and by resolving issues that were not submitted to arbitration.[11] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[12]

The Agency argues that the Arbitrator exceeded her authority by failing to address whether the grievants are entitled to penalty pay during their rest periods when they are no longer working; that is, while they are in a non-duty status.[13] However, the Agency's claim is based on a misinterpretation of the award. The Arbitrator explicitly restricted her penalty-pay remedy "to compensate the [g]rievants for their work time that occurred during their contractual rest[-]period hours,"[14] not for time spent in a non-duty status. In addition, when

[1] Award at 2.
[2] *Id.* at 4 (quoting § 4.9(a) of the parties' agreement).
[3] *Id.* at 16 (quoting § 4.9(a) of the parties' agreement).
[4] *Id.* at 17.
[5] *Id.* at 14.
[6] *Id.* at 15.
[7] *Id.* at 16.
[8] *Id.* at 15 (quoting § 4.9(a) of the parties' agreement) (internal quotation marks omitted).
[9] *Id.* at 21.
[10] *Id.*
[11] Exceptions Br. at 7-11.
[12] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[13] Exceptions Br. at 10-11.
[14] Award at 21.

formulating the remedy, she specifically found that the grievants were not entitled to compensation for the portion of their rest periods when they were in a *non-duty status*.[15] Therefore, because the award resolves the issue the Agency claims the Arbitrator failed to address, the Agency's first exceeds-authority exception fails to demonstrate that the award is deficient.

The Agency also argues that the Arbitrator resolved an issue that was not submitted to arbitration by addressing whether the grievants should be given penalty pay for time worked beyond sixteen hours, but before being "released from duty."[16] In the Agency's view, the Arbitrator lacked authority to address "the issue of pay and pay rates . . . while [employees were] still on duty."[17]

Because the Arbitrator's interpretation of the stipulated issue is not irrational, unfounded, or implausible, the Agency's exception does not demonstrate that the Arbitrator exceeded her authority. In this regard, when the Authority determines whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[18] Under the deferential "essence" standard that the Authority applies to an arbitrator's interpretation of a collective-bargaining agreement, the Authority will uphold the arbitrator's interpretation unless the interpretation: (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 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.[19]

The Arbitrator's interpretation of the stipulated issue merits deference. In resolving the stipulated issue, the Arbitrator found that her "task is to apply the relevant provisions of the parties' collective[-]bargaining agreement as a whole document."[20] This was not irrational, as the stipulated issue focused on the Union's allegation that the Agency violated Section 4.9(a) of the parties' agreement in its treatment of the grievants.

Further, interpreting and applying the parties' agreement "as a whole," the Arbitrator analyzed Section 4.9(a) in detail.[21] The Arbitrator found that under Section 4.9(a), "the right to a rest period does not occur until the employee has worked sixteen . . . hours (or more) within any twenty-four[-]hour[] period."[22] The Arbitrator referred in this regard to the "qualifying terms"[23] in Section 4.9(a)'s first sentence, which provide for an entitlement to a rest period when an employee "has worked sixteen . . . hours or more, consecutive or otherwise, in any twenty-four . . . consecutive hours."[24] The Arbitrator also explained that the phrase "upon release from duty" [25] in the first sentence "does not signify the start time of the employee's right to a rest period."[26] Rather, in the Arbitrator's view, the phrase pertains to an employee's right to a full eight-hour rest period when an employee is finally finished working. Referring to Section 4.9(a)'s second sentence, the Arbitrator found that:

> the parties stipulated that[,] should the employee's eight[-] . . . hour rest period extend into the employee's next regularly scheduled tour of duty[,] the employee would continue to remain in the non-work status for the remainder of the contractual rest period and would receive the employee's regular rate of pay under administrative leave for that portion of the employee's rest period.[27]

Finally, the Arbitrator analyzed Section 4.9(a)'s penalty-pay provisions. The Arbitrator focused on Section 4.9(a)'s third sentence which provides: "[i]f an employee is required to return or remain on duty to completion of the eight[-] . . . hour rest period," the employee is entitled to penalty pay "until the eight[-] . . . hour rest period has elapsed."[28] The Arbitrator found that penalty pay was due an employee who "has worked more than sixteen . . . hours in a twenty-four[-]hour[] period . . . , has earned a rest period of eight . . . hours[,] but the employee has either been called back to duty during the rest period or the employee has been required to continue on duty that interrupts the earned rest period."[29]

The Arbitrator's interpretation of Section 4.9(a) is consistent with the provision's language, and is

[15] *See id.* at 17-18 (The Arbitrator found one grievant "was not entitled by contractual right to receive pay . . . for his non-duty time for the rest period.").
[16] Exceptions Br. at 10 (emphasis omitted).
[17] *Id.* at 11 (emphasis omitted).
[18] *U.S. Dep't of the Army, Army Tank-Auto. Command*, 67 FLRA 14, 17 (2012).
[19] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (citations omitted).
[20] Award at 16.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 4.
[25] *Id.* at 16 (internal quotation marks omitted).
[26] *Id.*
[27] *Id.* at 13.
[28] *Id.* at 4.
[29] *Id.* at 14.

therefore not irrational, unfounded, or implausible. In addition, because Section 4.9(a), as interpreted by the Arbitrator, provides penalty pay for employees in various "on-duty" situations, it was not irrational, unfounded, or implausible for the Arbitrator to interpret the stipulated issue as requiring her to address penalty pay for employees who were "still on duty"[30] during what would otherwise be a rest period. Arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue, or by addressing an issue that necessarily arises from issues specifically included in a stipulation.[31] Accordingly, the Agency's second exceeds-authority exception fails to demonstrate that the award is deficient.

We deny the Agency's third exceeds-authority exception for the same reason. Concerning this exception, the Agency claims that the issue of when rest periods begin under Section 4.9(a) was not before the Arbitrator.[32] But the Arbitrator's interpretation of the stipulated issue, discussed above and to which we defer, required her to address that subject. Accordingly, the Agency's third exceeds-authority exception fails to demonstrate that the award is deficient.

Accordingly, we deny the Agency's exceeds-authority exceptions.

B. The award is based, in part, on a nonfact.

The Agency argues that the award is based on two nonfacts.[33] To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[34] Disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding the award deficient.[35]

The Agency's first nonfact exception cites record evidence to challenge the Arbitrator's conclusion that the Agency failed to properly pay the grievants for their work time during rest periods.[36] The Agency claims that "[t]ime cards were submitted as joint exhibits reflecting the correct amount of time at the appropriate pay rates and the [p]arties stipulated to the amount of time worked."[37]

This nonfact claim challenges the Arbitrator's evaluation of the evidence. As stated above, such claims do not provide a basis for finding that an award is based on a nonfact.[38] Accordingly, the Agency's first nonfact exception does not provide a basis for finding the award deficient.

The Agency's second nonfact exception contends that the Arbitrator committed a "math error" when calculating the number of penalty-pay hours that one grievant worked.[39]

This nonfact exception has merit. The Arbitrator calculated that one of the grievants was entitled to eight hours, or seven and one-half hours if the grievant took a lunch break, of penalty pay.[40] However, the Arbitrator made a math error. The Arbitrator found,[41] and the Agency agrees,[42] that the grievant was entitled to penalty pay starting at 4:00 a.m. until he was released from duty at 9:00 a.m. – a total of five hours, or four and one-half hours if the grievant took a lunch break. Thus, the Arbitrator's subsequent award of eight hours, or seven and one-half hours if the grievant took a lunch break, of penalty pay is clearly erroneous. Moreover, had the Arbitrator properly calculated the grievant's number of hours entitling him to penalty pay, she would have awarded five hours, or four and one-half hours if the grievant took a lunch break. Therefore, a central fact underlying this part of the award is clearly erroneous, but for which the Arbitrator would have reached a different result. Accordingly, we find that this part of the award is based on a nonfact.[43]

Absent the Arbitrator's math error, the number of hours that the grievant worked entitling him to penalty pay is apparent from the record. Accordingly, we modify the award to provide five hours, or four and one-half

[30] Exceptions Br. at 11 (emphasis omitted).
[31] *NFFE, Local 858*, 63 FLRA 227, 230 (2009) (arbitrators do not exceed their authority by resolving issues closely related to issue giving rise to grievance); *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996) (arbitrators do not exceed their authority by addressing issue that is necessary to decide stipulated issue).
[32] Exceptions Br. at 8.
[33] *Id.* at 15-17.
[34] *U.S. Dep't of VA Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[35] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012) (*IRS*).
[36] Exceptions Br. at 15 (citing Joint Exs. D-F).
[37] Exceptions Form at 14.
[38] *IRS*, 67 FLRA at 103.
[39] Exceptions Br. at 16-17.
[40] Award at 21.
[41] *Id.* at 18.
[42] Exceptions Br. at 16.
[43] *See DOD, Defense Commissary Agency*, 65 FLRA 310, 310-11 (2010) (finding nonfact where arbitrator sustained grievance after mistakenly concluding that agency admitted "favoritism"); *U.S. DOD, Def. Logistics Agency*, 62 FLRA 134, 136 (2007) (finding nonfact where arbitrator based award on memorandum of agreement after mistakenly concluding that union was party to that agreement).

hours if the grievant took a lunch break, of penalty pay to the grievant at issue.[44]

Accordingly, we deny the Agency's first nonfact exception, grant its second nonfact exception, and modify the award.

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

The Agency contends that the award fails to draw its essence from Section 4.9(a) of the parties' agreement.[45] Specifically, the Agency argues that the Arbitrator erroneously interpreted Section 4.9(a) to mean that the rest period does not begin when an employee is released from duty, but upon beginning the sixteenth hour of work.[46] According to the Agency, Section 4.9(a) provides that the rest period begins after being "release[d] from duty."[47]

The Agency's essence exception is substantively the same as the Agency's second exceeds-authority exception, concerning the Arbitrator's finding regarding when employee rest periods begin under Section 4.9(a). For the reasons discussed in Section III.A., above, we find that the Arbitrator's findings on this subject are not irrational, unfounded, implausible, or in manifest disregard of the agreement.

The Agency's additional claims that the findings lead to absurd results do not alter our conclusion that the Agency's essence exception lacks merit. The Agency argues that the Arbitrator's interpretation of Section 4.9(a) renders the second sentence of Section 4.9(a), concerning administrative leave for employees taking rest periods that extend into the next duty day, "unnecessary."[48] The Agency argues that if an employee's rest period begins after the employee has worked sixteen hours in a day, then the eight-hour rest period to which the employee would be entitled would necessarily end "precisely at the beginning of the next duty day."[49]

The Agency's argument ignores situations where the sixteen hours that an employee works in a twenty-four hour period are non-consecutive. This was the situation of one of the grievants. The grievant finished his ten-hour work day at 5:00 p.m. He was then called back to work at 10:00 p.m., and completed his sixteenth hour of work at 4:00 a.m. At that point, the grievant was entitled to an eight-hour rest period, which would have extended until noon, well after the grievant's normal duty day was scheduled to begin at 6:30 a.m. The Agency's argument therefore does not support its essence exception.

The Agency's second absurd-results argument also does not support its essence exception. The Agency argues that the Arbitrator's interpretation of Section 4.9(a) permits the Agency to work an employee sixteen hours in a day, as well as through the employee's subsequent eight-hour rest period, "into [the employee's] next duty day, without rest."[50]

The Agency's second argument is also unpersuasive. Although it would probably be absurd for an agency to decide to work its employees around the clock without rest, a finding that a contract provision leaves an agency with considerable discretion as to how to manage employees and schedule work does not demonstrate that an arbitrator's contract interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Accordingly, we deny the Agency's essence exception.

D. The award is not so incomplete and ambiguous as to make implementation impossible.

The Agency contends that the award is so incomplete and ambiguous as to make implementation impossible.[51] The Authority will set aside an award that is so "incomplete, ambiguous, or contradictory *as to make implementation of the award impossible*."[52] In order to prevail on this ground, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."[53]

The Agency offers no explanation of how implementation of the award is impossible other than arguments that the Arbitrator: (1) failed to address whether the Agency must compensate the grievants with penalty pay during their rest periods while in a non-duty status;[54] (2) awarded a remedy under a "mistaken belief" that the Agency failed to properly pay the grievants for

[44] *Cf. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270-71 (2015); *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 159 (1995).
[45] Exceptions Br. at 11-14.
[46] *Id.* at 11.
[47] *Id.* at 12 (emphasis omitted) (quoting § 4.9(a) of the parties' agreement) (internal quotation marks omitted).
[48] *Id.* at 13.
[49] *Id.*
[50] *Id.* at 14.
[51] *Id.* at 17-19.
[52] 5 C.F.R. § 2425.6(b)(2)(iii) (emphasis added).
[53] *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011) (citing *NATCA*, 55 FLRA 1025, 1027 (1999)).
[54] Exceptions Br. at 17.

time worked;[55] and (3) interpreted Section 4.9(a) in a "bizarre" way.[56] As the Agency relies on arguments previously rejected, we deny these exceptions as well.

IV. Decision

We deny, in part, and grant, in part, the Agency's exceptions, and we modify the award accordingly. We deny the Agency's remaining exceptions.

[55] *Id.* at 18.
[56] *Id.* at 19.

Member Pizzella, dissenting:

The famed philosopher Voltaire once said, "[j]udge a man by his questions rather than his answers."[1]

In this case, Arbitrator Kathy L. Eisenmenger's award *does not address* the questions that the parties intended for her to resolve. Indeed, Arbitrator Eisenmenger resolved a dispute; but she did not resolve *the* dispute that the parties submitted to her.

As a consequence, both parties disagree with the award. The majority, however, embraces it.

But, as I have previously cautioned, the Authority should "refrain[] from endorsing" awards that are "'circular[]' and 'incoherent.'"[2] It seems to me that the only point the Arbitrator made abundantly clear is that she fundamentally misunderstood the parties' dispute.[3]

The actual dispute in this case concerns a contract provision that entitles employees to an eight-hour rest period if they work sixteen hours in a twenty-four-hour period. The provision also provides that if the Agency requires an employee to perform work during the rest period, the Agency will pay the employee a penalty rate that is two-and-one-half times his or her regular rate of pay.

The parties – the Department of Interior, Bureau of Reclamation of the Great Plains Region (Agency) and the International Brotherhood of Electrical Workers, Local 1759 (Union) – agreed that when the seventeenth hour of work began, employees were entitled to penalty

[1] http://www.brainyquote.com/quotes/authors/v/voltaire.html.
[2] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (alterations in original) (quoting *U.S. DOJ, Fed. BOP v. FLRA*, 654 F.3d 91, 96-97 (D.C. Cir. 2011)).
[3] *Compare* Award at 2 ("Each of the three (3)[] employees at issue should be paid [the] penalty rate of 2 ½ [two-and-one-half] times the basic rate for the *entire* eight (8)[] hour rest period." (emphasis added)) (quoting Union's position included in parties joint stipulated issue stating Union's presented position) (emphasis added), *and* Union's Post-Hr'g Br. at 5 ("If the Agency or the Union had intended for the penalty pay rate of [two-and-one-half] 2 ½ time the basic rate to cease as soon as the employee was released from duty, that language would have been utilized in SECTION 4.9."), *with* Agency Post-Hr'g Br. at 4 ("The CBA Does Not Provide For A Paid Rest Period."), *and*; *id.* at 6 (acknowledging that CBA provides for a "penalty rate of [two-and-one-half]2 ½ time the basic rate for work performed after 16 [sixteen] hours").

pay.[4] On this point, the parties submitted, as a *joint* exhibit, timecards that showed *employees were, in fact, paid* at the penalty rate *whenever they worked more than sixteen hours*.[5]

The parties disagreed on how many hours of penalty pay should be paid if the employee began working and then was "released." The Agency argued that, *after working sixteen hours*, an employee would be paid the penalty rate *until* the employee was *released*, at which point the employee would be entitled to eight hours of rest.[6] The Union argued that the rest period began *after the end of the sixteenth hour* of work and that if an employee performed *any work during the rest period* the employee was eligible to receive a full eight hours of penalty pay.[7]

Apparently, the Arbitrator missed what the disagreement was about because she ordered the Agency to pay penalty pay – at two-and-one-half times regular pay – for the hours the grievants actually worked in excess of sixteen hours[8] – the point on which the Agency and Union had always agreed and for which the Agency had already paid the grievants.

I recognize that our review of an Arbitrator's interpretation of the stipulated issue is highly deferential,[9] but if that standard means anything, it must apply where it is clear that the Arbitrator's award is nonresponsive to the dispute which the parties submitted to the Arbitrator.

Unlike the majority, therefore, I would conclude that the Arbitrator exceeded her authority when she resolved an issue that *was not* submitted to her and failed to resolve the issue that *was*.

Without a doubt, it is clear that both parties could have done a better job explaining the precise nature of their dispute. But the fact remains, the Arbitrator concluded that the Agency *did not pay* the employees at the penalty rate for time in excess of sixteen hours, even though, as noted above, the Agency and Union agreed that the grievants were entitled to some amount of penalty pay[10] and were paid for the hours that they worked.[11]

Thus, I find the majority's conclusion that the Agency's exception merely "challenges the Arbitrator's evaluation of the evidence"[12] baffling. Challenged or not, the Arbitrator's award is based on a finding that is not factual.

In any sense, that is a nonfact.

Thank you.

[4] *Compare* Award at 2 ("Each of the three [] employees at issue should be paid [the] penalty rate of [two-and-one-half] times the basic rate for the *entire* eight[-]hour rest period." (emphasis added)) (stating the Union's presented position), *and* Exceptions, Attach. 2 (Union's Post-Hr'g Br.) at 5 ("If the Agency or the Union had intended for the penalty pay rate . . . to cease as soon as the employee was released from duty, that language would have been utilized in S[ection] 4.9 [of the parties' agreement]."), *with id.*, Attach. 3 (Agency's Post-Hr'g Br.) at 4 ("The [parties' agreement] [d]oes [n]ot [p]rovide [f]or [a] [p]aid [r]est [p]eriod."), *and id.* at 6 (acknowledging that parties' agreement provides for a "penalty rate . . . for any work performed after [sixteen] hours").

[5] Exceptions, Attachs. 7-9.

[6] Agency's Post-Hr'g Br. at 4.

[7] Union's Post-Hr'g Br. at 5

[8] Award at 21.

[9] *E.g.*, *U.S. Dep't of the Army, Army Tank-Auto. Command*, 67 FLRA 14, 17 (2012).

[10] Agency's Post-Hr'g Br. at 6; Union's Post-Hr'g Br. at 5.

[11] Exceptions, Attachs. 7-9; *see also* Exceptions, Attach. 12 (Step-Three Grievance Response) at 3-4.

[12] Majority at 7.