

69 FLRA No. 16

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3955
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

0-AR-5139

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DECISION

December 8, 2015

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

I. Statement of the Case

Arbitrator Richard D. Sambuco issued an award finding that the Agency committed violations of the Fair Labor Standards Act (FLSA)¹ and he ordered the Agency to pay liquidated damages to the grievants for all such violations that occurred after May 29, 2014. We must decide two questions. First, we must decide whether the award is contrary to the FLSA because the Arbitrator limited the period of recovery to less than two years. Because the minimum statute of limitations for a violation of the FLSA is two years, the answer to this question is yes.

Second, we must decide whether the grievants should be permitted to recover liquidated damages dating back three years, instead of two years, depending on the willfulness of the Agency's FLSA violations. Because the Arbitrator did not make any factual findings regarding whether the Agency's actions were willful, we remand the case to the parties for resubmission to the Arbitrator, absent settlement, to make such a determination.

¹ 29 U.S.C. §§ 201-19.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of all bargaining-unit employees alleging that "[t]he Agency has failed to properly pay bargaining[-]unit employees . . . for overtime worked."² The Agency denied the grievance, and the parties proceeded to arbitration.

The Arbitrator found that the Agency had failed on multiple occasions to compensate the grievants for overtime worked, and that this constituted a violation of the FLSA and its implementing regulations.³ The Arbitrator then assessed whether the grievants were entitled, under 29 U.S.C. § 216(c), to collect liquidated damages equal to the amount of overtime compensation that was not timely paid. The Arbitrator found that the Agency had not demonstrated that its violations of the FLSA were in good faith, or that it had reasonable grounds for believing that it was complying with the law. Accordingly, the Arbitrator ordered the Agency to pay the grievants liquidated damages equal to all overtime compensation not timely paid, dating back to May 29, 2014, the date on which the Agency denied the Union's grievance.

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

III. Analysis and Conclusions

The Union argues that the Arbitrator's award is contrary to law.⁴ 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.⁵ 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.⁶ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.⁷

² Award at 2.

³ *Id.* at 24 (citing 29 C.F.R. § 778.106).

⁴ Exceptions at 2-3.

⁵ *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994).

⁶ *Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

⁷ *U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).

- A. The award is contrary to 29 U.S.C. § 255(a).

The Union argues that the Arbitrator's award is contrary to the FLSA's statute of limitations because the award limits the period of recovery for liquidated damages to less than two years.⁸ Section 255(a) of Chapter 29 of the U.S. Code establishes that any action brought under the FLSA "may be commenced within two years after the cause of action accrued . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."⁹ The Authority has previously held that, at least where there is no indication that the parties have agreed contractually to backpay recovery periods different from those in 29 U.S.C. § 255(a),¹⁰ an "award limiting the recovery period for backpay to the filing date of the grievance[] is contrary to 29 U.S.C § 255(a)."¹¹

Here, the Arbitrator limited the recovery period to slightly more than one year – from May 29, 2014, the date that the Agency responded to the Union's grievance, to June 19, 2015, the date that the award issued. However, the parties do not claim, and the Arbitrator did not find, that they agreed contractually to a recovery period different from the recovery windows set forth in 29 U.S.C. § 255(a). Therefore, the award is contrary to 29 U.S.C. § 255(a), as it violates the grievants' statutory right to recover liquidated damages for up to a two-year period. As such, we grant the Union's exception that the award is contrary to law insofar as the award restricts the recovery period for liquidated damages arising from violations of the FLSA to less than two years.

- B. We remand the award to the parties for resubmission to the Arbitrator to determine whether the Agency willfully violated the FLSA.

The Union also claims that the award is contrary to law because the Arbitrator should have ordered the grievants to collect liquidated damages for a period dating back three years.¹² Section 255(a) of Chapter 29 of the U.S. Code provides that if an employer "willful[ly]" violates the FLSA, the statute of limitations for recovering liquidated damages is three years.¹³

⁸ Exceptions at 3.

⁹ 29 U.S.C. § 255(a).

¹⁰ *AFGE, Local 987*, 66 FLRA 143, 147 (2011) (citations omitted); *AFGE, Local 1741*, 62 FLRA 113, 117 (2007) (citations omitted).

¹¹ *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of NOAA Corps Operations, Atl. Marine Ctr., Norfolk, Va.*, 55 FLRA 816, 821 (1999) (*NOAA Norfolk*) (citing *NTEU*, 53 FLRA 1469, 1488 (1998)).

¹² Exceptions at 3.

¹³ 29 U.S.C. § 255(a).

Violations of the FLSA are "willful" if the employer knew or showed reckless disregard for whether its conduct was prohibited by the FLSA.¹⁴ If the employer acts unreasonably, but not recklessly, in determining its obligations under the FLSA, then the resulting actions are not willful.¹⁵ An employer's violation is not willful if the employer made efforts to keep abreast of FLSA requirements but failed to do so because of mistaken interpretations of the law.¹⁶

Here, the Union claims that "the Arbitrator found that the Agency's actions were willful."¹⁷ However, the Union does not cite to any portion of the award to support this conclusion, and a review of the award demonstrates that the Arbitrator did not make such a finding. Although the Arbitrator found that the Agency failed to act in good faith,¹⁸ this finding pertained to whether the Agency had established an affirmative defense to avoid payment of liquidated damages under the FLSA.¹⁹

The Authority has previously held that the "willfulness" standard set forth in 29 U.S.C. § 255(a) is legally distinct from the "good-faith" affirmative defense contained in 29 U.S.C. § 260.²⁰ Therefore, the Arbitrator's finding that the Agency did not act in good faith under 29 U.S.C. § 260 does not resolve whether the Agency acted willfully, and the Union is incorrect in asserting that the Arbitrator made such a finding. Rather, the Arbitrator made no finding as to whether the Agency's violations of the FLSA were committed willfully.

The Authority's ability to review de novo the legal conclusions in an award depends on the sufficiency of the record.²¹ When an award fails to contain factual findings necessary to assess an arbitrator's legal conclusions, and the findings cannot be derived from the

¹⁴ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 60 FLRA 298, 300 (2004) (*BOP Terre Haute*) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

¹⁵ *Id.* (citing *McLaughlin*, 486 U.S. at 135 n.13; *Lopez v. Corporación Azucarera de P.R.*, 938 F.2d 1510, 1515 (1st Cir. 1991)).

¹⁶ *Id.* (citing *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 (5th Cir. 1990); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, VA.*, 57 FLRA 559, 564 (2001)).

¹⁷ Exceptions at 2.

¹⁸ Award at 28-30.

¹⁹ 29 U.S.C. § 260 (setting forth affirmative defense for avoiding liquidated damages under the FLSA); see *AFGE, Local 2571*, 67 FLRA 593, 594 (2014) (*Local 2571*) (citing *AFGE, Local 1662*, 66 FLRA 925, 927 (2012)).

²⁰ *Local 2571*, 67 FLRA at 594.

²¹ *NOAA Norfolk*, 55 FLRA at 821 (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).

record, the award will be set aside and the case remanded to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made.²²

As set forth above, the Arbitrator did not make any finding concerning willfulness. The Authority has previously remanded cases where the arbitrator did not make a determination regarding whether the agency's violation of the FLSA was willful under 29 U.S.C. § 255(a).²³ Therefore, consistent with this precedent, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a determination as to whether the Agency acted willfully when it violated the FLSA.

IV. Decision

We grant the Union's exception that the award is contrary to law insofar as it limited the period for recovery of liquidated damages to less than two years. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a determination as to whether the Agency's actions were willful.

²² *Id.*

²³ *See id.*; *see also BOP Terre Haute*, 60 FLRA at 300; *NTEU*, 53 FLRA 1469, 1495 (1998).