69 FLRA No. 33

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
ATWATER, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1242
(Union)

0-AR-5081
(68 FLRA 857 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

March 11, 2016

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

I. Statement of the Case

Arbitrator Ronald Hoh found that the Agency violated the Fair Labor Standards Act (FLSA)[1] when it did not pay certain prison employees (officers) for performing particular activities before and after their shifts. As relevant here, the Arbitrator directed the Agency to pay the officers for the time they spent traveling to and from their posts through the secure main corridor of the prison (the main corridor). The Agency filed exceptions to the award, and, in *U.S. DOJ, Federal BOP, U.S. Penitentiary, Atwater, California* (*Atwater*),[2] the Authority sustained the Agency's exceptions, in part. Specifically, the Authority concluded that the Arbitrator had not found the officers' travel through the main corridor to be a "principal activity" under the FLSA,[3] and rejected the Arbitrator's conclusion that the officers' "vigilance" during the travel was sufficient to make the travel compensable.[4]

The Union has now filed a motion for reconsideration (motion) of *Atwater* under § 2429.17 of the Authority's Regulations,[5] arguing that the Authority "relied on erroneous factual findings that tainted its legal analysis and caused it to reach the wrong result."[6] The question before us is whether the Union has established extraordinary circumstances warranting reconsideration of *Atwater*. The Union's arguments challenge alleged findings that the Authority did not actually make in *Atwater*, attempt to relitigate the Authority's conclusions in *Atwater*, or do not otherwise establish extraordinary circumstances warranting reconsideration. Therefore, the answer is no, and we deny the motion.

II. Background

The Authority more fully detailed the circumstances of this dispute in *Atwater*,[7] so this order discusses only those aspects of the case that are pertinent to the motion.

A. Arbitrator's Award

The Union filed a grievance alleging that the Agency improperly failed to pay officers for compensable activities performed before and after scheduled shifts. The parties submitted the grievance to arbitration.

Describing the legal framework that he used in determining the compensability of the officers' pre-shift and post-shift activities – and citing case law and regulations that apply in the private sector – the Arbitrator stated that any preparatory activity that is "indispensable and closely related" to an employee's principal activities is itself a compensable principal activity.[8]

Applying that framework, the Arbitrator assessed whether certain officers were entitled to compensation for the time that they spent traveling (travel time) between the entrance to the main corridor and their posts. The Arbitrator found that "maintaining vigilance and monitoring inmate activity while traveling" within the main corridor constituted "work," even if no inmates were present.[9] Accordingly, the Arbitrator concluded that the travel time was compensable because "vigilance" while traveling in the main corridor was "an integral and indispensable part of the [officers'] principal

[1] 29 U.S.C. §§ 201-219.
[2] 68 FLRA 857 (2015) (Member DuBester dissenting in part).
[3] *Id.* at 860.
[4] *Id.* (quoting Award at 67).
[5] 5 C.F.R. § 2429.17.
[6] Mot. at 3.
[7] 68 FLRA at 857-58.
[8] Award at 45-46 (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005); *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1955); 29 C.F.R. § 785.38).
[9] *Id.* at 67.

activities"[10] and because an officer in the main corridor "must be prepared to respond to emergencies, inmate assaults, and similar inmate conduct, in his/her overall function of maintaining the safety and security of the [p]rison."[11] The Arbitrator awarded the officers backpay.

The Arbitrator also made findings concerning a variety of officers and the compensability of their pre- and post-shift activities. In particular, he stated that, "although *emergency situations are not specifically covered by the* [*awarded*] *overtime amounts*, it is clear that at least in some of those circumstances, employees have not been compensated for such emergency responses" (the emergency-response finding).[12] He directed the parties to "discuss this area and endeavor to remedy those non-paid emergency[-]circumstance responses,"[13] and he retained jurisdiction in the event the parties could not reach agreement on those claims (the emergency-response remedy).[14]

The Agency filed exceptions to the award, alleging, in pertinent part, that the award was contrary to the FLSA, as amended by the Portal-to-Portal Act (the Act),[15] as well as the FLSA's implementing regulations,[16] because the Arbitrator found that the officers' vigilance made the travel time compensable.[17] The exceptions did not challenge the emergency-response finding or the emergency-response remedy. The Union filed an opposition to the Agency's exceptions.

B. Authority's Decision in *Atwater*

In *Atwater*, as relevant here, the Authority found that the award of backpay for the officers' travel time was contrary to the FLSA and the Act.[18] The Authority stated that, under the Act, "the time that an employee spends traveling to his or her post is not compensable unless the employee is required to engage in a principal activity during that travel."[19] And the Authority found that the Arbitrator *did not determine* that the officers engaged in a principal activity during the travel time.[20] That is, the Authority rejected the Union's argument that the Arbitrator found that "remaining constantly alert and vigilant is the [officers'] principal activity."[21]

The Authority also explained that the Arbitrator found that officers' vigilance while traveling was "integral and indispensable" but did not find that travel, itself, was a principal activity.[22] In this regard, the Authority explained that Office of Personnel Management regulations do not transform pre-shift or post-shift activities into a principal activity even if those activities are "closely related" and "indispensable" to a principal activity.[23]

Additionally, the Authority noted that it has held that "the dangerous nature of . . . prisons" does not transform employees' vigilance into a principal activity.[24] Accordingly, the Authority rejected the Union's argument that "maintaining vigilance in secure areas of the prison" made the officers' travel time compensable.[25]

Further, the Authority rejected the Union's reliance on *U.S. DOJ, Federal BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman*).[26] In this regard, the Authority determined that certain of "[t]he Arbitrator's findings distinguish [*Atwater*] from *Coleman*."[27] Specifically, the Authority stated that: (1) "while the Arbitrator found that 'violent circumstances and inmate misconduct have occurred' and that officers 'may encounter inmates' when passing through the main corridor, he did not find that officers en route to their posts have had to *address* such circumstances or misconduct"; and (2) "although the Arbitrator . . . found the officers' 'vigilance' while traveling to be 'integral and indispensable' to officers' principal activities, he did not find the travel to be a principal activity itself."[28] Further, the Authority noted the Arbitrator's finding that certain other officers (main-corridor officers) continuously staff the main corridor, and the Authority stated that "it is the primary duty of *those* officers – not the officers en route to their posts – to respond to any violent circumstances or inmate misconduct."[29]

Moreover, the Authority noted that the Agency "concede[d] that 'if an employee is (as opposed to might be) called upon to respond to an emergency, . . . then the Agency would pay that employee from the time of that response forward, since there would be a principal

[10] *Id.*
[11] *Id.*
[12] *Id.* at 71 (emphasis added).
[13] *Id.*
[14] *Id.* at 71-72.
[15] 29 U.S.C. §§ 251-262.
[16] *Atwater*, 68 FLRA at 858 (citing Exceptions at 7-9, 14-15).
[17] *Id.* at 859.
[18] *Id.* at 859-60.
[19] *Id.* at 859 (citing 29 U.S.C. § 254(a); *U.S. DOJ, Fed. BOP, Metro Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 428 (2009)).
[20] *Id.* at 860.
[21] Opp'n at 13.
[22] *Atwater*, 68 FLRA at 860.
[23] *Id.* at 858 (citing 5 C.F.R. § 550.112(b); *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014)).
[24] *Id.* at 859 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1000 (2011) (*Allenwood*) (Member DuBester dissenting in part); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329-30 (2003) (*Terre Haute*)).
[25] *Id.* (citing Opp'n at 14-15).
[26] 68 FLRA 52 (2014) (Member Pizzella concurring in part, dissenting in part).
[27] *Atwater*, 68 FLRA at 860.
[28] *Id.* (emphasis added) (citations omitted).
[29] *Id.*

activity once that involvement began.'"[30] And the Authority noted that this approach – paying employees for any principal activities that they perform during travel – would be consistent with the Act.[31] However, the Authority distinguished that approach from the Arbitrator's instruction to pay officers for travel time based upon "the mere possibility that the officers *could* be called upon to perform a principal duty while traveling."[32]

Based on the foregoing, the Authority held that the Arbitrator's award of compensation for travel time was contrary to law.[33]

The Union then filed this motion for reconsideration of *Atwater*.

III. Analysis and Conclusion: We deny the Union's motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.[34] The Authority has repeatedly recognized that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[35] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[36] But attempts to relitigate conclusions that the Authority has reached are insufficient to establish extraordinary circumstances warranting reconsideration.[37]

The Union challenges what it characterizes as "erroneous factual findings" by the Authority in *Atwater*.[38]

First, the Union argues that: (1) contrary to the Authority's conclusions, the Arbitrator found that travel in the main corridor is "[r]isky" because "employees encounter inmates when they enter into the [m]ain [c]orridor and that violent circumstances have occurred during the shift[-]exchange times";[39] (2) "[t]he fact that [a main-corridor] officer patrols and monitors the main corridor has no bearing on whether staff encounter violence,"[40] as it was "undisputed in the record that all employees are required to respond to violence or inmate misconduct anytime they are present in the prison and when they are en route to and from their posts";[41] and (3) the Authority erred in finding that officers "[a]re [a]lways [p]aid [f]or [r]esponding" to emergencies in the main corridor.[42]

But the Authority did not make the findings that the Union challenges. Regarding violence in the main corridor, the Authority made no finding that travel in that corridor is not risky. In fact, the Authority acknowledged that "*the Arbitrator found* that 'violent circumstances . . . *have occurred*.'"[43] As to the Union's second argument, the Authority did not find that the presence of main-corridor officers indicated that the officers en route to their posts do not *encounter* violence or would not respond to violence *if* they encountered it; the Authority only found that responding to such violence was the "primary duty of" the main-corridor officers, not of the officers en route to their posts.[44] Further, the Authority did not find that the Agency "[a]lways [p]aid" officers for responding to emergencies.[45] Rather, the Authority noted that paying officers for any travel time that occurred after a response to an emergency would be consistent with the Act,[46] and that the Agency stated that it *would* pay officers "from the time of that response forward, since there would be a principal activity once that involvement began."[47] Because the Union's arguments challenge alleged findings that the Authority did not actually make, they do not establish extraordinary circumstances warranting reconsideration.[48]

Second, the Union argues that the Authority erred by allegedly "[d]isregard[ing] [t]he [r]ecord [e]vidence" that officers have addressed inmate

[30] *Id.* (citation omitted).
[31] *Id.* (citing *Reich v. N.Y.C. Transit Auth.*, 45 F.3d 646, 651-52 (2d Cir. 1995) (*Reich*)).
[32] *Id.* (citing *Reich*, 45 F.3d at 651-52; *Allenwood*, 65 FLRA at 1000; *Terre Haute*, 58 FLRA at 330).
[33] *Id.*
[34] 5 C.F.R. § 2429.17.
[35] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000).
[36] *E.g.*, *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[37] *E.g.*, *U.S. Dep't of HUD*, 69 FLRA 60, 63 (2015) (*HUD*) (Member Pizzella dissenting); *Bremerton Metal Trades Council*, 64 FLRA 543, 544-45 (2010) (*Bremerton*) (Member DuBester concurring).
[38] Mot. at 3.
[39] *Id.* at 6.
[40] *Id.* at 7.
[41] *Id.* at 7-8.
[42] *Id.* at 11.
[43] *Atwater*, 68 FLRA at 860 (emphasis added) (citations omitted).
[44] *Id.* (noting Arbitrator's finding that main-corridor officers "'patrol and monitor for anything that happens' in the main corridor" (quoting Award at 14)).
[45] Mot. at 11.
[46] *Atwater*, 68 FLRA at 860 (citing *Reich*, 45 F.3d at 651-52).
[47] *Id.* (citation omitted).
[48] *See, e.g.*, *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 52 FLRA 694, 698 (1996) (arguments that the Authority made a finding that it did not make do not establish extraordinary circumstances warranting reconsideration); *Norfolk Naval Shipyard*, 10 FLRA 685, 686 (1982) (same).

misconduct in the main corridor.[49] In addition, in other sections of its motion, the Union: (1) quotes the Arbitrator's finding that, "[o]nce employees . . . clear the [c]ontrol [c]enter,"[50] with the exceptions of the morning shift and "similar times when no inmates are present,"[51] the main corridor is the "first time officers come upon inmates[, and] . . . violent circumstances and inmate misconduct have occurred in the [m]ain [c]orridor";[52] and (2) notes the Arbitrator's emergency-response finding.[53] But the Arbitrator made no explicit findings that the officers have *addressed* inmate misconduct in the main corridor. With regard to the Arbitrator's quoted finding, even assuming that finding applies to the officers at issue – i.e., those whose compensable workday had *not* already started with a stop at the control center[54] – it does not equate to a finding that the officers have *addressed* inmate misconduct in the main corridor. And there is no basis for finding that the emergency-circumstances finding applies to officers addressing inmate misconduct in the main corridor – particularly given the Arbitrator's statement that the "emergency situations" that he was addressing were "not specifically covered by the [awarded] overtime amounts" that the Agency excepted to in *Atwater*.[55] Because the Arbitrator did not explicitly find that the officers at issue addressed inmate misconduct in the main corridor, there is no basis for finding that the Arbitrator credited the record evidence that the Union cites – or that the Authority erroneously disregarded it. Therefore, these Union arguments provide no basis for granting reconsideration.

Third, the Union argues that the Authority erred by distinguishing *Coleman*.[56] In *Atwater*, the Authority distinguished *Coleman* based on the arbitrator's finding in *Coleman* that officers' travel was itself a principal activity.[57] The Authority emphasized that, in contrast, the Arbitrator in *Atwater* found only that "the officers' 'vigilance' while traveling [was] 'integral and indispensable' to officers' principal activities."[58] The Union asserts that by making this distinction, the Authority "misinterpreted the Arbitrator."[59] Specifically, the Union claims that the Arbitrator found that vigilance was a principal activity because he stated that vigilance is an "integral and indispensable *part of the employees' principal activities*."[60] However, the Union's arguments attempt to relitigate the claim that the Authority rejected in *Atwater* – specifically, the claim that the Arbitrator's finding that vigilance was integral and indispensable was the same as finding it was a principal activity.[61] Attempts to relitigate the conclusions in *Atwater* do not establish extraordinary circumstances warranting reconsideration.[62] Therefore, the Union's argument provides no basis for granting reconsideration.

The Union also asserts that, because *Coleman* issued after the Arbitrator issued his award, we should remand the case to the Arbitrator so that he can "clarify his factual findings in light of . . . *Coleman*."[63] In particular, the Union argues that the Arbitrator did not know that he had to make specific findings regarding officers engaging with inmates, as the arbitrator did in *Coleman*, in order for the Authority to find the time compensable.[64] But the finding of a principal activity versus an integral and indispensable activity is the crux of the difference between *Coleman* and *Atwater*. And there is no basis for remanding the award to permit the Arbitrator to reach a *different* legal conclusion than the one that he already made – specifically, that the officers' travel time is a principal activity, rather than an activity which is integral and indispensable to a principal activity. Moreover, the requirement that a principal activity must be performed during travel in order for that travel to be compensable existed before both *Coleman* and the Arbitrator's award in *Atwater*.[65] In that regard, the Authority in *Atwater* acted in accordance with precedent by resolving the exceptions "based on the law at the time [that *Atwater* was] decided"[66] – including *Coleman*. For these reasons, we find no basis for remanding this case for further findings in light of *Coleman*.

For the foregoing reasons, the Union's arguments provide no basis for reconsidering *Atwater* or remanding for further findings.

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[49] Mot. at 9.
[50] *Id.* at 6 (quoting Award at 11).
[51] *Id.* (quoting Award at 11).
[52] *Id.* (quoting Award at 11).
[53] *Id.* at 2 (quoting Award at 71).
[54] *See Atwater*, 68 FLRA at 857 (noting that the officers' "workday begins at their respective duty posts within the prison," in contrast to other employees "whose workday begins at the . . . control center").
[55] Award at 71.
[56] Mot. at 6, 11.
[57] *Atwater*, 68 FLRA at 860 (citing *Coleman*, 68 FLRA at 53, 55-56).
[58] *Id.* (quoting Award at 67).
[59] Mot. at 5.
[60] *Id.* at 4 (emphasis added in Mot.) (quoting Award at 63-64).
[61] *Compare* Opp'n at 12-13 (arguing that, under *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 517-19 (2014), the Arbitrator's findings demonstrate that officers' vigilance is compensable as a principal activity), *with* Mot. at 4-6 (same).
[62] *See, e.g.*, *HUD*, 69 FLRA at 63-64; *Bremerton*, 64 FLRA at 544-45.
[63] Mot. at 13.
[64] *Id.* (citing *Atwater*, 68 FLRA at 860 (citing *Coleman*, 68 FLRA at 53)).
[65] *See, e.g.*, *Allenwood*, 65 FLRA at 1000; *Terre Haute*, 58 FLRA at 329-30.
[66] *AFGE, AFL-CIO, Council of Marine Corps Locals, Council 240*, 39 FLRA 839, 845 (1991) (citing *Pan. Canal Comm'n*, 39 FLRA 274, 277 (1991)); *see also NFFE, Local 2119*, 49 FLRA 151, 157 (1994).

IV. Order

We deny the Union's motion for reconsideration.

Member DuBester, dissenting in part:

I disagree with my colleagues' decision to deny the Union's motion for reconsideration. I would grant the motion in part and remand the case to the Arbitrator. Such a remand would provide the Arbitrator the opportunity to clarify whether the facts of this case – underlying his findings concerning violence in the main corridor – meet the standard the majority derives from the Authority's *U.S. DOJ, Federal BOP, U.S. Penitentiary, Coleman II, Florida* (*Coleman*) case,[1] for determining whether certain activities are compensable under the Fair Labor Standards Act (FLSA).

The majority stated that standard in their original decision in this case: "In *Coleman*, an arbitrator found that once certain prison employees entered a particular secure area, they began performing their principal duties because they were in the presence of inmates, they were called upon to restrain inmates, and incidents involving inmates '[did] occur' inside the area."[2] Distinguishing the instant case, the majority continued: "[I]n *Coleman*, unlike here, the arbitrator found that '[o]n one occasion[,] [an officer] personally assisted staff in restraining inmates who'd been fighting while he was walking in the corridor.'"[3]

In my dissent, I criticized – as overly legalistic – and unreal – the majority's reliance on an arbitral finding of "one occasion" when an officer dealt with inmate violence, in order to find the activity generally compensable under the FLSA.[4] But even applying the majority's narrow "one-occasion" standard, there is good reason to find that it is satisfied in this case. In this regard, the Union asserts in its motion for reconsideration, citing the record, that this case is not distinguishable from *Coleman*.[5] And the Union identifies specific record evidence that employees have had to address violence or misconduct in the main corridor while en route to their posts.[6]

The Arbitrator made findings concerning inmate violence in the main corridor. Specifically, the Arbitrator found that "violent circumstances and inmate misconduct have occurred in the [m]ain [c]orridor" during the time employees are en route to their posts.[7] But, the Arbitrator did not identify the specific bases in the record for his findings. So it is not clear what particular parts of the record the Arbitrator relied on, or what his more specific findings would have been, had the Arbitrator decided to address main-corridor-violence issues in more detail under the *Coleman* "one-occasion" standard.

Further, the Arbitrator's failure to address main-corridor-violence issues under the *Coleman* "one-occasion" standard is not a reliable basis for concluding that this case does not satisfy that standard. The parties and the Arbitrator lacked any kind of notice – legal or actual – of the "one-occasion" standard because the Authority issued *Coleman* after the Arbitrator rendered his award (but of course, before the Authority decided this case). In these circumstances, where there is a reasonable basis for concluding that the facts of a case underlying key arbitral findings satisfy the applicable legal standard, as clarified by intervening precedent, extraordinary circumstances are present. Accordingly, a remand for clarification is appropriate. I therefore dissent from the majority's denial of the Union's motion for reconsideration.

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[1] 68 FLRA 52 (2014) (Member Pizzella concurring in part, dissenting in part).

[2] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 68 FLRA 857, 860 (2015) (Member DuBester dissenting in part) (citing *Coleman*, 68 FLRA at 53, 55-56).

[3] *Id.* (quoting *Coleman*, 68 FLRA at 53 (quoting award)).

[4] *Id.* at 862.

[5] Mot. at 9-11.

[6] *Id.*

[7] Award at 12.