69 FLRA No. 28

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
JESUP, GEORGIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3981
(Union)

0-AR-5031

_____

DECISION

January 29, 2016

_____

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

I. Statement of the Case

Arbitrator John C. McCollister found that the Agency violated the Fair Labor Standards Act (FLSA)[1] when it failed to pay certain employees for work performed before and after their assigned shifts. He awarded backpay, but (1) limited recovery to a period that began after the date of the filing of the grievance, (2) declined to apply a three-year recovery period because he found that the Union failed to establish that the Agency's violations were willful, and (3) made no findings regarding liquidated damages. There are eight substantive questions before us.

The first question is whether the Arbitrator exceeded his authority when he failed to address whether two specific activities were compensable under the FLSA. Because the award addressed the parties' stipulated issue, which did not require the Arbitrator to consider those two activities, the answer is no.

The second question is whether the award is based on a nonfact. Because the Union's nonfact arguments either challenge the Arbitrator's legal conclusions or fail to identify factual errors, the answer is no.

The third question is whether the award is contrary to law because the Arbitrator did not award employees compensation for work that the Agency allegedly "suffered or permitted."[2] Because the record does not provide a sufficient basis for us to determine whether the award is contrary to law in this regard, we remand this portion of the award.

The fourth question is whether the award is contrary to law because the Arbitrator allegedly averaged the varying amounts of time employees spent performing compensable activities when he awarded backpay. Because there is no basis for finding that the Arbitrator used averaging to determine the amounts of overtime compensation that he awarded, the answer is no.

The fifth question is whether the Arbitrator's failure to award liquidated damages is contrary to law. Because the Agency has not established that it acted with a good faith, reasonable belief that it complied with the FLSA, the answer is yes.

The sixth question is whether limiting the recovery to a period that began after the date of the filing of the grievance is contrary to law. Because 29 U.S.C. § 255(a) governs the recovery period in this case, and the award is inconsistent with § 255(a), the answer is yes.

The seventh question is whether, in concluding that the Agency did not willfully violate the FLSA, the Arbitrator erred by: (1) failing to apply the doctrine of collateral estoppel; or (2) applying the wrong standard for evaluating the willfulness of the Agency's conduct. Because the Arbitrator had discretion to determine whether collateral estoppel applied, he did not err as a matter of law in declining to apply it. But the record is insufficient for us to determine whether the Agency's violation was willful. Therefore, we remand this portion of the award.

The eighth question is whether the award of prospective pay is contrary to law. Because we interpret the award as finding that the Arbitrator awarded pay only for overtime work that will actually be performed, the answer is no.

[1] 29 U.S.C. §§ 201-219.

[2] 5 C.F.R. § 551.104.

II. Background and Arbitrator's Award

In August 2011, the Union filed a grievance alleging that the Agency violated the FLSA and the parties' collective-bargaining agreement. According to the Union, the Agency failed to pay certain employees who work in a variety of departments, including food services, for work that they performed before and after assigned shifts. The grievance was unresolved, and it went to arbitration.

In a preliminary award, as relevant here, the Arbitrator rejected the Agency's argument that the grievance was untimely. In this regard, the Arbitrator relied, in part, on the doctrine of "collateral estoppel," and he referred to a prior arbitration award,[3] involving the same parties, in which a different arbitrator had found a grievance timely.[4]

At the arbitration hearing, the parties stipulated to the issue before the Arbitrator as follows: "Did the [Agency] suffer or permit bargaining[-]unit employees to perform compensable work before and/or after their scheduled shifts without compensation in violation of the [FLSA] . . . [?] If so, what is the remedy?"[5]

In the award, however, the Arbitrator framed the parties' issue, in relevant part as: "Over the past three years, were [employees] required to . . . work overtime, with the knowledge of their supervisors? If so, who should be awarded back pay and for how much?"[6]

In resolving this issue, the Arbitrator determined that he must decide whether: (1) "employees who volunteer[ed] to begin their shifts [fifteen] or so minutes early [were] entitled to be paid overtime"; and (2) "employees who must pick up equipment (e.g.[,] radios, batteries, etc.) prior to the beginning of their shifts [should have been] compensated for the time [that they] spent receiving this equipment and walking to their assigned stations."[7]

Regarding the employees who began their shifts early, the Arbitrator found that these employees arrived early in order to permit the coworkers they were relieving to leave early, and to "keep the system moving with a minimum amount of disruption."[8] Further, the Arbitrator rejected the Agency's contention that supervisors were not aware of this practice. Instead, he found that "the conscientious lieutenants whom he met at [the Agency] were those who would be aware as to the comings and goings of all their staff."[9]

But the Arbitrator stated that the employees who arrived early were entitled to compensation only for work that: (1) "[fell] in line with the work for which that employee was hired"; (2) was more than de minimis; and (3) was "ordered by or approved by" the employee's supervisor.[10] Applying this standard, the Arbitrator found that the employees who reported early to their assigned shifts were not ordered to do so by their supervisors. Accordingly, he concluded that "the volunteer gesture of employees to begin a shift [fifteen] minutes early in order to allow fellow workers a 'head start' on leaving for home should not be subject to extra compensation."[11] In reaching this conclusion, the Arbitrator stated that, "in order to promote good employee-employer relations, sometimes everyone benefits if we follow the *spirit* of the law in lieu of the *letter* of the law."[12]

Next, the Arbitrator addressed whether employees who must pick up equipment before their assigned shifts were entitled to overtime pay. The Arbitrator found that the Union met its burden of demonstrating that the Agency should have paid employees for the time that they spent picking up necessary equipment at a control center and the time that they subsequently spent walking from the control center to their assigned duty posts. Accordingly, the Arbitrator concluded that the employees at issue – with the exception of the food-service employees – should be paid an extra fifteen minutes per day (7.5 minutes after entering the facility and another 7.5 minutes to return equipment and to leave the facility).

Regarding the food-service employees, the Arbitrator found that they started their assigned tasks ahead of their scheduled starting times to prepare meals for awaiting inmates, and that this work was performed with the direct knowledge of the employees' supervisors. Thus, the Arbitrator awarded the food-service employees thirty minutes of overtime pay per day.

In addition, the Union argued that it was entitled to three years of backpay because the Agency's FLSA violation was willful. Under the FLSA, an employee may ordinarily recover up to two years of backpay, but may recover up to three years of backpay if the employee

[3] *AFGE, Local 3981*, FMCS No. 04-97225, 2006 WL 2571342 (2006) (La Penna, arb.) (*Local 3981*), *vacated, in part, sub nom., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 63 FLRA 323 (2009).
[4] Union's Opp'n, Ex. 2 (Preliminary Award) at 12-13.
[5] Union's Exceptions, Ex. 2 (Tr.) at 966-67; *accord* Union Opp'n at 9; Agency's Opp'n at 3 n.2.
[6] Award at 7.
[7] *Id.* at 26.
[8] *Id.* at 27.
[9] *Id.* at 32.
[10] *Id.* at 27.
[11] *Id.* at 28.
[12] *Id.*

proves that the employer's FLSA violation was "willful."[13]

The Arbitrator held that if the Agency withheld paying overtime compensation "for what it earnestly believed was a valid reason," then its violation was not willful.[14] Conversely, the Arbitrator held that if the Agency "purposely" violated the FLSA, and, "with malice, knowingly [kept] employees from legitimate remuneration," then the Agency's violation was willful.[15]

Applying this standard, the Arbitrator found that the Union did not meet its burden to prove that the Agency "purposefully disregarded existing rules and/or practices by withholding overtime payments."[16] In addition, the Arbitrator found that "the Agency demonstrated that it had legitimate reasons to question" whether the employees were entitled to overtime pay.[17] Accordingly, the Arbitrator held that the Agency's conduct was not willful, and he awarded the employees "two years" of backpay from July 1, 2012 to June 30, 2014.[18] He also stated that "these overtime payments should continue from July 1, 2014 forward."[19]

Although the Union also sought to recover liquidated damages, the Arbitrator did not address that issue.

The Union filed exceptions to the award, and the Agency filed an opposition. The Agency also filed exceptions to the award, and the Union filed an opposition. Additionally, the Union filed a motion for leave to file, and did file, a reply brief in support of its exceptions (Union's reply). Further, the Agency filed a motion requesting leave to file a response to the Union's reply. The Authority's Office of Case Intake and Publication (CIP) issued an order allowing the Agency to file its response, but stated that the Authority reserved judgment on whether it would consider that response.[20] The Agency filed its response to the Union's reply (Agency's response).

III. Preliminary Matters

As noted above, both parties have requested leave to file, and have filed, supplemental submissions. Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant requests for leave to file "other documents" as deemed appropriate.[21] But the Authority has held that a filing party must show why its supplemental submission should be considered.[22] If the record is sufficient for the Authority to resolve the issues in a case, then the Authority will not consider a party's supplemental submission.[23] In addition, if a party seeks to raise issues that it could have addressed in a previous submission, then the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[24] However, the Authority has granted a party's unopposed request to correct or clarify the record.[25] Similarly, the Authority has exercised its discretion to consider a supplemental submission to the extent that it narrows, or clarifies, the issues before the Authority for resolution.[26]

A. We will assume, without deciding, that the Agency's response is properly before us.

As discussed above, CIP permitted the Agency to file its response, but reserved judgment on whether the Authority would consider it. In the Agency's response, it argues that the Authority should not consider the Union's reply. Because the consideration of the Agency's response would not alter our ultimate decision concerning consideration of the Union's reply, we assume, without deciding, that the response is properly before us.[27]

[13] 29 U.S.C. § 255(a); *see also NTEU*, 53 FLRA 1469, 1488 (1998) (*NTEU I*) (citations omitted).
[14] Award at 34.
[15] *Id.* at 35.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Order at 1.
[21] 5 C.F.R. § 2429.26.
[22] *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012) (*FAA*) (citing *NTEU*, 65 FLRA 302, 305 (2010)).
[23] *NTEU*, 41 FLRA 1241, 1241 n.2 (1991); *see also U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1471 n.6 (1996).
[24] *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015) (citing *U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006)).
[25] *U.S. Dep't of HUD*, 69 FLRA 60, 63 (2015) (citing *NTEU*, 60 FLRA 782, 782 n.1 (2005) (*NTEU II*); *U.S. DOJ, BOP, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1339 n.1 (1996)).
[26] *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 714 (2012) (*IRS*) (citations omitted) (considering an arbitrator's supplemental award where it "clarified" the remedy and "affect[ed] the Authority's resolution" of some of the exceptions); *U.S. DOD, Def. Logistics Agency, Def. Supply Ctr. Columbus, Columbus, Ohio*, 60 FLRA 974, 975-76 (2005) (*DOD*) (considering Office of Personnel Management decision because both parties agreed that it rendered the issue before the Authority moot).
[27] *See, e.g., AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 567 (2015).

B. We will consider, in part, the Union's reply.

In the Union's reply, the Union raises a variety of arguments. Consistent with the principles set forth above, we decline to consider any arguments that the Union already raised, or could have raised, in its exceptions[28] (including its argument that the Arbitrator exceeded his authority by rephrasing the stipulated issue).[29] However, we will consider the Union's reply to the extent that it narrows the issues for our consideration.[30] In this regard, in its reply, the Union effectively withdraws one of its exceptions – specifically, an exception arguing that the Arbitrator exceeded his authority by failing to award liquidated damages.[31] Because this narrows the issues before us, we will consider this portion of the Union's reply. And, consistent with the Union's clarification, we will not consider whether the Arbitrator exceeded his authority by failing to award liquidated damages.[32]

In its reply, the Union suggests another possible narrowing of the issues before us, and we also consider the reply in that regard.[33] Specifically, the Union argues that although the Arbitrator made no determination regarding liquidated damages, "it is possible" that the Arbitrator reserved the question of liquidated damages for a future remedial phase of the proceedings,[34] which might render one of its exceptions premature, i.e., that the denial of liquidated damages is contrary to law.

The Arbitrator awarded certain employees backpay, and he retained jurisdiction in the event that the parties could not agree on which employees were entitled to that remedy.[35] But there is no indication in the award that the Arbitrator intended to make a separate ruling on liquidated damages in the future. Therefore, we find that the Union's contrary-to-law exception regarding liquidated damages is not premature, and we address it in Section IV.C.3. below.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by failing to address: (1) whether employees perform compensable work when they don equipment at the beginning of their shifts before arriving at the control center; and (2) whether certain employees should be compensated for time spent reviewing a "[p]osted [p]icture [f]ile" before and after their shifts.[36] As relevant here, the Authority has held that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration,[37] but do not exceed their authority by failing to address an argument that the parties did not include in their stipulation.[38]

The parties' stipulated issue – whether as initially submitted by the parties or as reframed by the Arbitrator – did not specifically include the two particular activities that the Union lists. As such, there is no basis for finding that the Arbitrator was required to address the alleged compensability of those activities, and the Union has not demonstrated that the Arbitrator exceeded his authority by failing to do so. Accordingly, we deny this exception.

B. The award is not based on a nonfact.

The Union challenges several of the Arbitrator's findings as nonfacts.[39] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[40] A challenge to an arbitrator's legal conclusion does not provide a basis for finding an award is deficient as based on a nonfact.[41]

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[28] *See, e.g.*, Union's Reply at 6 (arguing that the Arbitrator's failure to award liquidated damages is contrary to law).
[29] *Id.* at 2.
[30] *See, e.g.*, *IRS*, 66 FLRA at 714 (citations omitted); *DOD*, 60 FLRA at 975-76.
[31] *See* Union's Reply at 6 n.5 (stating that although the Union "mistakenly included" a related subheading in its exceptions, "the Union did not argue in its [e]xceptions that the Arbitrator exceeded his authority by failing to rule on . . . liquidated damages").
[32] *See, e.g.*, *NTEU II*, 60 FLRA at 782 n.1 (granting party's unopposed request to withdraw exceptions).
[33] *See, e.g.*, *IRS*, 66 FLRA at 714 (citations omitted); *DOD*, 60 FLRA at 975-76.
[34] Union's Reply at 6.
[35] Award at 35-36.
[36] Union's Exceptions at 30-31.
[37] *U.S. Dep't of Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 993 (2015) (*Interior*) (Member Pizzella dissenting); *SPORT Air Traffic Controllers Org.*, 66 FLRA 547, 551 (2012) (*SPORT*).
[38] *Interior*, 68 FLRA at 994 (denying an exceeded-authority exception because the award was responsive to the stipulated issue); *SPORT*, 66 FLRA at 551 (same).
[39] Union's Exceptions at 15, 20-21, 27.
[40] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).
[41] *AFGE, Local 3652*, 68 FLRA 394, 397 (2015) (citing *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015); *Union of Pension Emps.*, 67 FLRA 63, 64-65 (2012)); *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (citing *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000)).

The Union challenges the following as based on nonfacts: (1) the Arbitrator's conclusion that the Agency's actions were not willful;[42] (2) the Arbitrator's conclusion that employees who volunteered to perform work before their shifts were not entitled to overtime compensation;[43] (3) the Arbitrator's failure to apply the doctrine of collateral estoppel in connection with the issue of the Agency's willfulness;[44] and (4) the Arbitrator's failure to award liquidated damages.[45] Because the Union's arguments either challenge the Arbitrator's legal conclusions or fail to identify any *factual* findings that allegedly are clearly erroneous, they provide no basis for finding that the award is based on a nonfact. Accordingly, we deny the Union's nonfact exceptions.

C. The award is contrary to law, in part, and not contrary to law, in part; and we remand the award, in part.

Both parties argue that the award is contrary to law in several respects,[46] which we address separately below.

When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[47] 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.[48] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[49]

However, an arbitrator's failure to apply the correct legal analysis does not render an award contrary to law if "the arbitrator's legal conclusions are consistent with law, based on the underlying factual findings."[50] But the Authority's ability to review de novo an arbitrator's legal conclusions depends on the sufficiency of the record before it.[51] Thus, if an award fails to contain the factual findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and the necessary findings cannot be derived from the record, then the award will be remanded to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made.[52]

1. We remand the portion of the award concerning "suffered and permitted" overtime.

The Union argues that the award is contrary to law because the Arbitrator failed to apply the correct legal standard to determine whether the Agency "suffered or permitted" overtime.[53] Under the FLSA, an agency must compensate non-exempt employees for all hours of work in excess of forty hours in a workweek.[54] In this regard, "hours of work" includes time during which an employee is "suffered or permitted to work."[55] To establish that an employer suffered or permitted employees to work, the employee must show that: (1) the employee performed the work for the benefit of the employer, whether requested or not; (2) the employee's supervisor knew or had reason to believe that the work was being performed; and (3) the supervisor had an opportunity to prevent the work from being performed.[56]

Here, the Arbitrator stated that an employee who arrived early was entitled to compensation only for work that: (1) "[fell] in line with the work for which that employee was hired"; (2) was more than de minimis; and (3) was "ordered by or approved by" the employee's supervisor.[57] Applying this standard, the Arbitrator found that the employees who reported early to their assigned shifts were not ordered to do so by their supervisors. Accordingly, the Arbitrator concluded that employees who arrived early did so voluntarily, and that "the volunteer gesture of employees to begin a shift [fifteen] minutes early in order to allow fellow workers a 'head start' on leaving for home should not be subject to extra compensation."[58] However, as described above, the "suffered or permitted" standard does not turn on whether the supervisor ordered or approved the work. Thus, the Arbitrator applied an incorrect legal analysis in finding that the supervisors' failure to *order* the pre-shift work

[42] Union's Exceptions at 15.
[43] *Id.* at 27.
[44] *Id.* at 20.
[45] *Id.* at 21.
[46] *Id.* at 19-26; Agency's Exceptions at 4-6.
[47] *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)).
[48] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*)).
[49] *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011)).
[50] *NTEU*, 61 FLRA 618, 624 (2006) (*NTEU III*) (internal quotation marks omitted) (citations omitted).
[51] *Local 1437*, 53 FLRA at 1710.
[52] *Id.* (citing *AFGE, Local 1997*, 53 FLRA 342, 347–48 (1997) (*Local 1997*); *AFGE, Local 940*, 52 FLRA 1429 (1997) (*Local 940*); *U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 374 (1996) (*PTO*)).
[53] Union's Exceptions at 28.
[54] 29 U.S.C. § 207(a)(1); *see also AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 722 (2006) (citation omitted).
[55] 5 C.F.R. § 551.401(a)(2) (internal quotation marks omitted).
[56] *Id.* § 551.104; *see also NFFE, Local 858*, 66 FLRA 152, 154 (2011) (citing 5 C.F.R. § 551.104); *AFGE, Local 1741*, 62 FLRA 113, 120 n.20 (2007) (citing 5 C.F.R. § 551.104).
[57] Award at 27.
[58] *Id.* at 28.

ended the inquiry into whether that work was compensable.

Some of the Arbitrator's findings support the conclusion that Agency supervisors knew or had reason to believe that work for the benefit of the Agency was being performed when employees arrived early to work their assigned shifts, and that supervisors had an opportunity to prevent the work from being performed but did not do so.[59] Further, the parties do not dispute that the employees performed the work for the benefit of the employer. Accordingly, because the Arbitrator's factual findings support a conclusion that the Agency suffered or permitted employees to perform work before their assigned shifts, we find that the award satisfies the proper legal standards for "suffered and permitted" overtime in these respects.

However, the Agency raises a pertinent factual issue that we are not able to resolve based on the record before us. Specifically, the Agency notes the Arbitrator's finding that employees arrived early in order to permit their coworkers to leave early,[60] and claims that this indicates that "employees informally altered the starting *and ending* time[s] of their shifts by arriving *and departing* early."[61] In other words, the Agency asserts, the early arrivers "were not working any extra minutes entitling them to overtime, but rather modifying the time period during which they performed the number of hours in their shifts."[62]

It is unclear from the award and the record whether the Arbitrator based his denial of "suffered and permitted" overtime for these employees, in part, on a finding that they were departing work fifteen minutes early – and thus working no "suffered or permitted" overtime at all. If he did, then this portion of the award is not contrary to law; if he did not, then it is. Because the award fails to contain the factual findings necessary to enable us to assess the Arbitrator's legal conclusion regarding "suffered or permitted" overtime, and the necessary findings cannot be derived from the record, we remand this portion of the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification consistent with this decision.[63]

2. The Agency has not established that the Arbitrator improperly awarded an average of fifteen minutes of overtime pay to non-food-service employees.

The Agency argues that the award of fifteen minutes of overtime pay to non-food-service employees is contrary to law because it is based on the average amount of time that those employees spent performing compensable pre-shift and post-shift duties, rather than the actual time that they spent performing those duties.[64] According to the Agency, the Arbitrator did not take into account the varying amounts of time that non-food-service employees spent traveling between the control center and their posts.[65]

The Authority has held that an award is contrary to law where an arbitrator uses an "average amount of time expended per day per" employee in calculating an award of FLSA pay.[66] In this regard, the Authority has held that an arbitrator's award was contrary to law where the arbitrator found that the amount of time the employees spent performing pre-shift and post-shift activities greatly varied depending on the type of post to which the employees were assigned, but then awarded each employee thirty minutes of overtime compensation without taking the time variances into consideration.[67]

Unlike the above-cited precedent, here, the Arbitrator did not make any finding that the amount of time that non-food-service employees spent performing pre-shift and post-shift activities varied from employee to employee. In fact, the Agency acknowledges as much.[68] And there is no indication in the award that the Arbitrator averaged employees' compensable work time in order to calculate their backpay. Accordingly, we find that the Agency has not established that the Arbitrator awarded an average of fifteen minutes of overtime to non-food-service employees, and we deny this exception.

[59] *See id.* at 31-32.
[60] Agency Opp'n at 15-16 (citing Award at 28, 32).
[61] *Id.* at 16 (emphasis added).
[62] *Id.*
[63] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 624-25 (*FCI*) (award remanded to the parties for resubmission to the arbitrator for clarification where it was not clear which correctional officers performed compensable activity and the amount of time that the correctional officers were engaged in such activity).
[64] Agency's Exceptions at 4.
[65] *Id.* at 5.
[66] *FCI*, 63 FLRA at 624 (citations omitted) (internal quotation marks omitted).
[67] *Id.*; *see also U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 966 (2011) (citing *FCI*, 63 FLRA at 624-25).
[68] Agency's Exceptions at 5 (noting that the award is "void of any discussion regarding the difference in times that employees spent traveling between the control center and the various locations where they were assigned to work").

3. The Arbitrator's failure to award liquidated damages is contrary to law.

The Union argues that the Arbitrator's failure to award liquidated damages is contrary to law.[69] Under 29 U.S.C. § 216(b), an employer who violates the FLSA is liable to affected employees for both unpaid overtime and liquidated damages unless the employer can establish an affirmative defense under 29 U.S.C. § 260. Under § 260, liquidated damages are "mandatory" unless the employer can demonstrate that: (1) the act or omission giving rise to the employee's FLSA action was in good faith; and (2) the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA.[70] Because an employer bears the "substantial burden" of establishing the affirmative defense under § 260,[71] "the award of liquidated damages is the norm, and the denial of liquidated damages is the exception."[72]

To satisfy the good-faith requirement, the employer must show that it "acted with an honest intention to ascertain what the [FLSA] requires and to act in accordance with it."[73] Thus, an employer does not demonstrate good faith by showing only that it did not purposefully violate the FLSA.[74] Nor does an employer satisfy the good-faith requirement merely by showing that it lacked knowledge of the FLSA violation,[75] that it conformed with industry-wide practice,[76] or that it "has broken the law for a long time without complaints from employees."[77] Moreover, the employer's failure to request specific advice about the FLSA compliance issue in question is evidence that the employer did not act in good faith.[78]

In addition to establishing that it acted in good faith, the employer must also show that its good-faith belief was objectively reasonable.[79] Thus, ignorance of legal obligations, standing alone, will not exonerate the employer under the reasonableness test.[80]

The Arbitrator found that the Agency violated the FLSA, but did not address the issue of liquidated damages. However, the Agency is liable for liquidated damages unless it established the affirmative defense under § 260.[81] In this regard, while the Agency claims that the "Arbitrator's factual findings support his conclusion that the Agency demonstrated that it acted in good faith and had reasonable grounds for not paying overtime to the employees at issue,"[82] the Arbitrator did not reach that conclusion.

In addition, the Agency argues that the Arbitrator specifically found that "the Agency demonstrated that it had legitimate reasons to question" whether the employees were entitled to overtime compensation.[83] But the Agency's "legitimate reasons to question"[84] the employees' entitlement to pay do not affirmatively establish that the Agency took "active steps" to ascertain the FLSA's requirements.[85] Further, the Agency does not allege that it requested specific advice regarding whether its pay practices satisfied the Agency's obligations under the FLSA. And, as discussed above, "an employer does not demonstrate good faith merely by showing that its violation of the FLSA was unintentional."[86]

Accordingly, none of the Agency's arguments establishes an affirmative defense under § 260. And the Arbitrator did not make any findings that would support a denial of liquidated damages under the standards set forth above. Thus, we find that the Arbitrator's failure to award liquidated damages is contrary to law, and we modify the award to include liquidated damages in an amount equal to the overtime compensation due to the employees.[87]

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[69] Union's Exceptions at 21.
[70] *AFGE, Local 1662*, 66 FLRA 925, 927 (2012) (*Local 1662*).
[71] *AFGE, Local 987*, 66 FLRA 143, 146 (2011) (*Local 987*) (quoting *NTEU I*, 53 FLRA at 1481) (internal quotation marks omitted).
[72] *Id.* at 147 (citing *NTEU I*, 53 FLRA at 1481).
[73] *Id.* at 146-47 (quoting *NTEU I*, 53 FLRA at 1481) (alteration in original) (internal quotation marks omitted).
[74] *Local 1662*, 66 FLRA at 927 (citing *Elwell v. Univ. Hosp. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 71-72 (2d Cir. 1997)).
[75] *Local 987*, 66 FLRA at 147 (citing *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008)).
[76] *Reich*, 121 F.3d at 71 (citing *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991); *Brock v. Wilamowsky*, 833 F.2d 11, 19-20 (2d Cir. 1987)).
[77] *Local 987*, 66 FLRA at 146-47 (quoting *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984)) (citing *Reich*, 121 F.3d at 71).
[78] *Id.* at 147 (citing *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993)).
[79] *See* 29 U.S.C. § 260; *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) (*NOAA*) (citing *NTEU I*, 53 FLRA at 1482), *reconsideration denied*, 57 FLRA 723 (2002).
[80] *NOAA*, 57 FLRA at 564 (citing *NTEU I*, 53 FLRA at 1482).
[81] *Local 1662*, 66 FLRA at 926-27 (citation omitted).
[82] Agency's Opp'n at 12-13.
[83] *Id.* at 13 (quoting Award at 35) (internal quotation marks omitted).
[84] Award at 35.
[85] *Local 1662*, 66 FLRA at 927 (quoting *Barfield v. N.Y.C Health & Hosps. Corp.*, 537 F.3d 132, 150-51 (2d Cir. 2008)) (internal quotation marks omitted).
[86] *Id.* (citing *Elwell*, 276 F.3d at 841 n.5; *Reich*, 121 F.3d at 71-72).
[87] *See, e.g., AFGE, Local 3828*, 69 FLRA 66, 69-70 (2015).

The Union also argues that the Arbitrator's denial of liquidated damages is deficient for another reason: specifically, that the Arbitrator erred, as a matter of law, in declining to apply collateral estoppel to preclude relitigation of whether the Agency established its affirmative defense under § 260.[88] Because we have modified the award to provide for liquidated damages, we find it unnecessary to separately consider this argument.

4. The Arbitrator's limitation of the recovery to a period that began after the date of the filing of the grievance is contrary to law.

Because the Union filed its grievance in August 2011, the Union argues that the award limiting the recovery to the period from July 1, 2012 to June 30, 2014 – rather than awarding backpay for either two or three years prior to the date the grievance was filed – is contrary to 29 U.S.C. § 255(a).[89]

The Authority has held that, "at least where parties have not contractually agreed to backpay periods different from those in § 255(a)," an arbitrator must apply § 255(a) to determine the appropriate statute-of-limitations period for a claim brought under the FLSA.[90] Under § 255(a), the ordinary statute of limitations is two years, but is extended to three years if an agency has willfully violated the FLSA.[91] Thus, as a matter of law, where an FLSA violation involves the failure to make proper overtime payments, an employee is entitled to recover backpay beginning two years before the filing of the grievance, or three years in the case of a willful violation.[92]

Here, the Arbitrator limited the recovery to a two-year period that began after the date of the filing of the grievance, rather than beginning the recovery period two or three years before the date the grievance was filed. Further, the Arbitrator did not find, and there is no claim, that the parties have contractually agreed to a recovery period that differs from those in § 255(a). Accordingly, the Arbitrator's limitation of the recovery to a period that began after the date of the filing of the grievance is contrary to law.

The next question then becomes whether a two-year or three-year recovery period applies. This is based upon whether the Agency's violations were willful. We address that question below.

5. We remand the issue of whether the Agency's FLSA violation was willful.

The Union argues that the Arbitrator erred, as a matter of law, in finding that the Agency's violations were not willful.[93] In this regard, the Union makes two arguments,[94] which we address separately below.

a. The Arbitrator's failure to apply the doctrine of collateral estoppel is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to apply the doctrine of collateral estoppel, as set forth in *U.S. Dep't of the Air Force, Scott Air Force Base, Illinois* (*Scott Air Force Base*),[95] to bar the Agency from relitigating the issue of willfulness.[96] In this regard, the Union contends that a different arbitrator previously concluded that the Agency willfully violated the FLSA by failing to compensate employees for pre-shift and post-shift work.[97] Further, the Union maintains that the Arbitrator in this case found, in the preliminary award,[98] that he was bound by the doctrine of collateral estoppel when it came to assessing the timeliness of the grievance.[99] The Union argues that the Arbitrator should have also applied collateral estoppel to bar relitigation of the willfulness issue.[100]

[88] Union's Exceptions at 23.
[89] *Id.* at 10-14.
[90] *FAA*, 66 FLRA at 446; *see also Local 987*, 66 FLRA at 147 (citing U.*S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 60 FLRA 298, 299-300 (2004) (*Terre Haute*)); *NTEU I*, 53 FLRA at 1494 & n.17 (citations omitted).
[91] 29 U.S.C. § 255(a) (a FLSA cause of action "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"); *see also Local 987*, 66 FLRA at 147 (citing 29 U.S.C. § 255(a)); *NTEU I*, 53 FLRA at 1494 (citing *Acton v. United States*, 932 F.2d 1464, 1466 (Fed. Cir. 1991) (holding that § 255(a) applies to grievances claiming violations of the FLSA, and, thus, arbitrators are bound to apply that section).
[92] *FAA*, 66 FLRA at 446 (citing *Knight v. Columbus*, 19 F.3d 579, 581 (11th Cir. 1994); *Doyle v. United States*, 20 Cl. Ct. 495, 503 (1990)).
[93] Union's Exceptions at 14-15, 18-20.
[94] *Id.*
[95] 35 FLRA 978, 982 (1990).
[96] Union's Exceptions at 18.
[97] *Id.* at 19 (citing *Local 3981*, 2006 WL 2571342).
[98] Preliminary Award at 12-13.
[99] Union's Exceptions at 18.
[100] *Id.* at 20.

Scott Air Force Base does not hold that arbitrators are required to apply collateral estoppel and give preclusive effect to other arbitrators' prior awards.[101] In fact, the Authority has held that arbitrators have discretion to determine whether to do so,[102] and the Authority normally defers to those determinations.[103]

In the preliminary award, as relevant here, the Arbitrator relied, in part, on the doctrine of collateral estoppel in rejecting an Agency argument that the grievance was untimely.[104] But that determination did not bind the Arbitrator to apply that doctrine in determining whether the Agency's violation was willful. Instead, as discussed above, we defer to the Arbitrator's decision not to apply collateral estoppel to the willfulness issue,[105] and the Union's argument does not demonstrate that the award is contrary to law.

b. We are unable to determine whether the Arbitrator's conclusion regarding willfulness is contrary to 29 U.S.C. § 255(a).

The Union argues that the award is contrary to law because the Arbitrator applied the wrong legal standard when he concluded that the Agency did not willfully violate the FLSA.[106] In *McLaughlin v. Richland Shoe Co.*, the Supreme Court articulated the standard required for finding an employer's violation willful under the FLSA.[107] Under *McLaughlin*, the plaintiff must establish that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]."[108] As relevant here, "reckless disregard" of the requirements of the FLSA "means failure to make adequate inquiry into whether conduct is in compliance with the [FLSA]."[109] That said, "failure to make adequate inquiry" means "more than a merely negligent or unreasonable failure."[110] In this respect, a willful violation occurs when an employer shows "evident indifference" to the FLSA's requirements.[111] For example, employers have been found to willfully violate the FLSA where they ignored the advice of legal counsel or a relevant regulatory agency, or were previously penalized for a similar FLSA violation.[112] In contrast, an employer does not willfully violate the FLSA if the employer made efforts to keep abreast of FLSA requirements, but failed to do so because of mistaken interpretations of the law.[113] Nor is an employer's violation necessarily willful if the employer simply fails to seek legal advice concerning its pay practices.[114]

Here, the Arbitrator held that "if the Agency withheld paying overtime compensation for what it earnestly believed was a valid reason," then the Agency's violation was not willful.[115] Conversely, he held that if the Agency "purposely" violated the FLSA, and, "with malice, knowingly [kept] employees from legitimate remuneration," then the Agency's violation was willful.[116]

Applying this standard, the Arbitrator found that the "Agency demonstrated that it had a legitimate reason to question" whether the employees at issue were entitled to overtime pay.[117] Accordingly, the Arbitrator concluded that "the Union did not bear its burden" to prove that the Agency "purposefully disregarded existing rules and/or practices by withholding overtime payments."[118] Thus, the Arbitrator determined that the Agency's violation was not willful, and that employees were entitled to two, not three, years of backpay.[119]

The Union argues that, by requiring that the Union prove that the Agency acted with purpose or malice to establish that the Agency willfully violated the

[101] *AFGE, Local 2459*, 51 FLRA 1602, 1607 n.5 (1996) (*Local 2459*) (citations omitted) (noting that *Scott Air Force Base* applies only to determinations as to whether the Authority must give preclusive effect to previous Authority decisions).
[102] *Id.* at 1606 (citing *Gonce v. Veterans Admin.*, 872 F.2d 995, 997 (Fed. Cir. 1989); *U.S. Dep't of the Air Force, Air Logistics Center, Tinker Air Force Base, Okla.*, 41 FLRA 303, 305 (1991)).
[103] *Local 2459*, 51 FLRA at 1607.
[104] Preliminary Award at 12-13.
[105] *See Local 2459*, 51 FLRA at 1607.
[106] Union's Exceptions at 15.
[107] 486 U.S. 128 (1988).
[108] 486 U.S. at 133; *see also Terre Haute*, 60 FLRA at 300 (citation omitted); *see also Abbey v. United States*, 106 Fed. Cl. 254, 282 (2012) (citation omitted).
[109] 5 C.F.R. § 551.104.
[110] *Abbey*, 106 Fed. Cl. at 282 (citing *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903, 924 (E.D. La. 2009); *Angelo v. United States*, 57 Fed. Cl. 100, 105 (2003)); *see also Terre Haute*, 60 FLRA at 300.
[111] *Moreno v. United States*, 88 Fed. Cl. 266, 277 (2009).
[112] *Abbey*, 106 Fed. Cl. at 282 (citing *Bull v. United States*, 68 Fed. Cl. 212, 273 (2005)).
[113] *See Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 (5th Cir. 1990) (employer discussed regulations with Texas Employment Commission and received pertinent brochures and pamphlets); *NOAA*, 57 FLRA at 563 (employer directed experienced labor counsel to research issue and provide written report).
[114] *Mireles*, 899 F.2d at 1416 (citing *McLaughlin*, 486 U.S. at 134-35).
[115] Award at 34.
[116] *Id.* at 35.
[117] *Id.*
[118] *Id.*
[119] *Id.*

FLSA, the Arbitrator failed to apply the appropriate standard.[120] The Union is correct. The Union needed to demonstrate that the Agency either knew or showed reckless disregard for its failure to pay the employees' overtime – not that the Agency: "purposely" violated the FLSA; "with malice, knowingly [kept] employees from legitimate remuneration"; or "purposefully disregarded existing rules and/or practices by withholding overtime payments."[121] Thus, the Arbitrator failed to apply the correct legal standard in determining whether the Agency's conduct was willful.

As stated previously, an arbitrator's failure to apply the correct legal analysis does not render the award deficient where the Authority determines that "the arbitrator's legal conclusions are consistent with law, based on the underlying factual findings."[122] However, the Authority's ability to review de novo the arbitrator's legal conclusions is dependent on the sufficiency of the record before it.[123] Thus, if an award fails to contain the factual findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and the necessary findings cannot be derived from the record, the award will be set aside and the case will be remanded to the parties for resubmission to the arbitrator so that the requisite findings can be made.[124]

In this case, the Arbitrator did not make sufficient findings of fact for the Authority to determine, under the correct standard, whether the Agency's FLSA violation was willful. Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings and an application of the correct legal standard.

c. The award of prospective overtime pay is not contrary to law.

The Agency argues that the award is contrary to law because it awards overtime pay prospectively, and indefinitely, regardless of whether the employees actually will perform compensable pre-shift and post-shift work in the future.[125] In this regard, after awarding employees backpay from July 1, 2012 to June 30, 2014, the Arbitrator further held that "[t]hese overtime payments should continue from July 1, 2014 forward."[126]

We interpret the award as awarding prospective overtime pay only to employees who continue to work compensable overtime. As the Agency does not argue that this would be contrary to law, the Agency provides no basis for finding the award deficient in this regard, and we deny this exception.

V. Decision

We deny the Agency's exceptions. We grant, in part, and deny, in part, the Union's exceptions. We modify the award to include liquidated damages, and we remand the award, in part, to the parties for resubmission to the Arbitrator, absent settlement, for determinations consistent with this decision.

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[120] Union's Exceptions at 15.
[121] Award at 35.
[122] *NTEU III*, 61 FLRA at 624 (internal quotation marks omitted) (citations omitted).
[123] *Local 1437*, 53 FLRA at 1710.
[124] *Id.* (citing *Local 1997*, 53 FLRA at 347–48; *Local 940*, 52 FLRA 1429; *PTO*, 52 FLRA at 374).
[125] Agency's Exceptions at 5.
[126] Award at 35.

Member Pizzella, dissenting, in part:

I do not agree with the Majority that it is necessary to remand the portion of the arbitrator's award which concerns "suffered and permitted" overtime.[1]

As the Majority notes, to establish that an employer suffered or permitted employees to work, the employee must show that: (1) the employee performed the work for the benefit of the employer, whether requested or not; (2) the employee's supervisor knew or had reason to believe that the work was being performed; and (3) the supervisor had an opportunity to prevent the work from being performed.[2]

The Majority concludes that "[i]t is unclear from the award and the record whether the Arbitrator based his denial of 'suffered and permitted' overtime for these employees . . . on a finding that they were departing work fifteen minutes early – and thus working no 'suffered or permitted' overtime at all."[3] Therefore, my colleagues decide that it is necessary to remand the award for clarification on this point.

I do not see what needs to be clarified here. It is perfectly clear from the award that the first of the "suffered or permitted" criteria – "for the benefit of the employer" – has not been met. On this point, the Arbitrator specifically questioned "why the Union would initiate an action that might result in the disruption of this practice that seems to bear so many positive *benefits for employees*."[4] The Arbitrator then concludes that this practice is "a *volunteer gesture* . . . in order to allow fellow workers a 'head start' on leaving for home," which "should not be subject to extra compensation."[5] In this respect, the Arbitrator found that the work was for the *benefit of the employees* and not the employer.

As the Arbitrator clearly found that the first of the "suffered and permitted" criteria is not met, I would conclude that it is unnecessary to remand this issue and would deny the Union's exception on this point.

Thank you.

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[1] *See* Majority at 9-10.
[2] 5 C.F.R. § 551.104; *see also NFFE, Local 858*, 66 FLRA 152, 154 (2011) (citing 5 C.F.R. § 551.104); *AFGE, Local 1741*, 62 FLRA 113, 120 n.20 (2007) (citing 5 C.F.R. § 551.104).
[3] Majority at 10.
[4] Award at 28 (emphasis added).
[5] *Id*. (emphasis added).