

**71 FLRA No. 3**

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL INSTITUTION  
ENGLEWOOD, COLORADO  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 709  
COUNCIL OF PRISON LOCALS #33  
(Union)

0-AR-5381

DECISION

February 1, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Chairman Kiko and Member Abbott concurring)

**I. Statement of the Case**

In this case, we uphold an arbitrator's award of liquidated damages under the Fair Labor Standards Act (FLSA) to remedy an agency's untimely overtime payments. As discussed below, we deny the Agency's contrary-to-law exception.

**II. Background and Arbitrator's Award**

The grievants are correctional officers in the Agency's prison complex. Since at least 2008, the Agency has paid employees overtime later than the regular payday for the pay period in which they actually worked the overtime hours. On April 22, 2015, the Union filed a grievance alleging that the Agency violated the FLSA<sup>1</sup> by untimely paying overtime.

When the parties could not resolve the matter, the Union invoked arbitration. Before the Arbitrator, the parties stipulated to the issues as: "Did the [Agency] fail to pay overtime timely? If so, then what is an appropriate remedy?"<sup>2</sup>

Arbitrator Kathy L. Eisenmenger determined that "the weight of . . . authority establishes that failure to pay overtime on the regular payday for the pay period in which it was worked is a violation of the FLSA."<sup>3</sup> Supporting this finding, the Arbitrator cited the Department of Labor's implementing regulation, 29 C.F.R. § 778.106,<sup>4</sup> which requires "that overtime compensation earned in a particular workweek must be paid on the regular payday for the period in which such workweek ends."<sup>5</sup> The Arbitrator also cited *U.S. DOJ, Federal BOP, Federal Correctional Complex, Florence, Colorado (FCC Florence)*,<sup>6</sup> where the Authority applied § 778.106 to find that paying overtime to an employee on a payday later than the regular pay day for the pay period in which the employee actually worked the overtime hours, violates the FLSA.

Based on this authority, the Arbitrator concluded that the Agency's untimely overtime payments violated the FLSA. Specifically, the Arbitrator found that, "in multiple instances," the Agency "failed to compensate employees who had worked overtime . . . within the same pay period for the work week of their regular hours" and thus violated § 778.106.<sup>7</sup> Similarly, the Arbitrator found that the Agency "violated the FLSA, specifically . . . § 778.106, each instance when [it] delayed" overtime payments by one or more paydays.<sup>8</sup>

Finding an FLSA violation, the Arbitrator awarded liquidated damages. The Arbitrator found that liquidated damages are "mandatory and absolute for violations of [the] FLSA . . . unless an employer establishes its good faith and reasonable grounds for non-compliance under 29 U.S.C. § 260."<sup>9</sup> She concluded that the Agency failed to establish grounds that would relieve it from paying liquidated damages. Accordingly, the Arbitrator ordered the Agency to pay liquidated damages under the FLSA for "each . . . of the untimely overtime payments."<sup>10</sup> In doing so, the Arbitrator noted that "[b]ecause the Union seeks liquidated damages, interest . . . is not available."<sup>11</sup>

On June 6, 2018, the Agency filed exceptions to the Arbitrator's award. The Union filed an opposition to the Agency's exceptions on June 25, 2018.

<sup>3</sup> *Id.* at 29.

<sup>4</sup> *Id.* at 28 (citing 29 C.F.R. § 778.106).

<sup>5</sup> 29 C.F.R. § 778.106.

<sup>6</sup> 66 FLRA 537 (2011).

<sup>7</sup> Award at 25.

<sup>8</sup> *Id.* at 44-45.

<sup>9</sup> *Id.* at 36-37 (citing 29 U.S.C. § 260).

<sup>10</sup> *Id.* at 28 (citing 29 U.S.C. §§ 216(b), 255(a)).

<sup>11</sup> *Id.* at 36 n.38 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) (interest not recoverable under 29 U.S.C. § 216(b)).

<sup>1</sup> 29 U.S.C. §§ 201-219.

<sup>2</sup> Award at 2.

### III. Analysis and Conclusion: The award is not contrary to law.

The Agency does not dispute that it violated the FLSA by failing to pay overtime within § 778.106's timeframe. Rather, the Agency contends that the Arbitrator's award of liquidated damages is contrary to the FLSA because there was no unpaid overtime, and therefore no basis to award liquidated damages.<sup>12</sup> 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.<sup>13</sup> In making that determination, the Authority defers to the arbitrator's underlying findings of fact.<sup>14</sup>

Contrary to the Agency's claim, the FLSA does not distinguish between a violation where an agency never paid overtime due, and a violation where an agency failed to timely pay overtime due. Under the FLSA, both are unlawful *unpaid overtime compensation*.<sup>15</sup> And in both cases an award of liquidated damages is *mandatory*, absent an agency satisfying its "substantial burden" of proof that it acted both with good faith and with a reasonable basis for believing that it was not violating the FLSA.<sup>16</sup>

Here, in finding an FLSA violation, the Arbitrator concluded that the Agency failed to meet its substantial burden of demonstrating that liquidated damages were not warranted.<sup>17</sup> And, the Agency does not challenge this conclusion.<sup>18</sup> Against this background, we find that the award is not contrary to law.

Further, the decisions cited by the Agency<sup>19</sup> do not support a contrary conclusion. In *U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Office of Marine & Aviation Operations, Marine Operations Center, Norfolk, Virginia (NOAA)*<sup>20</sup> the Authority found that an arbitrator erred in awarding liquidated damages for the agency's delay in implementing an arbitration award.<sup>21</sup> Here, unlike NOAA, the Arbitrator awarded liquidated damages

because the Agency's delay – failing to timely pay overtime – itself violated the FLSA.<sup>22</sup>

Finally, there is no merit to the Agency's claim that the award is "acting . . . as an interest payment" and thus is "at odds with" <sup>23</sup> *Library of Congress v. Shaw (Shaw)*.<sup>24</sup> In that decision, the U.S. Supreme Court held that in enacting Title VII of the Civil Rights Act of 1964, Congress did not waive the government's immunity from interest.<sup>25</sup> *Shaw* was later superseded by statute on this point.<sup>26</sup> In so holding, the Court indicated that interest is "designed to compensate for the belated receipt of money."<sup>27</sup>

Here, the Arbitrator specifically stated that she was not awarding interest.<sup>28</sup> Moreover, the Arbitrator awarded liquidated damages as a consequence of the FLSA, rather than as a means of compensating employees for a delay in the payment of backpay.<sup>29</sup> Because the liquidated damages awarded by the Arbitrator do not function as interest, the Agency's reliance on *Shaw* is misplaced.

Based on the foregoing, the Agency has failed to demonstrate that the Arbitrator's award is contrary to law.

### IV. Decision

We deny the Agency's exception.

<sup>12</sup> Exceptions at 7-10.

<sup>13</sup> *AFGE, Local 1633*, 70 FLRA 752, 753 (2018).

<sup>14</sup> *Id.*

<sup>15</sup> 29 U.S.C. §§ 216(b), 260; compare *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 189 (2017) (*BOP*), with *FCC Florence*, 66 FLRA at 537-38, 541.

<sup>16</sup> *BOP*, 70 FLRA 189; *FCC Florence*, 66 FLRA at 537-38, 541; see also 29 U.S.C. §§ 216(b), 260.

<sup>17</sup> Award at 39-41, 43.

<sup>18</sup> The Agency insists that it "is not arguing that it meets the good faith requirement." Exceptions at 8.

<sup>19</sup> *Id.* at 7, 10.

<sup>20</sup> 57 FLRA 559 (2001).

<sup>21</sup> *Id.* at 559-61, 564.

<sup>22</sup> *BOP*, 70 FLRA at 189; Award at 36-37.

<sup>23</sup> Exceptions at 7-8.

<sup>24</sup> 478 U.S. 310 (1986).

<sup>25</sup> *Id.* at 312, 314, 323.

<sup>26</sup> *E.g., Health Republic Ins. Co.*, 129 Fed. Cl. 757, 779 (2017).

<sup>27</sup> *Shaw*, 478 U.S. at 322.

<sup>28</sup> Award at 36 n.38.

<sup>29</sup> *Id.* at 36-37.

**Chairman Kiko, concurring:**

Chairman Kiko notes that, even under the more specific Department of Labor overtime regulations, an employer may delay payment “[w]hen the correct amount of overtime compensation *cannot* be determined until some time after the regular pay period,” but the employer must pay any delayed compensation “as soon after the regular pay period as is *practicable*.”<sup>1</sup> However, the Arbitrator found that this exception did not apply here, and the Agency does not provide a basis for reversing that determination.<sup>2</sup>

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<sup>1</sup> 29 C.F.R. § 778.106 (emphases added).

<sup>2</sup> Award at 26.

**Member Abbott, concurring:**

Member Abbott agrees with Chairman Kiko's comments concerning the intent and scope of 29 C.F.R. § 778.106. Member Abbott also notes that, in this case, the Agency concedes that it committed a technical violation of the FLSA. In the August 28, 2015 memorandum, the Agency admits that the FLSA requires employees to be compensated in a *timely* manner and sets out the mechanism to be used to ensure that overtime is authorized and paid timely. Member Abbott does not believe that where, as here, the parties have a longstanding practice – whereby employees are *consistently* not paid for overtime worked until the *next* pay period following when they are paid for regular hours – that a violation of the FLSA has occurred. Under this scenario, the “as soon . . . as is practicable” language of § 778.106 seems to indicate that only payments made *after* the *next* pay period would constitute a violation.