

73 FLRA No. 18

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 3690
(Union)

0-AR-5630

DECISION

June 21, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members
(Member Kiko dissenting in part)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated Articles 11 and 18 of the parties' master collective-bargaining agreement (master agreement), and the Fair Labor Standards Act (FLSA),¹ by denying official time and failing to pay an employee (the grievant) for time spent attending an arbitration-preparation meeting. Arbitrator Michael J. Pecklers issued an award sustaining the grievance and directing FLSA remedies. The Agency filed exceptions to the award on contrary-to-law, exceeded-authority, and essence grounds. For the reasons set forth below, we dismiss the Agency's exceptions, in part, and deny the Agency's exceptions, in part.

II. Background and Arbitrator's Award

The grievant, a Union representative, filed grievances on his own behalf. After the Agency denied the

grievances, the parties proceeded to arbitration and scheduled two days of arbitration hearings. One week before the first hearing date, the Union requested eight hours of official time for the grievant to attend an arbitration-preparation meeting on August 7, 2018.² The Union also requested official time for the grievant to attend his arbitration hearings on August 8 and August 9. Later that week, the Union's attorney asked the Agency's attorney to "see why the roster still has [the grievant] on his normal shift and post for August 7-9."³ The Agency's attorney replied "will do."⁴

On August 7, the grievant—as planned—did not report to his duty station and, instead, participated in witness preparation with the Union's attorney and Union president. Throughout the day, the grievant interacted with the Agency's attorney, his supervisor, and an Agency human resources manager. The Agency did not inform the grievant or Union that the grievant would not receive official time for that day. Once the arbitration-preparation meeting ended, the grievant checked the daily assignment log for August 7 which indicated that the Agency had marked him as absent without leave (AWOL). The grievant and Union informed the Agency's attorney that the official-time request had not been properly processed. In response, the Agency's attorney stated that "she would make sure that gets taken care of."⁵ Subsequently, the Agency granted official time for the grievant to attend the arbitration hearings scheduled for August 8 and August 9.⁶ But the grievant was marked AWOL and received no pay for August 7.

The Union filed a grievance alleging that the Agency violated the FLSA, the Back Pay Act,⁷ and the master agreement by denying official time and withholding pay for the time that the grievant spent attending the arbitration-preparation meeting. The Agency denied the grievance, and the parties proceeded to arbitration.

In the award, the Arbitrator framed the issues, in relevant part, as follows: "Did the Agency violate either the [FLSA] or the . . . [m]aster [a]greement? [I]f so, what shall the remedy be?"⁸

Article 11(a)(1) of the master agreement provides that "official time will be granted to elected/appointed Union officers, designated stewards, and other representatives authorized by the Union, in accordance

¹ 29 U.S.C. §§ 201-219.

² All dates hereafter occurred in 2018.

³ Award at 47.

⁴ *Id.*

⁵ *Id.* at 38.

⁶ *Id.* at 47 n.3. Under Article 32(e) of the master agreement, "[g]rievant(s), witnesses, and representatives" may receive "official time when attending the [arbitration] hearing." *Id.* at 10 (quoting Master Agreement, Art. 32(e)).

⁷ 5 U.S.C. § 5596.

⁸ Award at 4.

with this article.”⁹ As relevant here, Article 11(c) permits official time for the purpose of “assist[ing] an employee in all steps of the grievance procedure” as well as “any other purpose agreed to by the parties.”¹⁰ Article 11(c) further states that “preparation time can be granted for the circumstances stated above after proper approval.”¹¹

Interpreting and applying Article 11, the Arbitrator found that the grievant was eligible to receive official time for “assisting the Union in the preparation of his arbitration cases” on August 7.¹² And the Arbitrator held that the grievant justifiably relied upon the Agency attorney’s representations that the grievant would receive official time on August 7 and not be marked AWOL. Thus, the Arbitrator concluded that the grievant was entitled to the eight hours of official time requested for arbitration preparation under Article 11.

Before the Arbitrator, the Agency asserted that Article 11 did not permit a grievant in an arbitration proceeding to receive official time for arbitration preparation, even if the grievant was also a Union representative. However, the Arbitrator held that the Agency’s assertion was at “sharp variance” with the Agency’s position “both before and at the August 7, 2018 arbitration preparation session – that [the grievant] was entitled to official time [. . . and] the AWOL error would be rectified.”¹³

Regarding the FLSA claim, the Arbitrator found that the Union met its burden of establishing a “just and reasonable inference” that the grievant performed work on August 7—by participating in the arbitration-preparation meeting—and was not compensated for it.¹⁴ And because the Agency did not provide contrary testimony at arbitration, the Arbitrator determined that the Union’s FLSA claim was “un-rebutted.”¹⁵

Based on these findings, the Arbitrator concluded that the Agency violated the FLSA, Article 11, and Article 18¹⁶ of the master agreement by failing to pay the grievant for eight hours of duty time on August 7. Consequently, the Arbitrator sustained the grievance and directed the Agency to pay the grievant compensatory and liquidated damages under the FLSA. In addition, the Arbitrator found that attorney fees and costs were warranted under the FLSA, and the Arbitrator retained jurisdiction to consider a petition for attorney fees.

On May 7, 2020, the Agency filed exceptions to the award, and the Union filed its opposition on June 10, 2020.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar one of the Agency’s arguments.

The Agency argues that the Arbitrator’s FLSA findings and remedies are contrary to the FLSA¹⁷ and violate the doctrine of sovereign immunity.¹⁸ In its opposition, the Union contends that §§ 2425.4(c) and 2429.5 of the Authority’s Regulations¹⁹ bar these Agency arguments.²⁰ Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.²¹ But the Authority has held that “a claim of federal sovereign immunity can be raised by an agency at any time.”²²

Nothing in the record indicates that the Agency argued to the Arbitrator that the grievance failed to state a claim for monetary damages under the FLSA. And because the grievance asserted an FLSA violation and requested FLSA remedies, the Agency should have known

⁹ *Id.* at 8 (quoting Master Agreement, Art. 11(a)(1)).

¹⁰ *Id.* at 9 (quoting Master Agreement, Art. 11(c)(8), (12)).

¹¹ *Id.* (quoting Master Agreement, Art. 11(c)).

¹² *Id.* at 47.

¹³ *Id.* at 50-51; *see also id.* at 43 (finding that the grievant and the Union “were entitled to rely upon [the Agency attorney’s] representations as she had the authority to rectify the situation”).

¹⁴ *Id.* at 49. The FLSA provides that, “any employer who violates the provisions of section 206 or 207 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages.” 29 U.S.C. § 216(b). Employees have the burden under the FLSA of establishing that they have performed work for which they have not been properly compensated. *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 188 (2017) (citing *AFGE, Loc. 3723*, 67 FLRA 149, 150 (2013)). Under FLSA regulations, “[o]fficial time granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work.” *U.S. Dep’t of Transp., FAA, Atlanta, Ga.*, 64 FLRA 262, 264 n.5 (2009) (citing

5 C.F.R. § 551.424(b); *Ass’n of Civilian Technicians, Mont. Air Chapter 29*, 57 FLRA 55, 58 (2001) (Chairman Cabaniss concurring in part and dissenting in part on other grounds)).

¹⁵ Award at 51.

¹⁶ Article 18 states, in pertinent part, that “[t]he basic workweek will consist of five (5) consecutive workdays” with a “standard workday . . . consist[ing] of eight (8) hours.” *Id.* at 9 (quoting Master Agreement, Art. 18(a)).

¹⁷ Exceptions Br. at 6-11 (arguing that the award is contrary to law because the grievance failed to state a claim for relief under the FLSA).

¹⁸ *Id.* at 17-20.

¹⁹ 5 C.F.R. §§ 2425.4(c), 2429.5.

²⁰ Opp’n Br. at 4-5.

²¹ 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., AFGE, Loc. 2302*, 70 FLRA 202, 203-04 (2017) (*Loc. 2302*).

²² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 70 FLRA 477, 478 (2018) (*BOP*) (then-Member DuBester dissenting on other grounds) (quoting *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015)).

to raise this argument at arbitration.²³ Because it did not do so, we dismiss the Agency's contrary-to-law exception.²⁴ However, because the Agency may raise a claim of sovereign immunity "at any time," it is unnecessary to address whether the Agency raised that argument at arbitration.²⁵ Therefore, we consider the Agency's sovereign-immunity allegation below.

IV. Analysis and Conclusions

A. The award does not violate the doctrine of sovereign immunity.

The Agency asserts that the Arbitrator lacked the authority to award FLSA remedies.²⁶ Specifically, the Agency contends that the awarded remedies are not based on a valid waiver of sovereign immunity under the FLSA because "the [g]rievant made no claim of working . . . overtime."²⁷

The United States is immune from liability for money damages under the doctrine of sovereign immunity.²⁸ Sovereign immunity can be waived by statute, but a waiver will be found only if "unequivocally expressed in statutory text."²⁹ Thus, an arbitration award directing an agency to provide monetary damages to an employee must be supported by statutory authority to impose such a remedy.³⁰

²³ Award at 2-3 (noting that the grievance "alleged violations of [the] FLSA" and requested that the grievant "receive his lost payment . . . liquidated damages . . . reasonable attorney fees and costs as mandated under the FLSA").

²⁴ See *U.S. Dep't of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 72 FLRA 691, 692 n.22 (2022) (citing *U.S. Dep't of the Army, White Sands Missile Range*, 72 FLRA 435, 439 & n.66 (2021) (Chairman DuBester concurring); *U.S. DHS, U.S. CBP*, 71 FLRA 1155, 1157 (2020) (Member Abbott dissenting on other grounds)).

²⁵ *BOP*, 70 FLRA at 478.

²⁶ Exceptions Br. at 17-20. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 678 n.13 (2022) (VA) (citation omitted); see also *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 59 FLRA 811, 813-14 (reviewing de novo an exceeded-authority exception challenging award's consistency with the doctrine of sovereign immunity). In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. VA, 72 FLRA at 678 n.13 (citation omitted).

²⁷ Exceptions Br. at 20.

²⁸ *SSA, Off. of Disability Adjudication & Rev., Region 1*, 65 FLRA 334, 337 (2010) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

²⁹ *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 (2020) (then-Member DuBester concurring on other grounds) (quoting *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004) (*HHS*)).

Here, the Agency does not dispute that "[b]y authorizing suits against the United States, the [FLSA's amendment] waives the government's sovereign immunity."³¹ Rather, the Agency's sovereign-immunity claim is solely dependent upon its argument that the Arbitrator erred by finding that the Agency violated the FLSA. And, as explained in Section III, we have dismissed this argument because the Agency did not raise it to the Arbitrator. Accordingly, we deny the exception.³²

B. The award draws its essence from the master agreement.

The Agency argues that the award fails to draw its essence from Article 11 of the master agreement.³³ As previously noted, Article 11 provides that official time may be granted to "representatives authorized by the Union"³⁴ for the purpose of "assist[ing] an employee in all steps of the grievance procedure,"³⁵ as well as "any other purpose agreed to by the parties."³⁶ Relying on these provisions, the Arbitrator found that the grievant was entitled to official time because the Union had received assurances from the Agency's attorney that the grievant could use official time to "assist[] the Union in the preparation of his arbitration cases."³⁷

Although the Agency contends that Article 11's plain wording does not allow a grievant, acting in their

³⁰ *Id.* (citing *HHS*, 60 FLRA at 252).

³¹ *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 72 FLRA 575, 580 (2021) (Chairman DuBester concurring in part and dissenting in part; Member Abbott dissenting in part on other grounds) (quoting *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 65 FLRA 76, 77 (2010)).

³² See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 66 FLRA 537, 541 (2012) (denying sovereign-immunity claim where excepting party failed to demonstrate that arbitrator erroneously found an FLSA violation).

³³ Exceptions Br. at 11-16. The Authority will find an arbitration award deficient as failing to draw its essence from an agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021) (citations omitted). The Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions. *Loc. 2302*, 70 FLRA at 261 (citation omitted).

³⁴ Award at 8 (quoting Master Agreement, Art. 11(a)(1)).

³⁵ *Id.* at 9 (quoting Art. 11(c)(8)).

³⁶ *Id.* (quoting Art. 11(c)(12)).

³⁷ *Id.* at 47.

own interest, to receive official time,³⁸ the Arbitrator found this interpretation to be at “sharp variance” with the Agency’s earlier position “that [the grievant] was entitled to official time [. . . and] the AWOL error would be rectified.”³⁹ As the Agency does not challenge, as a nonfact, the Arbitrator’s finding that the Agency’s attorney agreed to provide the grievant official time for August 7 and change the grievant’s AWOL entry,⁴⁰ we defer to that finding.⁴¹ Further, the Agency does not demonstrate that it was irrational for the Arbitrator to conclude that the grievant, as a Union representative, could use Article 11 official time to prepare for his own arbitration hearing. Consequently, the Agency’s argument fails to establish that the award is deficient on essence grounds, and we deny this exception.⁴²

V. Decision

We dismiss the Agency’s exceptions, in part, and deny the Agency’s exceptions, in part.

³⁸ Exceptions Br. at 14 (“Article 11(c) makes clear that official time for [arbitration preparation] can be granted to [U]nion representatives, but does not say anything about [U]nion witnesses.”), *id.* (asserting that “[t]here is nothing in the [master] agreement that provides for official time for witnesses” to prepare for an arbitration hearing).

³⁹ Award at 50-51.

⁴⁰ *Id.* at 47, 50-51.

⁴¹ See *AFGE, Loc. 2328*, 70 FLRA 797, 797-98 (2018) (deferring to arbitrator’s factual findings in resolving essence exception

where excepting party did not successfully challenge those findings as nonfacts).

⁴² See *Int’l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (denying essence exception because excepting party failed to establish that award was inconsistent with plain wording of parties’ agreement); *U.S. Dep’t of VA, Member Servs. Health Res. Ctr.*, 71 FLRA 311, 312 (2019) (then-Member DuBester concurring) (award not deficient on essence grounds where arbitrator’s interpretation was “plausible and consistent” with parties’ agreement).

Member Kiko, dissenting in part:

When parties agree to limit official time to specific classes of employees, and for certain purposes, arbitrators must enforce the plain wording of those official-time provisions.

Article 11(a)(1) of the master agreement clearly and unambiguously limits official time to “Union officers, designated stewards, and other representatives authorized by the Union.”¹ It is undisputed that the grievant was not serving in the capacity of a Union officer, steward, or authorized representative while preparing for arbitration of his own personal grievance.² Therefore, the grievant was ineligible to receive Article 11 official time for that activity.

The Agency’s attorney is neither in the grievant’s chain of command nor employed in the human-resources department. Yet the Arbitrator, and the majority, rely on two perfunctory responses made by that attorney when asked about the status of the grievant’s official-time request: “will do,”³ and “[I will] make sure that gets taken care of.”⁴ These statements are immaterial to an interpretation of Article 11 as there is no evidence that the attorney was applying that article or that the attorney had the authority to bind the Agency to a particular interpretation of the parties’ agreement.⁵

Thus, in finding that the Agency wrongfully denied the grievant official time, the Arbitrator relied on extraneous considerations and ignored the plain wording of Article 11.⁶ And the Arbitrator compounded this error by awarding remedies pursuant to the Fair Labor Standards Act,⁷ including liquidated damages, when the appropriate remedy for a wrongful denial of official time is straight-time compensation.⁸

Accordingly, I would find that the award fails to draw its essence from Article 11 of the master agreement and set aside the award.⁹

¹ Award at 8 (quoting Master Agreement, Art. 11(a)(1)).

² *Id.* at 46 (finding that the grievant participated in arbitration preparation as a “bargain[ing]-unit witness[.]”).

³ *Id.* at 37.

⁴ *Id.* at 38.

⁵ Notably missing from the award is any discussion of whether the grievant was actually eligible for official time under Article 11.

⁶ See *U.S. Dep’t of HUD*, 72 FLRA 450, 452 (2021) (Chairman DuBester dissenting) (granting essence exception where arbitrator’s arbitrability finding was contrary to plain language of parties’ agreement); *U.S. DOJ, Fed. BOP, Fed. Com. Inst., Talladega, Ala.*, 71 FLRA 1145, 1146-47 (2020) (then-Member DuBester dissenting) (setting aside award on essence ground where arbitrator “relied on extraneous considerations and ignored the plain wording” of parties’ agreement).

⁷ 29 U.S.C. §§ 201-219.

⁸ The Authority has held that “where official time authorized by the provisions of a collective[-]bargaining agreement is wrongfully denied and the representational functions are performed on nonduty time, [§] 7131(d) [of the Federal Service Labor-Management Relations Statute] entitles the aggrieved employee to be paid at the appropriate straight-time rates for the amount of time that should have been official time.” *U.S. Dep’t of Transp., FAA, Sw. Region, Ft. Worth, Tex.*, 59 FLRA 530, 532 (2003) (quoting *U.S. DOD, Def. Contract Audit Agency, Ne. Region, Lexington, Mass.*, 47 FLRA 1314, 1322 (1993)). Additionally, “the Authority has emphasized that the remedy for wrongful denial of official time . . . is straight-time compensation and has found deficient other remedies.” *Id.* (citations omitted).

⁹ I agree with the decision to dismiss the Agency’s contrary-to-law exception and deny the Agency’s sovereign-immunity exception.