65 FLRA No. 112

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
VICTORVILLE, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3969
(Union)

0-AR-4596

_____

DECISION

February 17, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Ruth Carpenter filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency improperly classified teachers in its correctional facility as exempt from the provisions of the Fair Labor Standards Act (FLSA), and that the Agency violated the parties' Memorandum of Agreement (MOA) by utilizing employees other than Vocational Training Instructors (VTIs) to cover for employees who were on sick and annual leave.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency classified teachers at its correctional facility as exempt from the provisions of the FLSA, and assigned employees other than VTIs to cover employees' sick and annual leave. A grievance was filed, and, when the grievance was unresolved, it was submitted to arbitration, where the Arbitrator stated the issues, in pertinent part, as follows:

> Has . . . management properly classified "Teachers" at [the correctional facility] as [FLSA] exempt in accordance with federal law?
>
> If not, what shall be the remedy?
>
> . . . .
>
> Has . . . management violated the Master Agreement and/or the [MOA] . . . in regards to which employees in the Education Department are utilized as sick and annual leave coverage? If so[,] what shall be the remedy?

Award at 2.[1]

With regard to whether the teachers were properly classified as exempt from the FLSA, the Arbitrator found that the teacher position "requires greater qualifications to be hired" than the education specialist position, which the Agency classified as FLSA nonexempt. Award at 6. However, the Arbitrator also found that, like education specialists, the teachers' primary function is to perform "custody-officer type duties" rather than teaching. Award at 12. *Accord id.* at 6-7 (summarizing teachers' non-teaching duties). According to the Arbitrator, teachers "generally have [twelve to fifteen] hours per week where they are assigned teaching duties[.]" *Id.* at 6. In addition, the Arbitrator determined that teachers "may have to leave class to perform other duties to which they are assigned[,]" and that "[t]his can take up to [fifty percent] or longer of the class time." *Id.* at 12. For example, the Arbitrator found that teachers are "required to make sure all inmates are in the classroom, and if they are not, they must find them." *Id.* Accordingly, the Arbitrator found that teachers "only spend [fifty percent] of the class time actually in the class" and that, consequently, "some [teachers] only spend approximately six hours a week performing teaching duties." *Id.* at 6. The Arbitrator stated that "[a] few hours a week is not substantial and given the major focus and duties of the [t]eachers

1. The Arbitrator addressed additional issues, *see* Award at 2-3, but as those issues are not raised in the exceptions, we do not discuss them.

. . ., it cannot be said that limited teaching responsibilities are the predominant or defining facets of the position." *Id.* at 13. Thus, the Arbitrator concluded that the teachers' "primary duty" was not teaching, and that the Agency failed to establish that the teachers were properly classified as FLSA exempt. *Id.* Accordingly, she directed the Agency to pay teachers backpay until they are reclassified as FLSA nonexempt. *Id.* at 14.

With regard to whether the Agency inappropriately assigned employees other than VTIs to cover employees' sick and annual leave, the Arbitrator found that the MOA requires that only VTIs be utilized to cover absences caused by extended sick leave and scheduled annual leave, and that the Agency violated the MOA by utilizing non-VTI employees to cover such leave. *See id.* at 13. The Arbitrator noted that one employee who negotiated the MOA (the negotiator) testified that non-VTI employees would bid on their shifts on a six-month rotating basis, and that, "because the [VTIs] would not be required to rotate their shifts, it was agreed in . . . the MOA . . . that [VTIs] would be utilized for sick and annual leave coverage." *Id.* at 11. In addition, although the Arbitrator acknowledged the Agency's claim that "[m]anagement ha[s] the right to assign work[,]" she found that, by agreeing to the MOA, the Agency limited its ability to exercise that right. *Id.* at 13. As a remedy for the violation of the MOA, the Arbitrator directed that, in the future, VTIs will cover all extended sick leave and scheduled annual leave. *Id.* at 14.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to the FLSA and Office of Personnel Management (OPM) regulations implementing the FLSA. Specifically, the Agency contends that 5 C.F.R. § 551.208(h) exempts teachers from the FLSA, and that the Arbitrator "did not properly consider the unique necessities of being a teacher in a correctional institution."[2] Exceptions at 6. In this connection, the Agency asserts that: "[t]he time spent locating inmates who are absent from class is a part of a teacher's role in a correctional environment[;]" "[t]eaching inmates about punctuality and accountability should be considered teaching[;]" and "it is inappropriate for the Arbitrator to say teachers are not performing teachers' duties whey they are required to search inmates and provide for safety in the classroom." *Id.* at 7. In addition, the Agency claims that the Arbitrator "discounted the fact that teachers . . . are required to have an advanced degree in a specialized field of learning as contemplated by 5 C.F.R. § 551.208[,]" and asserts that "[t]he simple fact that education specialists are not required to have this degree and still do similar duties does not inherently mean that teachers should be [FLSA] non[]exempt as well." *Id.* at 8. Further, the Agency contends that "[i]t is reasonable to believe" that the teachers in *Wilks v. District of Columbia*, 721 F. Supp. 1383, 1386 (D.D.C. 1989) (*Wilks*), who were found to be exempt from the FLSA, "have the same or similar types of correctional duties as the teachers in the present case." Exceptions at 8 n.2.

The Agency also argues that the award is contrary to management's rights to assign work and assign employees under § 7106(a)(2)(B) and (a)(2)(A) of the Statute because it precludes management from assigning employees other than VTIs to cover sick and annual leave vacancies and may require management to use overtime assignments, cancel leave and/or training, or even assign management to vacant posts. *Id.* at 10, 12. The Agency also contends that the MOU, as interpreted by the Arbitrator, "does not constitute an arrangement for employees adversely affected by the exercise of a management right." *Id.* at 13. In this connection, the Agency asserts that: "[a]n arrangement must seek to mitigate adverse effects flowing from the exercise of a protected management right[;]" "[p]rovisions that are unrelated to management's exercise of its reserved rights do not constitute arrangements[;]" and "the purported arrangement must be sufficiently tailored to compensate or benefit employees suffering adverse effects resulting from the exercise of management's rights." *Id.* at 14. The Agency also asserts that the Arbitrator's remedy excessively interferes with management's rights, and that "the Arbitrator's remedy . . . is not a reconstruction of what the Agency would have done." *Id.* at 15, 17.

2. The pertinent wording of the OPM regulations at issue in this case is set forth below.

B. Union's Opposition

The Union argues that the award is not contrary to the FLSA. In this connection, the Union contends that the Agency had the burden of proving that the teachers are exempt from the FLSA, and that the record supports the Arbitrator's finding that the teachers' primary duty is to serve as correctional officers. Opp'n at 7-8. With respect to the Agency's claim that the teachers teach inmates about punctuality and accountability, the Union asserts that "there is no factual basis for this claim" because no witnesses testified that teachers perform that duty. *Id.* at 8.

With regard to the Agency's management rights exception, the Union argues that the award "certainly affects a management right[,] but that "[t]here is no doubt between the parties that the MOA constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the [S]tatute." *Id.* at 12. According to the Union, the question is whether the award would "abrogate the exercise of a management right[,]" and the award "does not limit the Agency's ability to assign work and assign employees any further than the Agency has chosen to limit itself." *Id.* Finally, the Union contends that the award reconstructs what management would have done if it had complied with the MOA. *Id.* at 12-13.

IV. Analysis and Conclusions

The Agency alleges that the award is contrary to the FLSA and § 7106 of the Statute. The Authority reviews questions of law de novo. *See 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)). In applying a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The FLSA

Under the OPM regulations implementing the FLSA, "[e]ach employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions[.]" 5 C.F.R. § 551.202(a). In addition, "[e]xemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption." 5 C.F.R. § 551.202(b). Accordingly, "[t]he burden of proof rests with the agency that asserts the exemption[,]" and "[i]f there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt." 5 C.F.R. § 551.202(c), (d).

With regard to the specific exemption alleged here, 5 C.F.R. § 551.208(h) provides, in pertinent part, that "[a] teacher is any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge[.]" In turn, 5 C.F.R. § 551.104 provides, in pertinent part, that "[p]rimary duty typically means the duty that constitutes the major part (over [fifty] percent) of an employee's work."[3] Thus, as relevant here, an employee is an FLSA-exempt teacher if he or she spends over fifty percent of his or her time teaching, tutoring, instructing or lecturing in the activity of imparting knowledge.

The Agency argues that the teachers' time spent locating inmates who are absent from class is a part of a teacher's role in a correctional environment, and that teaching inmates about punctuality and accountability should be considered teaching. The Agency also asserts that teachers are performing teaching duties when they are required to search inmates and provide for safety in the classroom. However, the Agency does not cite any authority to support its arguments, and the record provides no other basis for finding that these activities constitute teaching, tutoring, instructing or lecturing in the activity of imparting knowledge within the meaning of 5 C.F.R. § 551.208(h). Given that employees are presumed to be nonexempt, that exemption criteria must be construed narrowly, that the burden of proof

3. 5 C.F.R. § 551.104 also provides:

> A duty constituting less than [fifty] percent of an employee's work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:
>
> (1) Constitutes a substantial, regular part of the work assigned and performed;
>
> (2) Is the reason for the existence of the position; and
>
> (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made.

The Agency neither asserts that the teaching is teachers' alternative primary duty nor addresses the requirements of the alternative primary duty test.

rests with the Agency, and that any reasonable doubt should result in finding employees nonexempt, *see* 5 C.F.R. § 551.202, the Agency's arguments do not provide a basis for setting aside the Arbitrator's finding that the teachers are nonexempt.

The Agency also argues that the nonexempt status of education specialists does not demonstrate that teachers also are nonexempt. Although the Arbitrator noted that education specialists are nonexempt, she based her determination regarding the teachers' FLSA status on the teachers' actual duties, not on the FLSA exemption status of education specialists. As such, the Agency's argument is misplaced and does not provide a basis for finding the award contrary to the FLSA.

With regard to the Agency's claim that the Arbitrator "discounted the fact that teachers . . . are required to have an advanced degree in a specialized field of learning[,]" Exceptions at 8, 5 C.F.R. § 551.208(a) states, in pertinent part: "To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." As stated previously, the Arbitrator found that teachers' "primary duty" did not involve teaching. Award at 13. Thus, the Agency's claim is misplaced and does not provide a basis for finding the award contrary to 5 C.F.R. § 551.208(a).

Finally, the Agency provides no support for its assertion that "[i]t is reasonable to believe" that the teachers at issue here have the same or similar duties as those performed by the teachers in *Wilks*, 721 F. Supp. 1383. Exceptions at 8 n.2. As an initial matter, "[w]hile established position descriptions and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee." 5 C.F.R. § 551.202(e). Thus, it is not reasonable to assume that the teachers at issue here are exempt merely because the teachers at issue in *Wilks* also were exempt. Further, in *Wilks*, unlike here, there was no finding that the teachers spent a minority of their time performing teaching duties. Thus, *Wilks* does not provide a basis for finding that the award is contrary to the FLSA.

For the foregoing reasons, we deny the Agency's exceptions regarding the FLSA.

B. Section 7106 of the Statute

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[4] *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3),[5] the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right.[6] *See id.* at 118. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 113. In addition, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997). *See FDIC*, 65 FLRA at 106-07.

The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, the duties will be assigned. *E.g., U.S. Dep't of Commerce, PTO*, 65 FLRA 13, 15 (2010) (Member Beck dissenting on other grounds). The

4. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

5. The Union does not contend that the MOA was negotiated under § 7106(b)(1) or (2) of the Statute. Therefore, we do not consider that issue. *E.g., U.S. Dep't of Veterans Affairs, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, 62 FLRA 508, 510 n.3 (2008).

6. Contrary to the Agency's claim that an arrangement must be "tailored[,]" Exceptions at 14, the Authority does not conduct a tailoring analysis in resolving exceptions to arbitration awards. *EPA*, 65 FLRA at 116.

right to assign employees under § 7106(a)(2)(A) of the Statute includes, among other things, the right to make temporary assignments. *E.g.*, *NATCA*, 64 FLRA 161, 165 (2009). The award precludes management from assigning any employees other than VTIs to cover for employees who are on extended sick leave or scheduled annual leave. Thus, the award affects management's rights to determine to whom particular duties will be assigned and to make temporary assignments. Accordingly, the award affects management's rights to assign work and assign employees.

As for whether the Arbitrator was enforcing an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Arbitrator noted the negotiator's testimony that the MOA was negotiated to provide that VTIs would be utilized for extended sick and annual leave coverage because, unlike non-VTI employees, VTIs are not required to rotate their shifts every six months. *See* Award at 11. In this connection, the negotiator testified, without dispute, that the MOA "came about because the [VTIs] were given a set Monday through Friday day schedule, weekends, holidays off, without having to bid for any shift or post[]" and without having to "move out of their institution." Opp'n, Attach. 1 (Tr.) at 71. *Accord id.* at 54 (negotiator testified that VTIs "don't bid or rotate in their shifts or posts[,]" that "[t]heir schedule is set Monday through Friday days," and that "[t]hey don't ever have to change their shift or . . . place of work."). Put simply, in exchange for the instability that results from management's assignment of non-VTI employees to rotating shifts and posts, the parties agreed that those employees would be exempt from covering absences due to extended sick and annual leave -- and that, instead, the VTIs, whose schedules are stable, Monday-through-Friday day shifts, would cover that leave. Thus, the MOA was intended to ameliorate the adverse effects on non-VTI employees of management's right to assign those employees to shifts and posts that change every six months. Accordingly, we find that the MOA constitutes an arrangement within the meaning of § 7106(b)(3) of the Statute. *Cf. AFGE, Local 3157*, 44 FLRA 1570, 1580-81, 1591-92 (1992) (requirements that provided stability and predictability in employees' work schedules constituted arrangements).

With regard to whether the arrangement is appropriate, the Agency argues that the award "excessively interferes" with management's rights. Exceptions at 15. However, as stated above, the Authority no longer applies an excessive-interference standard to determine whether an arrangement is appropriate. *See EPA*, 65 FLRA at 118. Rather, the Authority applies an abrogation standard, which assesses whether the arbitration award "precludes [the] agency from exercising" the affected management right. *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 399 (2010) (citation omitted).[7] The Agency does not assert, and there is no basis for finding, that the award precludes the Agency from exercising its rights to assign work and assign employees. Therefore, we find that the arrangement is appropriate within the meaning of § 7106(b)(3) of the Statute.

Finally, the Agency claims that the Arbitrator's remedy "is not a reconstruction of what the Agency would have done[]" if it had complied with the MOA. Exceptions at 17. However, as stated above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done if it had not violated the contract provision. *FDIC*, 65 FLRA at 118. Thus, the Agency's argument does not provide a basis for setting aside the award.

For the foregoing reasons, we deny the Agency's management rights exception.

V. Decision

The Agency's exceptions are denied.

7. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC*, 65 FLRA at 107; *SSA, Office of Disability Adjudication & Review*, 65 FLRA 477, 481 n.14 (2011); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.