65 FLRA No. 38

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SHERIDAN, OREGON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3979
(Union)

0-AR-4630

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DECISION

October 20, 2010

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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 Burton White 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.[1]

The Arbitrator directed the Agency to pay correctional officers (COs) for unpaid overtime. For the reasons that follow, we set aside the merits award in part, and remand it in part to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA), and the Federal Employees Pay Act, by failing to compensate COs for pre- and post-shift work activities. Merits Award at 7. When the grievance was unresolved, it was submitted to arbitration, where, absent a stipulation by the parties, the Arbitrator framed the substantive issues[2] as follows:

> [D]id [COs] work beyond their eight-hour day? . . . If so, did the Agency fail to compensate [COs] for work time over eight hours in a day? . . . If so, did the Agency act willfully by allowing the overtime to take place without appropriate compensation? . . . If [so], what is an appropriate remedy?

Id. at 3. The Arbitrator found that the Agency willfully failed to compensate COs for pre- and post-shift overtime. *Id.* at 18, 40, 44. In this regard, the Arbitrator found that some COs were required to stop at a control room to pick up equipment and/or a battery before their shift, and to drop it off after their shift, and that the Agency should have treated this activity as the beginning and end of the COs' compensable workdays. *Id.* at 4. The Arbitrator also found that those COs who did not need to stop at a control room to pick up equipment or a battery were required to stop at the office of the Operations Lieutenant before going to their post, and that this "was a pre-shift duty that was an integral part of the principal activity" of those COs, and, thus, began their compensable workdays. *Id.* at 39, 44.

The Arbitrator acknowledged that "federal courts consider overtime of ten minutes or less to be *de minimis*[,]" but stated that he would not apply this standard. *Id.* at 45. Rather, he computed overtime on the basis of the following language in Article 18(a) of the parties' agreement (Article 18): "Overtime work will be ordered or approved and paid in increments of one-quarter hour, with odd minutes rounded up or down to the nearest quarter hour." *Id.*

1. After issuing his first award in this matter (merits award), to which the Agency filed exceptions, the Arbitrator subsequently issued a remedy award. Upon the issuance of the remedy award, the Agency filed a second set of exceptions and asked the Authority to take official notice of its previously filed exceptions. As the Agency's second set of exceptions contains all of the arguments put forth in its prior exceptions, we find it unnecessary to separately consider the first set, and we refer to the second set as the Agency's exceptions. Similarly, in response to each set of the Agency's exceptions, the Union filed identical copies of its opposition, the second of which we refer to as the Union's opposition.

2. The Arbitrator also addressed an issue concerning whether the grievance was arbitrable, and found that it was. Merits Award at 14. As there are no exceptions to this finding, we do not address it further.

In an appendix to the merits award, the Arbitrator provided a table with estimations of the number of minutes spent on each compensable pre- and post-shift activity for ten groups of COs. Attachment to Merits Award (Appendix) at 1-2 (App.). In this appendix, the Arbitrator grouped the COs according to their assigned units, the types of compensable pre- and post-shift activities that they performed, and the relevant estimated walking times between compensable-activity locations. *See id.*

The Arbitrator explained that the "times [in the appendix] are minimum estimates. Post-shift activity is shown only if needed to meet the minimum for rounding under [Article 18]." Merits Award at 47. Consequently, for nine of the ten groups of COs identified in the appendix, the Arbitrator estimated only the number of minutes per day that the COs spent performing *pre*-shift activity. *See* App. at 1-2. The Arbitrator's estimates of time spent engaged in pre-shift activity for five of those nine groups (hereinafter "pre-shift COs") did not exceed ten minutes per day. *See id.* For the tenth group of COs – "Housing Unit CO starting at Lieutenant's office" (housing unit COs) – the Arbitrator estimated the number of minutes per day spent engaged in both pre- *and* post-shift activity, and the resulting total did not exceed ten minutes per day. *See id.*

As a remedy, the Arbitrator directed the Agency to compensate COs in all ten groups for fifteen minutes of overtime for each shift worked during the grievance period, including interest. Merits Award at 46. The Arbitrator solicited input from the parties on the matters of liquidated damages and attorney fees. *Id.* Subsequently, in the remedy award, the Arbitrator withdrew his previous order of interest, and awarded liquidated damages and attorney fees. Remedy Award at 1-3.

III. Positions of the Parties

A. Agency Exceptions

The Agency argues that the merits award is contrary to the FLSA and its implementing regulations because the Arbitrator awarded overtime pay to employees who performed less than ten minutes of pre- or post-shift work. Exceptions at 6-7 (citing 5 C.F.R. § 551.412(a)(1) (§ 551.412(a)(1));[3] *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 598 (2004) (*Leavenworth*), *recons. den.*, 59 FLRA 803 (2004)). In particular, the Agency argues that the Arbitrator erroneously directed the Agency to pay overtime compensation to housing unit COs despite the fact that he estimated that these employees spent less than ten minutes per day on pre- and post-shift activity. *Id.* at 7-8. In addition, the Agency states that the Arbitrator "appears" to have awarded overtime to pre-shift COs who worked ten minutes or less of overtime per day. *Id.* at 8. Regarding these COs, the Agency concedes that "[i]t is unclear from the [merits] [a]ward if the Arbitrator is including any post-shift activity [in] these totals." *Id.* at 8 n.4.

B. Union Opposition

The Union concedes that "time spent engaged in pre-shift and post-shift activities totaling fewer than 10 minutes per workday is considered *de minimis* under . . . § 551.412(a)(1) and not compensable." Opp'n at 3 (citing *Leavenworth*, 59 FLRA at 98). According to the Union, the Authority must remand the merits award for clarification because the Authority "cannot determine whether the total pre-shift and post-shift overtime compensation awarded actually exceeds 10 minutes[.]" *Id.* at 3-4. In this regard, the Union argues that the Arbitrator determined that COs' post-shift activities were compensable, but that the merits award is incomplete because the Arbitrator only estimated time spent engaged in post-shift activities "if it was necessary to exceed 7.5 minutes, which is the threshold required to 'round up [to fifteen minutes]' [under] Article 18[.]" Opp'n at 4, 5 n.2 (quoting Merits Award at 45). In addition, the Union argues that the Arbitrator listed a particular compensable post-shift activity – "'[p]erson needing to turn in equipment or paperwork to Lieutenant'" – in the section of the appendix concerning housing unit COs, but failed to include the estimated time that those COs spent engaged in this activity. *Id.* at 5-6 (quoting App. at 1).

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *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 *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

3. The text of § 551.412(a)(1) is provided below.

The Agency contends that the merits award is contrary to the FLSA and § 551.412(a)(1) which provides, in pertinent part:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, *and that the total time spent in that activity is more than 10 minutes per workday*, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

5 C.F.R. § 551.412(a)(1) (emphasis added). *See also Gen. Servs. Admin.*, 37 FLRA 481, 484 (1990) ("[p]reparatory and concluding activities *of more than 10 minutes per workday* are compensable as hours of work" when they are an integral and indispensable part of employees' principal activities) (emphasis added). Accordingly, as both parties concede, pre- and post-shift activities totaling ten minutes or less per workday are considered *de minimis* and not compensable under § 551.412(a)(1). *See Leavenworth*, 59 FLRA at 598.

In the appendix to the merits award, the Arbitrator estimated the time spent by housing unit COs engaged in several pre-shift activities. App. at 1. Under the phrase "Person needing to turn in equipment or paperwork to Lieutenant[,]" the Arbitrator estimated the time housing unit COs spent engaged in the post-shift activity "[w]alk from housing unit to Lieutenant's office[,]" and he provided "[t]otal" estimated time spent in pre- and post-shift activity for these COs. *Id.* The "[t]otal" pre- and post-shift activity estimates for these COs range from 7.6 minutes to 9.4 minutes. *See id.* The Union contends that these estimates are incomplete because the Arbitrator failed to estimate the time housing unit COs spent performing the post-shift activity "'[p]erson needing to turn in equipment or paperwork to Lieutenant[.]'" Opp'n at 5 (quoting App. at 1). However, when read in context, it is clear that the phrase "Person needing to turn in equipment or paperwork to Lieutenant" does not identify a type of compensable post-shift activity, but, rather, identifies the COs who perform the post-shift activity of "[w]alk[ing] from housing unit to Lieutenant's office[,]" for which the Arbitrator provided estimates. *See* App. at 1. Thus, the Arbitrator estimated the total time housing unit COs spent engaged in pre-*and* post-shift activity, and, as the estimates did not exceed ten minutes for any of those COs, the merits award is contrary to § 551.412(a)(1) insofar as it provides overtime compensation to those COs. *See Leavenworth*, 59 FLRA at 598. Accordingly, we set aside this portion of the merits award.

Regarding the pre-shift COs, the Arbitrator's estimates of the time these COs spent performing overtime work were each less than ten minutes per day. *See* App. at 1-2. Because the Arbitrator apparently reasoned that COs met the minimum threshold for compensable overtime under Article 18 if their pre- and post-shift activities exceeded 7.5 minutes per day, the Arbitrator did not determine how much, if any, time these COs spent engaged in *post*-shift activities. *See id.*; Merits Award at 47 ("[p]ost-shift activity is shown only if needed to meet the minimum for rounding under . . . Article 18"). In addition, the record does not provide sufficient information for the Authority to make that determination. Therefore, we are unable to determine whether the merits award directs the Agency to compensate these COs for activities that the parties concede to be noncompensable, *i.e.* pre- and post-shift activities totaling ten minutes or less per day. Accordingly, we remand the merits award to the parties for resubmission to the Arbitrator, absent settlement, to clarify how much time, if any, was spent by pre-shift COs engaged in post-shift activities. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 625 (2009) (remanding award for clarification where record insufficient to determine which COs performed compensable activity and the amount of time they spent engaged in such activity).

V. Decision

The merits award is set aside insofar as it provides overtime compensation to housing unit COs, and the portions of the merits award concerning pre-shift COs are remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings.