

66 FLRA No. 61

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3955
(Union)

0-AR-4772

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DECISION

November 16, 2011

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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 Douglas P. Hammond filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

As relevant here, the Arbitrator awarded backpay plus interest and liquidated damages to two categories of employees: (1) employees in the Agency's Health Services, Education, Food Services, Psychology, Case and Unit Teams, and Court Movement Departments (affected employees); and (2) employees in the Agency's Religious and Recreation Departments (non-affected employees). For the following reasons, we modify the award to exclude the award of all relief to non-affected employees and the award of interest to affected employees.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated applicable laws and regulations by failing to compensate certain employees for pre-shift and post-shift work. Award at 1, 45. The grievance was

unresolved and submitted to arbitration, where, as relevant here, the parties stipulated to the following issue: "Did the Agency violate the Fair Labor Standards Act [(FLSA)][,] 29 [U.S.C.] [§§] 201-209, [and] the Federal Employees Pay Act [(FEPA)] . . . [?] If so, what shall be the remedy?" *Id.* at 2 (internal parentheses omitted).

The Arbitrator found that the Agency violated the FLSA and the FEPA "by its intentional and willful failure to pay employees for all hours worked in performance of their principal activities." *Id.* at 54. As relevant here, the Arbitrator directed the Agency to pay the affected and non-affected employees backpay plus interest and liquidated damages "[t]o the extent allowed[] by law or [c]ourt [d]ecision." *Id.* at 55. The Arbitrator retained jurisdiction "for resolution of questions regarding damages or fees." *Id.*

Following the Arbitrator's issuance of the award, the Agency requested clarification of the award regarding, among other things, whether the Arbitrator had directed the Agency to pay interest and liquidated damages, or whether he had retained jurisdiction to determine liability for those remedies. Exceptions, Attach., Ex. D at 3. In a clarification letter, the Arbitrator stated that his award had directed the Agency to pay: (1) liquidated damages; and (2) interest unless precluded by law or court decision. *Id.*, Attach., Ex. E at 1.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency argues that the award is contrary to law, and that the Arbitrator exceeded his authority, because the award provides relief to the non-affected employees. Exceptions at 5-8. Specifically, the Agency alleges that the Arbitrator did not find that those employees were "affected" as required under the FLSA, 29 U.S.C. § 216(b), and that the Union did not request relief for those employees. *Id.* at 6-8. The Agency also argues that the award is contrary to law because it awards both liquidated damages and interest. *Id.* at 4-5.

B. Union's Opposition

The Union concedes that it did not request relief for the non-affected employees, and agrees that the Authority should set aside that portion of the award. Opp'n at 5. The Union also concedes that the award of both liquidated damages and interest is contrary to law. *Id.* at 3. In this regard, the Union argues that the Authority should set aside the award of interest because: (1) the Arbitrator's finding of an intentional and willful violation supports the award of liquidated damages; and (2) the Union requested liquidated damages -- not interest. *Id.* at 3-5. However, the Union contends that, to

the extent the Agency is requesting the Authority to set aside the award of liquidated damages, the Authority should deny the request. *Id.*

IV. Analysis and Conclusions

Where an opposing party concedes that an award is deficient, the Authority sets aside the award. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (finding arbitrator's granting of thirty days to file petition for attorney fees deficient where union conceded that arbitrator exceeded his authority); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 300 (2000) (*Oxon Hill*) (finding that arbitrator's award of punitive damages was deficient after union conceded it was contrary to law). Consistent with this precedent, as the Union concedes that the award is deficient to the extent that it provides relief to the non-affected employees, we modify the award to exclude the award of all relief to those employees.

The Agency also argues that the award is contrary to law because it awards both liquidated damages and interest. Exceptions at 4-5. As the Union concedes that the award of both liquidated damages and interest is contrary to law, *see* Opp'n at 3, we modify the award to exclude the award of interest.* *Oxon Hill*, 56 FLRA at 300. To the extent that the Agency is arguing that the award of liquidated damages also should be set aside, such damages are the standard remedy for violations of the FLSA -- unless the agency demonstrates that it "acted in good faith and on a reasonable belief that [it] . . . was in compliance" with the FLSA. *U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 286 (2000) (brackets, internal quotation marks, and citation omitted). The Agency provides no basis for finding that the award of liquidated damages is deficient. Accordingly, we do not modify the award to exclude the award of liquidated damages.

V. Decision

The award is modified to exclude the award of all relief to non-affected employees and the award of interest to affected employees.

* We acknowledge that the Arbitrator awarded interest "[t]o the extent allowed[] by law or [c]ourt [d]ecision." Award at 55. We modify the award to clarify that the Union is not entitled to both liquidated damages and interest.